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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

COVERING

ALL THE CASES (LAW AND EQUITY) FROM THE ORGANIZATION OF THE COURT (BAY'S REPORTS) UP TO AND INCLUDING VOLUME 25 OF THE SOUTH CAROLINA REPORTS

ANNOTATED EDITION

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BOOK 25

CONTAINING A VERBATIM REPRINT OF

SPEERS' EQUITY REPORTS
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VOLS. 1 & 2, RICHARDSON'S EQUITY REPORTS

ST. PAUL
WEST PUBLISHING CO.
1917

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EQUITY CASES

ARGUED AND DETERMINED IN

THE COURT OF APPEALS OF SOUTH CAROLINA

VOLUME I

FROM NOVEMBER, 1842, TO MAY, 1844, BOTH INCLUSIVE

By R. H. SPEERS

STATE REPORTER

COLUMBIA, S. C.
PRINTED BY A. S. JOHNSTON
1844

ANNOTATED EDITION

ST. PAUL
WEST PUBLISHING CO.
1917

583309

PREFACE

In presenting this volume of reports to the public, the Reporter deems it necessary to say, that it would have appeared some weeks earlier than the present, had he not considered a short delay expedient, with a view of adding the few cases decided and directed to be reported at the last May Term of the Court of Appeals.

Had this course not been pursued, these cases, though few, would necessarily have been postponed for a subsequent volume; and when the importance of some of these cases, both to the public and the profession, was considered, it was thought to be altogether preferable to postpone the appearance of the volume for a short time, for the purpose of inserting them; besides which, as Equity causes accumulate more slowly, comparatively, it seems to be desirable to include in our volumes of Equity cases as much matter as practicable, as well to avoid an unnecessary augmentation of their number, as to furnish them to the public at earlier periods; and also, to consult the respectability of their appearance.

In addition to the ordinary index at the end of the volume, the Reporter has appended to each case, in the table of cases reported, a brief abstract of the subjects considered in it. This method, he observes, has been adopted by some of the most respectable Reporters, and, it was supposed, might be of some service to the reader, in obtaining a more ready access to the merits of each particular case decided.

A table of the various statutes, as well as of the cases and authorities, cited in the course of the volume, has also been prepared and published, which, if not indispensable, may at least be of some utility, and can hardly be objectionable.

As it regards the general execution of his task, he trusts that he will not be found to have failed in so preparing and arranging the materials as to subserve every essential and valuable purpose, although he is satisfied, that had he felt himself warranted in taking further time, a more thorough investigation of the cases referred to in the consideration of each both by the Court and the Counsel, might have enabled him to analyze and condense with greater accuracy, and also, to have subjoined many analogous cases.

Some of the marginal notes may appear unnecessarily prolix, but after repeated and diligent perusals of the cases in which this has more particularly occurred, it hardly appeared to be practicable to abridge them without incurring the risk of being obscure and unintelligible; and, of the two alternatives, the plan pursued in this respect was considered most advisable.

In a majority of the cases, it will be found that both the Circuit and Appellate decrees are given. The Reporter might, in some instances, have abridged the number of pages occupied in the consideration of the case, by collecting the facts as briefly as possible, and simply stating the points ruled in the Circuit decree, but in thus doing, there would have frequently been a difficulty from the want of papers connected with the case—besides, the statements of the facts and pleadings are generally so fully given by the Chancellor who presided on the Circuit, as to supersede the necessity of any attempt of the kind on his part. In addition to this, it occurred to him that the preliminary statements must, of necessity, be more precise and accurate in the language of his Honor, the Chancellor, who heard the cause; besides which, the decrees very frequently are so connected, that by giving both, the case is more completely elucidated. The Reporter has been led into these remarks, from having observed the different methods pursued by various reporters, both English and American, very few seeming to adopt precisely the same style or manner in this respect.

He has, generally, where he could procure them, endeavored to give a brief statement of the arguments of counsel—in one or two instances, entire argu-

ments. But generally, nothing more is stated than the names of counsel. An attempt to do more, without the statements of the gentlemen of the Bar who argued the respective cases, would probably have done them injustice. Some arguments have been reluctantly omitted, which could not be procured in time for the press.

From the table of Errata, it will be observed that some typographical errors have occurred, but they consist chiefly of slight mistakes in orthography, and in the transposition of letters. These are readily corrected, and it is hoped will meet with indulgence.

In preparing materials for the press, so eminently honorable to the Equity Jurisprudence of the State, the Reporter trusts that his duty, arduous as it unquestionably is, has been performed, if not with that ability which he could wish, at least in such a manner as to be acceptable and useful.

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

Chancellors, and Judges of the Court of Appeals in Equity.

Hon. David Johnson,
" William Harper,
Hon. Job Johnston,
" B. F. Dunkin.

Judges of the Courts of Sessions and Common Pleas, and of the Law Court of Appeals.

Hon. J. S. Richardson,
" J. B. O'Neall,
" J. J. Evans,
Hon. B. J. Earle,[1]
" A. P. Butler,
" D. L. Wardlaw.
Henry Bailey, Esq'r. Attorney General.

Solicitors.

Eastern Circuit	A. R. McIver,
Western "	J. N. Whitner,
Middle "	J. J. Caldwell,
Northern "	T. N. Dawkins,
Southern "	J. D. Edwards.

A. Herbemont, Esqr. c. c. a. at Columbia.
Thomas Gantt, Esqr. c. c. a. at Charleston.

1 Resigned, Dec. 1843, and the Hon. Edward Frost elected in his place.

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CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
" JOB JOHNSTON,
" B. F. DUNKIN.

Speers, Eq. *1

*JOHN A. BRADLEY et al. ads. JANE LOWRY.

(Columbia. Dec. Term, 1842.)

[1. *Wills* ⇐436.]

The validity of a testamentary disposition of personalty, depends exclusively upon the laws of the country where the testator was domiciled at the time of his death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 947; Dec. Dig. ⇐436.]

[2. *Domicile* ⇐1.]

A mere relinquishment of actual residence is no abandonment of domicil, if there is no intention to change it; as where a man leaves home for temporary purposes, as for a voyage, for foreign travel, for health or pleasure, or business of a temporary nature. In all such cases, there is animus revertendi.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 1; Dec. Dig. ⇐1.]

[3. *Domicile* ⇐1.]

Abandonment of a man's domicil, however deliberate, is no destruction of it, unless he shall have acquired a new one. From the necessity of the case, the last residence, although intentionally and permanently forsaken, must still be regarded as his domicil. But the acquisition of a new domicil, which is much more a question of fact than of law, will be credited on far less evidence than would otherwise be required.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 1; Dec. Dig. ⇐1.]

[4. *Domicile* ⇐4.]

Where one has abandoned his domicil with the avowed intention of not returning, and of living in another place, a very short residence will suffice to create a new domicil, and the

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force of residence, as evidence of *domicil, is increased by the length of time it has continued, but time alone is not conclusive.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 23; Dec. Dig. ⇐4.]

[5. *Domicile* ⇐1.]

The true basis and foundation of domicil is the intention, the quo animo, of the residence.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 1; Dec. Dig. ⇐1.]

[6. *Domicile* ⇐1.]

The apparent or avowed intention of constant residence, not the manner of it, constitutes the domicil.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 1; Dec. Dig. ⇐1.]

[7, 8. *Domicile* ⇐8.]

J. M. L. made and duly executed his will on the 5th of May, 1836, bequeathing his whole estate, except a small portion to his wife, to his illegitimate children; and having first made sale of all his property, except his slaves, removed with them, during the fall of that year, to the State of Alabama. He left this State with the avowed intention of not returning, and of going to the West to live. In Alabama, he hired out his slaves, and in May, 1837, died, at a house where he had taken lodgings as a boarder. It did not appear from the testimony, where the testator was, between his emigration into the State and the time of his death.

It was *held*, that as there was no evidence where the testator was in the interval, he must be presumed to have been where he was found at the time of his death, and that, prima facie, he was domiciled at that place.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 36, 37; Dec. Dig. ⇐8.]

[9. *Domicile* ⇐4.]

Also, that this presumption was not rebutted from the fact of the testator's former residence in South Carolina, it having been shewn that he had intentionally and permanently abandoned that—and that as the proof was that the testator might be expected to remain in Alabama, unless called elsewhere by some particular circumstance, he was domiciled in that State at the time of his death.

[Ed. Note.—Cited in Riddle v. Reese, 53 S. C. 201, 31 S. E. 222.

For other cases, see Domicile, Cent. Dig. § 9; Dec. Dig. ⇐4.]

[10. *Wills* ⇐17.]

Also, that the will of J. M. L. as to his personalty, was not avoided by the Act of 1795, (5 Stat. at Large, 271,) there being nothing shewn in the common law, as prevailing in Alabama, to impair its validity, nor any Statute suggested to this effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 40–42; Dec. Dig. ⇐17.]

[11. *Domicile* ⇐5.]

Although the testator had left his wife behind him, yet as her residence had not been her husband's, but that of her son-in-law, this did not determine his domicil.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 24–35; Dec. Dig. ⇐5.]

[12. *Domicile* ⇐4.]

The rule, that the place where a married man's family resides, is generally to be deemed his domicil, may be controlled by circumstances.

[Ed. Note.—Cited in Colburn v. Holland, 14 Rich. Eq. 230.

For other cases, see Domicile, Cent. Dig. §§ 5–23; Dec. Dig. ⇐4.]

[13. *Wills* ⟸17.]

The Act of 1795 is remedial, and should be construed so as to suppress the mischief contemplated by it.

[Ed. Note.—Cited in Bouknight v. Brown, 16 S. C. 169; Gore v. Clark, 37 S. C. 544, 16 S. E. 614, 20 L. R. A. 465.

For other cases, see Wills, Cent. Dig. §§ 40–42; Dec. Dig. ⟸17.]

[14. *Bastards* ⟸98.]

Thus, where the testator, while an inhabitant of this State, had given to the defendant, who had married his illegitimate daughter, a negro girl, and had also, indirectly, transferred to him a tract of land by an advance of money as a purchase of it, so that in effect the land was the thing purchased by the one party, and gratuitously accepted by the other—these gifts were construed to be for the benefit and advancement of testator's daughter. And, also, as coming within the true intent of the Statute,

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if exceeding, at *the time they were made, one fourth of the clear value of the donor's estate.

[Ed. Note.—Cited in Hull v. Hull, 2 Strob. Eq. 192; Cooley v. Cooley, 58 S. C. 175, 36 S. E. 563; Williams v. Halford, 73 S. C. 124, 53 S. E. 88.

For other cases, see Bastards, Cent. Dig. § 249; Dec. Dig. ⟸98.]

[15. *Wills* ⟸17.]

In construing this statute, where there is a plurality of gifts, the property first given should be valued at the time of the gift, and compared with the nett value of the entire estate of the donor at that time, (the property given included,) and the gift is to be held void for so much as the property given may have exceeded in value one fourth of the whole. If the first gift should fall short of one fourth, it is valid. But when a second gift is made, the subject of the first donation should be brought down and added to the second; and these two are to be valued at the time of the second gift, and compared with the nett value of the whole estate of the donor at that time, as before described, and the second gift will be void for so much as it, with the prior gift, shall exceed in value the proportion described in the Statute. And this process should be repeated as to each succeeding donation which may be made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 40–42; Dec. Dig. ⟸17.]

[16. *Wills* ⟸17.]

As it regarded the slave given, it was held, that even if the gift were void under the statute, the property being given again by the will was good; as a party having two titles, one good and the other bad, may claim under the title most advantageous to himself.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 40–42; Dec. Dig. ⟸17.]

[17. *Wills* ⟸436.]

As the foreign domicil of the testator could have no effect on real property, the gift of the land was held void, if, when made, it exceeded one fourth of the donor's estate—the excess not being made good by the will, but remaining as if never given.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 947; Dec. Dig. ⟸436.]

[18. *Wills* ⟸17.]

Supposing the land to have exceeded one fourth of the whole estate owned by the donor at the time it was given, estimating both the land and the residue at that time, (which is the proper time of valuation,) could after accessions to the donor's property, left by him at the time of his death, be taken into account, for the purpose of supporting the gift? Also whether, supposing the land to have exceeded one fourth of the estate of the donor, the donee should account for the excess, or whether it should not be taken off by the process of partition? Opinion reserved on these questions.

[Ed. Note.—Cited in Hull v. Hull, 2 Strob. Eq. 194.

For other cases, see Wills, Cent. Dig. §§ 40–42; Dec. Dig. ⟸17.]

Before Dunkin, Ch., at Chester, June Term, 1842.

James M. Lowry, by his will, executed on the 5th of May, 1836, devised and bequeathed as follows:

"I, James M. Lowry, of the district of Chester, and State of South Carolina, do make and ordain the following disposition of my property, to be my last will and testament, viz:

"1st. I direct all my just debts to be paid.

"2nd. I will and bequeath unto my wife Jane Lowry, all the kitchen furniture, one

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good bed, bedding and bedstead, *one pair of fire dogs, one pair of tongs, one fire shovel, one wire fender, one half dozen sitting chairs, and one chest of drawers.

"3rd. I will and bequeath unto John A. Bradley and his wife Louisa Bradley, and their heirs, the negro girl Eliza, now in their possession.

"4th. I will and bequeath unto the said John A. Bradley and his wife Louisa, all the rest and residue of my property, both real and personal, to them and their heirs forever. It is my intention to bequeath every thing of which I may be possessed, or to which I may have any right. It is not my intention to die intestate as to any part of my estate.

"5th. The bequest in the fourth clause made, is made on this condition, and with this intention, to wit: that the said John A. Bradley and his wife Louisa, shall deliver over one half in value to James Jackson Lowry, a lad whom I have raised, and who is now living with me, of the property contained in the fourth clause, or account to him, the said James Jackson Lowry, upon his attaining the age of twenty-one years, for the same; and out of the one half of the said bequest in said fourth clause, to maintain and educate the said James Jackson Lowry; but if the said James should die before he attains the age of twenty one, then all the property in the 4th clause mentioned, is to be the absolute property of the said John A. Bradley and the said Louisa, and their heirs forever.

"6th. I nominate and appoint John A. Bradley and Samuel M'Aliley, executors of this my last will and testament, and I do fully empower and authorize them or either of them, should but one of them qualify, to sell at public or private sale, any part or all of the property bequeathed in the fourth clause, should they deem it necessary and prudent so to do. I also empower them to

appoint any two disinterested persons to appraise and value my estate. I hereby revoke all former wills by me made, and declare this to be my last will and testament."

The bill was filed by Jane Lowry, the widow of the testator, and states that she, with Samuel Lowry, the father of testator, were his only heirs at law—that Louisa Bradley, the wife of the defendant, and James Jackson Lowry, are the illegitimate children

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of the testator, and *prays for an account of the administration of John A. Bradley, as well as a partition of three fourths of the whole estate, both real and personal.

The case was heard before his Honor Chancellor Dunkin, at Chester, June Term, 1842, from whose decree it will be fully understood.

Dunkin, Ch. It is important, first, to consider where James M. Lowry (the testator) was domiciled at the time of his death.

Domicil is defined to be "the place where one lives, in opposition to that where he resides for a time."—Lieber's Enc. Am. "Domicil."

In Story's Conflict of Laws, 44, several rules are suggested as having been adopted and settled by the courts in prosecuting this inquiry. Domicil is there said to be of three kinds, viz; by birth, by choice, or by operation of law. The place of his birth is said to be his domicil, if, at that time, it be the domicil of his parents—so the place where a married man's family resides, is generally to be deemed his domicil. Bemfide v. Johnson, 3 Ves. 148, (or 198.)

But a man has a right to change his domicil. He may, therefore, remove to another place with an intention to make it his permanent residence, and this place then becomes his domicil. But the mere intention to abandon the original domicil and acquire a new domicil, is not sufficient.

In the well considered case of Sommerville v. Sommerville, 5 Ves. 750, it was held that the domicil once acquired remains until clearly abandoned and another taken. The original domicil is not gone, until a new one has been actually acquired, facto et animo.

The testator died in the spring of 1837. Until November or December, 1836, it is not questioned that his domicil was in this State. If he was not born in South Carolina, he emigrated from Ireland to this country at an early age. He was married and settled here. In this country he acquired all his property, his habits, friends and connexions; and all the links that attach him to society are found here. "If" says the Lord Chan-

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cellor in Bemfide v. *Johnson, "you add to that, that he had no other fixed residence, upon an establishment of his own, you answer the question, where is his domicil."

The domicil being originally established in South Carolina, until December, 1836, it is incumbent on those who would prove a change of domicil, not merely to shew that he intended to abandon South Carolina, but that he had established a new domicil elsewhere.

The testimony is vague and indefinite, perhaps necessarily so. It seems in keeping with the condition of the party's mind, at the period when he spoke of his intention as to his future conduct and movements. He told Mr. Wylie that he could not live with his wife, and that he was going to the West to live. Notwithstanding such declaration, made, perhaps, under the excitement of the moment, the law would still presume that he had not abandoned his wife and his home, until he had evinced a fixed determination by establishing his home elsewhere.

He went to Alabama, did not establish himself in any residence, seemed undetermined whether to sell or hire out his negroes, (which seems to have been all the tangible property he then had,) and in May following, died at the house of a gentleman in the neighborhood of Blakely, Alabama.

On this testimony the Court would feel some hesitation in declaring that Lowry had abandoned his domicil in South Carolina. Many persons have gone to the West with the same indefinite notion of improving their condition, and having prudently looked about them before making a new establishment, have been well satisfied to return to their original homes. But abandonment is not enough. On what part of the testimony can it be assumed that this mere sojourner, hiring out his negroes to cut wood, having no establishment of his own, but dying a stranger, at the house of a stranger, a few months after leaving his original home, had become a permanent resident, and acquired a domicil in the State of Alabama?

But on this point no testimony is so strong as the acts of the defendant. He had married the daughter of Lowry. To him he had bequeathed his estate, and made him the executor of his will.

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*He probably possessed his entire confidence, and none knew his intentions so well as the defendant. There is every reason to suppose, that immediately on the death of Lowry he acted under the advice of counsel. It was stated at the bar, that a professional gentleman, now deceased, was the adviser in all his proceedings in relation to this estate.

The will of the testator bears date, 5th May, 1836. He is there described as of Chester district, in the State of South Carolina. On the 16th of October, 1837, the defendant propounded the will for probate, before the Ordinary of Chester District, and on the 1st December, 1837, he returned an Inventory to the Ordinary's office, of "the estate of James M. Lowry, late of the District of Chester, deceased;" and in his Inventory he returns several negroes, which he identifies as being then "in Perry County, Alabama, and will be sold there 1st January, 1838."

The defendant never proved the will in Alabama: but, as he states in his answer, he took out letters of administration in that State, sold the property there situated, and returned the proceeds in his account rendered to the Ordinary of Chester district. In December, 1839, he purchased from Samuel Lowry, (the father of the deceased,) for the sum of seven hundred dollars, an assignment of his interest in his son's estate, whose interest depended entirely on the fact, that the testator was domiciled in South Carolina.

On the 13th May, 1840, this bill was filed, directly impeaching the will, as made in violation of the Act of 1795. The answer is filed on the 20th April, 1841. In the meantime the application of the defendant to have the will proved in solemn form, before the Ordinary of Chester, was refused, on the ground that the provisions of the will were obnoxious to the declarations of the statute. The defendant appealed to the Court of Common Pleas, and on 2d April, 1841, the presiding Judge sustained the grounds of appeal holding that although the Ordinary was fully warranted in his construction of the Act of 1795, yet, that the will, vesting the entire legal estate in the executor, should have been admitted

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to probate, and that it should *be left to the Court of Equity to carry into effect the provisions of the statute.

At no stage of these proceedings had the defendant agitated the question of domicil.

In the answer to this bill, various objections are suggested to defeat or restrict the claims of the complainant, but in no part of the answer is the suggestion made, that the domicil of the testator had been changed, although that fact would have been probably conclusive on the rights of the parties. On the contrary, all the proceedings of the defendant, as narrated circumstantially in the answer, were conducted on the assumption that the domicil of the testator was in the State of South Carolina.

At the hearing of the cause on the 28th June, 1842, it was for the first time moved, that the defendant have leave to amend his defence, by pleading specially that the testator had removed from this State, and was at the time of his decease domiciled in Alabama.

In John Burden v. McElmoyle, 1 Bailey Eq. Rep. 375, after answer filed, the defendant was permitted to amend, by relying on an account stated, and the statute of limitations. But the cause had been already continued, and the Chancellor said "the Court was always reluctant to shut out any light, or to deprive a party of any just or legal defence." It may be remarked, that this defence was ultimately sustained by the Court of Appeals.

In delivering the judgment of the Court, Judge Nott remarks that "he did not think that allowing the answer to be amended in this case, was a very regular proceeding; and he could readily conceive that such a practice, if too liberally indulged, might open the door to great fraud and perjury." But the Court concluded that the regulation of the pleadings was so much a matter of discretion with the Chancellor, that they would not readily interfere, unless in some case of very palpable injustice.

Concurring fully in the general inexpediency of permitting such irregularity, the Court was unwilling, at the moment of the hearing, to allow the defendant to present a new and substantially inconsistent issue. He had, notwithstanding, all the advantage of the defence.

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*But the Court was of opinion, from the testimony adduced, that the original inference of the defendant and his counsel, was well taken, and that the distribution of the real and personal estate of the testator must be governed by the laws, and administered by the tribunals, of the State of South Carolina.

By the Act of 1795, 2 Brev. 68, it is declared that any gift, legacy or devise, in trust or by direct conveyance, by a married man, having lawful children living, for the use and benefit of a woman with whom he lives in adultery, or of his bastard child or children, of any larger or greater proportion of the clear value of his estate, real or personal, after payment of his debts, than one fourth part thereof, "shall be null and void, for so much of the amount or value thereof, as shall or may exceed such fourth part of his real and personal estate."

Louisa Bradley, the wife of the defendant, and James Jackson Lowry, were illegitimate children of the testator, James M. Lowry. By his will, he bequeaths to his wife some kitchen furniture, one good bed, and some other articles of inconsiderable value. To the defendant and his wife he bequeathed a negro girl Eliza, then in their possession—the rest and residue of his estate, real and personal, is devised and bequeathed to the defendant and his wife. It is declared, however, that as to one moiety, the estate is to be held in trust for James J. Lowry, if he attains twenty-one years, if not to the defendant and his wife absolutely.

Some question was made whether the slave Eliza was held under the will, or by a presumed parol gift on the part of James M. Lowry, but in the view taken by the Court, this inquiry is unimportant. In either case it must be regarded as a gift from the father to his illegitimate child.

In August, 1832, a tract of land was sold by the sheriff of Chester district, under executions against James M. Lowry. It was bid off at the request of Lowry, by James Pagan, for $1,200. Lowry paid to the sheriff two hundred dollars. Sometime afterwards, Pagan directed the sheriff to transfer the bid, and make the title to Samuel Lowry, Jr. Samuel Lowry, Jr. paid to the sheriff the balance of the purchase money, and took

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his conveyance. In June, *1835, James M. Lowry gave to Samuel Lowry, Jr. his note for one thousand dollars, (which was afterwards paid,) and Samuel Lowry, by request of James, conveyed the premises to the defendant, who was at that time the husband of his (Lowry's) daughter.

On the part of the complainant, it is insisted that this land constitutes part of the estate of James M. Lowry, while the defendant relies on the conveyance from Samuel Lowry, Jr., and the accompanying circumstances, as vesting in him an indefeasible title.

Certainly the general rule is as stated, viz: that if a man purchase an estate, and the conveyance is taken in the name of another, the trust of the legal estate results to the man who advances the purchase money. Sugden Vend. p. 2, 134. But this equitable presumption may be rebutted by parol evidence, to prove the purchaser's intention, that the person to whom the conveyance was made should take beneficially.

No parol evidence was offered of the intention in this case. But it may be very well inferred from the circumstances, that it was the intention of the purchaser to confer a benefit on his daughter.

The conveyance to the husband may be regarded as a provision for his wife; and it is well settled that if a father purchase in the name of a child, although illegitimate, it will not be deemed a resulting trust for the father, but a gift or advancement for the child. Sugden, 140.

There is no ground for supposing that a donation was intended to the defendant, except as the husband of the donor's daughter. The conveyance to the defendant was made in June, 1835. The possession was not changed, but Lowry continued to reside on the premises as exclusive owner, until he left the State in December, 1836. Under all the circumstances, the Court would be constrained to infer, that the gift was intended for the benefit of the daughter, or that it was a mere arrangement to change the title of the property, and that a trust resulted to Lowry himself. In either alternative the consequence is the same.

The Court can hardly regard the other small matters which went into the possession of the defendant on his marriage with Low-

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ry's daughter, and which are consumed *by the use, as coming within the provisions of the Statute.

The remarks of the Court in McCaw v. Blewett, 2 McCord Eq. 103, may be applied by analogy, both in reference to the object of this law and the circumstances of this case.

It remains only to declare, that in the judgment of the Court, the deed of June, 1835, and so much of the will of the testator as bequeaths to the defendant and his wife the negro girl Eliza, and the residue of the testator's estate, are null and void for so much as the amount or value of the property exceeded one-fourth part of the clear value of the testator's real and personal estate, after the payment of his debts. It is ordered and decreed, that an account be taken of the estate of the testator and of the defendant's administration—that the commissioner inquire and report whether it would be for the interest of the parties, that the real estate of the testator should be sold for the purpose of partition, with leave to report any special matter—any final order being deferred until the hearing of the report in relation to the estate and the accounts of the defendant.

The defendants appealed, on the following grounds.

1. Because the testator, James M. Lowry, having previously removed with all his property to Alabama, was not at the time of his death an inhabitant of this State, but of the State of Alabama, and by the laws of that State, the last will of the testator was legal and valid, and should be carried into effect.

2. Because by the true construction of the will, according to the laws of this State, the defendants are entitled to five-eighths of the estate.

3. Because neither the negro Eliza nor the tract of land formed any part of the estate of the testator, nor was there any evidence that the purchase money of the land was given to the defendant, John A. Bradley, in trust for any one.

Mr. Gregg, for the appellant. There is no fixed or definite period of time requisite to create a domicil.

The residence to create it may be short or long, according to circumstances.

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*It depends on the actual or presumed intention of the party.

There must be intention and act, to effect a change of domicil; 1 Bin. 351, note.

The 8th rule laid down by Judge Story, for ascertaining the domicil of a person, is "If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of present domicil, notwithstanding he may entertain a floating intention to return at some future period." Story Con. Laws, 45.

"His mode of living is not material, whether on rent, at lodgings, or in the house of a friend." 1 Bin. 351, note; 4 Cow. Rep. 516, note; per Rush, J. in Guier v. O'Daniel, reported in 1 Bin. 351, note.

"Domicil may be defined to be a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time." Same, 352; per Prest. Rush.

In the case of the Venus, 8 Cranch, 279, Judge Washington, who delivered the opinion of the Court, says, "If it sufficiently ap-

pear, that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence even of a few days; this is one of the rules of the British Courts, and it appears to be perfectly reasonable."

In Munroe v. Douglass, 5 Mad. Rep. 405, it was held, that a domicil is not to be defeated animo merely, but animo et facto, and necessarily remains until a subsequent domicil be acquired, unless the party die in itinere towards an intended domicil. From which it would seem that a former domicil may be abandoned, even before a subsequent domicil has been acquired.

It was also held in the same case, "that a residence in India, for the purpose of following a profession there, in the service of the East India Company, creates a new domicil."

And that without any regard to the circumstance of the person's owning real estate.

In Somerville v. Somerville, 5 Ves. 785, the Master of the Rolls says, "In the late cases, the question has been whether the first domicil was abandoned; and where, at

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*the time of the death, the sole domicil was; but here, the question is, which of two acknowledged domicils shall preponderate; or rather, which is the domicil according to which the succession to the personal estate shall be regulated."

The intestate had lived about one half of the year in Scotland, and one half in London.

The question in this case is, whether Lowry had abandoned his residence in Chester district, and taken up his residence in Alabama?

The point in this case is not the same with the point in that case.

The third rule laid down by Lord Alvanley, is "The original domicil, or as it is called, the forum originis, or the domicil of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and taking another as his sole domicil."

Now Lord Somerville never abandoned his residence in Scotland, any more than his residence in London.

In such case, the original residence or domicil was allowed to prevail.

But Lowry had actually abandoned his former residence, and taken up his residence in Alabama.

Lord Alvanley also sanctions this distinction, upon cotemporary domicils. "In the case of a gentleman or nobleman generally, the domicil is the mansion house in the country; that of a merchant, is his residence in town."

So that if Lord Somerville had been a merchant, his domicil might have been decided to be in London, notwithstanding his original domicil.

In Tidswell v. Bowyer, 7 Simons, 64, (9 Con. E. C. R. 430,) leave was given to file a supplemental answer, to state the fact as to domicil; upon the ground that the defendant had taken an erroneous view as to the law of domicil.

J. A. Alston, contra.

Curia, per JOHNSTON, Ch. We are of opinion, that the will in this case must be supported. It has been long ago settled, that the validity of a testamentary disposition of

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*personalty, depends exclusively upon the laws of the country where the testator was domiciled at the time of his death. If Mr. Lowry had acquired a domicil in Alabama when he died, the will is good; for it is conceded, that its validity is not effected by the common law, which prevails there; and no statute of that State, impairing it, has been suggested. We think he was domiciled in Alabama at his death. It appears from the evidence, that he had disagreed with his wife, that they had separated, that she had gone to live in the family of her son-in-law; and that he declared they could no longer live together; that he broke up his establishment, made sale of all his property but his slaves, and removed with them from this State, in the fall of 1836, declaring that he was going to the West to live, and that he would never return to this country. He proceeded to Alabama, where he employed his negroes in cutting wood; and in the May following died, at a house where he was boarding, near the town of Blakeley. There can be little doubt that his design, when he left this State, was to abandon his domicil here. He left no trace of his original settlement and residence behind him; and he emigrated with a declared intention never to return. He entered another State, with avowed intentions of a permanent settlement there. It is not doubted, that the mere relinquishment of actual residence, is no abandonment of domicil, if there is no intention to change it; as where a man leaves his home for temporary purposes, as for a voyage, for foreign travel, for health or pleasure, or business of a temporary nature. In all such cases, there is an animus revertendi. But here, there was a deliberate, intentional and actual abandonment of the domicil in South Carolina, with a declaration that it was made with an intention never to resume it. Nor is there any doubt, that a man's abandonment of his domicil, however deliberate, is no destruction of it, unless he shall have acquired a new one. From the necessity of the case, the last residence, although intentionally and permanently forsaken, must still be regarded as his domicil. But the acquisition of a new domicil, which is much more a question of fact than of law, will be credited on far less evidence, when the former one has been abandoned, than would otherwise be required.

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*It is said, (Story's Conflict of Laws, ch. 3, sec. 46,) that if a person of full age removes to another place, with an intention to make it his permanent residence, (animo movendi,) it becomes, instantaneously, his place of domicil. Mr. Lowry entered the State of Alabama with an avowed intention that he would not return to South Carolina, but that he had come to live in Alabama. Under such circumstances, a very short residence will suffice to create a new domicil. Sir John Nicholl says, (in his very instructive judgment in Stanley v. Bernes, 2 Hagg. 373—5 Eccles. Rep. 171,) the force of residence, as evidence of domicil, is increased by the length of time during which it has continued; but, he adds, time alone is not conclusive, for where is the line to be drawn? Will the residence of a month, or a year, or five years, or fifty years, be conclusive? As a criterion, therefore, to ascertain domicil, another principle is laid down in the authorities quoted, as well as practise:—it depends upon the intention, upon the quo animo: that is the true basis and foundation of domicil. President Rush, (in Guier v. O'Daniel, 1 Bin. 349, note,) says there is no fixed period of time necessary to create domicil. It may be acquired after the shortest residence, under certain circumstances; under others, the longest residence may be insufficient for the purpose.

But was there any residence in Alabama? The testator came to that State in the fall, and remained until May, when he died. It is true he did not buy a plantation, and settle upon it. Neither did he open a house of his own. He put his negroes to a particular employment, or hired them out; and in May we find him boarding in the house where he died. But, says the learned judge, in the case of Guier v. O'Daniel, already quoted, on a question of domicil, the mode of living is not material; whether on rent, at lodgings, or in the house of a friend. The apparent or avowed intention of constant residence, not the manner of it, constitutes the domicil. It is not, says he, by any particular act, that a domicil, generally speaking, is acquired; but by a train of conduct, manifesting that the country in which he died was the place of his choice, and to all appearance, of his intended residence. Some reliance is placed upon the fact that there is no evidence where

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the *testator was between his immigration into the State and the time of his death. It is possible he was transient in the mean time. I am not sure, however, that a fixed abode is essential to a domicil. Domicil, says a high authority, is, properly speaking, the place where one has fixed the centre of his business; (Encyc. Mod. Art. Domicil;) and this definition is the only one that will include some peculiar classes of population in all countries. But as there is no evidence where the testator was in the interval, are we not authorized to presume he was where he was found in May? Suppose nothing had been heard of him between his leaving this State and the time of his death. At that time, we find him at lodgings. A person's being at a place, says Lord Thurlow, (in Bruce v. Bruce, 2 Bos. and Pul. 230, note,) is prima facie evidence that he is domiciled at that place. The actual place where he is, says Lord Rosslyn, (in Bemfide v. Johnstone, 3 Ves. 200,) is, prima facie, to a great many purposes, his domicil; and, says Sir John Nicholl, (in Stanley v. Bernes, before quoted,) prima facie, he is domiciled where he is resident. That is to say, if we had never been apprised that the testator had before been elsewhere domiciled, we should be bound to consider him domiciled in Alabama, from the mere fact of finding him residing there. The fact of a former residence in this State, cannot be allowed to rebut this presumption, it having been shewn that he had intentionally and permanently abandoned that. There is one test suggested in Bemfide v. Johnstone, which may be applied here with confidence. The place where one resides, says the Lord Chancellor, is his domicil; unless you shew that is not the place where he would be, if there was no particular circumstance to determine his position in some other place, at that time. Does not the proof in this case shew that the testator might be expected to remain in Alabama, unless called elsewhere by some particular circumstance?

I will conclude what I have to say on this point, by meeting one more objection. The testator left his wife behind him. It is said, (Story's Confl. ch. 3, sec. 46,) where a married man's family resides, is, generally, to be deemed his domicil. But it is subjoined—it may be controlled by circumstan-

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ces; for if it is a place of temporary *establishment for his family, or for transient objects, it will be otherwise. Mrs. Lowry's residence had not been her husband's. She was living apart from him, in the family of her son-in-law. The conclusion is, that the will is not avoided by the statute of 1795, (5 Coop. Stat. 271.)

But there is another branch of this case which remains to be considered. The slave Eliza and the land were given while Mr. Lowry was an inhabitant of this State.

The statute before referred to enacts that "if any person, who is an inhabitant of this State, or who hath any estate therein, shall have already begotten or shall hereafter beget any bastard child, or shall live in adultery with a woman, the said person having a wife or lawful children of his own, living; and shall give, or settle, or convey, either in trust or by direct conveyance, by deed of gift, legacy, devise, or by any other way or means whatever, for the use and benefit of the said woman with whom he lives in

adultery, or of his bastard child or children, any larger or greater proportion of the real, clear value of his estate, real or personal, after payment of his debts, than one fourth part thereof; such deed of gift, conveyance, legacy, or devise, made or to be made, shall be. and is hereby declared to be, null and void for so much of the amount or value thereof, as shall or may exceed such fourth part of his real and personal estate." I concur with the Chancellor, that substantially the negro and the land were given to Mrs. Bradley. I regard the statute as remedial; and I conceive that it should be so construed as to suppress the mischief contemplated by it. It would be a fraudulent evasion of its intention to allow an adulterer to advance his mistress or his natural children, more than one fourth of the nett value of his estate, by any subterfuge whatever. We are to look at the substance and design of the gift, and not at the mere form. We cannot for a moment suppose, that the slave was given to Mr. Bradley as a stranger. No doubt the motive and intention was to advance and benefit his wife. The same may be said of the transaction respecting the land; and notwithstanding the form of it was not a direct transfer of the land itself, but an advance of money, as a purchase of it, the land was the thing purchased by the one party, and gratuitously received by the

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*other. Both these transfers, that of the slave as well as of the land, come within the true intent of the statute, if they exceeded, at the time they were made, one fourth of the clear value of the donor's estate. By the construction which I put upon the statute, where there is a plurality of gifts, the property first given should be valued at the time of the gift, and compared with the nett value of the entire estate of the donor at that time, (the property given included,) and the gift is to be held void for so much as the property given may have exceeded in value one fourth of the whole. If the first gift should fall short of one fourth, it is valid. But when a second gift is made, the subject of the first donation should be brought down and added to the second; and these two are to be valued at the time of the second gift, and compared with the nett value of the whole estate of the donor at that time, as before described; and the second gift will be void for so much as it with the prior gift shall exceed in value the proportion described in the statute. And this process should be repeated as to each succeeding donation which may be made. The Court cannot know, in this case, whether the slave Eliza and the land, separately or conjointly, exceeded the statutory proportion; and if it were necessary, would be obliged to direct an inquiry as to both of them. But it appears to be unnecessary to make any inquiry as to the value of Eliza, because, conceding that the parol gift of her were wholly void under the Act, she is given again by the will; and that we have pronounced to be valid; and as a party having two titles, one good and the other bad, may claim under the title most advantageous to himself, the defendants here may take under the will. The land, however, stands upon a different footing. The foreign domicil of the testator can have no effect upon real property; and if the land, when given, exceeded one fourth of the donor's estate, the excess is not made good by the will, but remains as if never given. An inquiry as to the comparative value of the land is necessary, and will be directed to be made by the commissioner.

There are two points upon which I wish to reserve my opinion at present, as they may more properly be made on the circuit, after

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the commissioner shall have reported. *One is, supposing the land to have exceeded one fourth of the whole estate owned by the donor at the time it was given, estimating both the land and the residue at that time, (which is the proper time of valuation,) whether after accessions to the donor's property, left by him at his death, may not be taken into account, for the purpose of supporting the gift? The commissioner should therefore take a separate account of after acquisitions, in order to enable the Court to decide this question. The other is, supposing the land to exceed one fourth of the estate of the donor, whether the donee should account for the excess, or whether it should not be taken off by the process of partition? I incline to the latter opinion; as it seems to result from the Act, that the title of the donee is good for a part and void for the residue, as if the title were still in the donor for the latter; which seems to infer that there is a community of title in the donee and the kindred of the donor, according to their respective interests.

The circuit decree will be modified according to this opinion and the bill will be retained, to allow the plaintiff to go into the inquiry indicated, if she desires to do so; and it is decreed accordingly.

JOHNSON, Ch., concurred.

HARPER, Ch., absent.

Speers, Eq. *20

*SAMUEL DILLARD and JOHN T. KIRBY ads. SOLOMON CROCKER.

(Columbia. Dec. Term, 1842.)

1. S. C. gave to his daughter, P. M. an undivided moiety of a tract of land. Afterwards, in Dec. 1833, her interest in said land was sold by the sheriff, under an execution against her and her husband. G. M. a grandson of S. C.

bid it off, and transferred his bid to S. C. who paid the purchase money; the sheriff, however, declined to make him a title without a written order from G. M. who never applied for a title. After the death of G. M., J. M. a brother of the former, insisted on having the title to G. M., which the sheriff, having some time previously made out in the name of G. M. delivered to him. S. C., after the sale by the sheriff, was in exclusive possession of the premises, against whom, in March 1836, J. M. instituted a suit, but whether for the land itself, or for the rents and profits, did not appear, the writ not being produced.

2. The matter was referred to arbitration on the 22nd of March, 1836, both parties being sworn to abide by the decision; and in May following, the arbitrators made an award under seal, by which they awarded the land in dispute to S. C. and discharged him from the payment of any rents therefor. The suit of J. M. was not prosecuted further; and S. C.'s possession of the land remained uninterrupted until the 31st of May, 1838, he having in the mean time, since the sheriff's sale, rented the land to several persons, amongst whom, at one time, was S. D., one of the defendants. On the day last mentioned, S. C. was served with a summons from the Ordinary, on the petition, as was alleged, of A. M., H. M. and J. M., brothers of G. M. dec'd. and, with their mother, his heirs at law, praying a division of the premises. S. C. resisted the application, on the ground, that under the circumstances, he was the exclusive owner of the land. The Ordinary doubted his jurisdiction, but ordered the land to be sold. In Feb. 1839, it was sold to S. D. who gave bond and security; the bond was subsequently paid by the security, and the money remained in the hands of the Ordinary. The purchaser, S. D. brought an action of trespass to try title against S. C. and obtained a verdict with forty dollars damages. The land was purchased in June, 1840, by J. T. K. the other defendant, under an execution against S. D. and on the 29 June, 1841, he not having paid the purchase money, gave his note to the sheriff. This petition was filed in Oct. 1840, but no injunction was granted. In June, 1841, the defendant Kirby caused a writ of haberi facias possessionem cum fi. fa. to be sued in the case of S. D. against S. C. under which the tenant of the latter was dispossessed, J. T. K. put in possession, and the damages collected and paid over to the plaintiff's attorney. S. C. charged in his petition, that the heirs of G. M. dec'd. were not parties to the proceedings before the Ordinary, never having directed or sanctioned them. The Ordinary directed the land to be sold upon S. D's. testimony. It was

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*charged in the petition, and against S. D. taken pro confesso, that at the time of the sale by order of the Ordinary, he had full notice of the petitioner's equitable claim. The Ordinary testified, that none of the petitioners for a partition applied to him—that the application was made by attorney. None of the parties had applied for the proceeds of sale in the Ordinary's hands. The counsel who had signed the petition to the Ordinary, stated on examination, that he did not recollect to have had any authority from the applicants.

[3. *Partition* ⇐⇒40.]

It was *held* by the Court, that so far as the rights of the petitioner were involved, the decree of the Ordinary was to be regarded as null and void. The Act of 1824, (6 Stat. at Large, 248.) authorizing the Ordinary to make partition of real estate, where the value does not exceed one thousand dollars, was only intended to apply where no dispute exists as to the right of the land. If an adverse claim be interposed by the party in possession, the right should be adjudicated in the ordinary tribunals.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 101; Dec. Dig. ⇐⇒40.]

[4. *Attorney and Client* ⇐⇒71; *Vendor and Purchaser* ⇐⇒220.]

Prima facie, the signature of counsel to a proceeding, is regarded as sufficient evidence of their authority; where a decree has been pronounced and a sale made under it, the Court would scarcely permit any other than the party himself to question the authority, to the possible prejudice of a bona fide purchaser. But *held*, that S. D. was not entitled to this protection.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 100; Dec. Dig. ⇐⇒71; Vendor and Purchaser, Cent. Dig. § 462; Dec. Dig. ⇐⇒220.]

[5. *Vendor and Purchaser* ⇐⇒226, 229.]

To have rebutted the petitioner's equity, the defendants must have shewn that they were purchasers for a valuable consideration, without notice of the petitioner's title; Sugden on Vendors, 303. The money must have been actually paid, and not merely a security given for the payment, before notice of the title. Snelgrove v. Snelgrove, 4 Des. Eq. Rep. 274; 2 Atk. 241; 3 Id. 304, 814. Nor will the defence be allowed, where the purchaser might, by due diligence, have ascertained the true state of the title. It is enough, if he has been put on the inquiry. G. and Jackson v. Rowe, 2 Sim. and Stuart, 472.

[Ed. Note.—Cited in Williams v. Hollingsworth, 1 Strob. Eq. 113, 47 Am. Dec. 527; Maybin v. Kirby, 4 Rich. Eq. 113, 115; Zorn v. Railroad Company, 5 S. C. 101; Summers v. Brice, 36 S. C. 212, 15 S. E. 374.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 475–494; Dec. Dig. ⇐⇒226, 229.]

6. The defendants not having brought their case within these rules, it was *held*, that the petitioner's title must prevail.

[7. *Attorney and Client* ⇐⇒71.]

In a controversy between third persons, on a collateral issue, the authority to act for the heirs of S. M. dec'd. could not have been questioned.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 97–101; Dec. Dig. ⇐⇒71.]

[8. *Trusts* ⇐⇒72.]

[Where one purchases land and pays for it with his own money, and takes a conveyance to another, a trust results in favor of the purchaser, unless there be circumstances rebutting this presumption of law.]

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 102; Dec. Dig. ⇐⇒72.]

This case came up on an appeal from a decree of Chancellor Dunkin, before whom it was heard, at Spartanburgh, June Term, 1842. The facts and the evidence will appear from the decree.

Dunkin, Ch. The petitioner was the owner of a tract of land, containing about two hundred acres, situated on the waters of the

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Pacolet, under a grant from the State, *dated 4th Nov'r. 1816. He states in his petition that he had given an undivided moiety of his land to his daughter, Patsey Robertson, at that time Patsey McBee.

In December, 1833, the interest of Patsey Robertson in this land was sold by the sher-

iff of Spartanburgh district, under an execution against Patsey Robertson and her husband. The testimony of the Sheriff (Poole,) is, that the land was bid off by Greenberry McBee, (the grandson of the petitioner,) that he did not comply with the terms, and witness was about to re-sell—that Greenberry, however, came and told witness that he had transferred his bid to the petitioner, who would call and pay the money, and the witness was then to make title to the petitioner—that the petitioner called and paid the purchase money, and wished his title—that the witness declined to make the title without a written order from Greenberry McBee, as in case of death there might be difficulty. Greenberry McBee never applied to him for a title, nor did he ever see him afterwards.

After the death of Greenberry McBee, witness was applied to by John McBee, a brother of Greenberry, who insisted on having the title to Greenberry, and threatened to sue witness if he did not deliver it. Witness had sometime previously made out a conveyance in Greenberry McBee's name, which he kept by him, but on this demand of John McBee, he delivered the deed to him.

It seems that after the sale in December, 1833, the petitioner was in exclusive possession of the premises. In March, 1836, John McBee instituted a suit against him in the Court of Common Pleas; whether the suit was for the land itself, or for the rents and profits, is not very clear, as the writ was not produced.

The matter was referred to arbitration, both parties being sworn, on the 22nd March, 1836, to abide by the decision. On the 22d May, 1836, the arbitrators made an award under seal, in which they state that they are satisfied the contract with Greenberry McBee was in good faith; that the petitioner paid the purchase money, and was entitled to the land: they therefore, "award the land in dispute to Solomon Crocker, and discharge him from the payment of any rents therefor." The suit of John McBee was no further prosecuted.

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*The possession of the petitioner then remained uninterrupted until 31st of May, 1838. In the meantime he had, since the sale of the sheriff, rented the land to several persons; at one time his tenant was Samuel Dillard, one of the defendants.

On the day last named, the petitioner was served with a summons from the Ordinary, granted, as was alleged, on the petition of Asa McBee, Henry McBee and John McBee, as brothers of Greenberry McBee, deceased, and, with their mother, Patsey Robertson, heirs at law of said Greenberry, praying a division of the premises in question, which are alleged to be in possession of the petitioner Crocker, who had purchased their mother's right.

The petitioner resisted the application, on the ground that he was the exclusive owner of the land, under the circumstances as hereinbefore detailed. The Ordinary, doubting his jurisdiction, and intimating his opinion that the parties ought to have their rights elsewhere adjusted, proceeded nevertheless to determine the case against the petitioner (Crocker,) on the ground (principally,) that the right could not be established by parol. The land was ordered to be sold on a credit of twelve months. In Feb. 1839, it was sold by the sheriff for fifty-one dollars, to Samuel Dillard, who gave bond, with Simpson Bobo, Esq. as security. The bond was subsequently paid by Mr. Bobo, and the money remains in the hands of the Ordinary.

An action of trespass to try title was then instituted by Dillard against the petitioner, and a verdict rendered for the plaintiff with forty dollars damages. The petitioner sought to restrain the enforcement of the execution issued on this writ.

It appeared that the land was, in the meantime, sold under an execution against Dillard, and purchased by the other defendant, John T. Kirby, for fifty one dollars. Kirby purchased in June, 1840, and on the 29th June, 1841, he gave to the sheriff his note for the purchase money, with interest from June, 1840, which is yet unpaid.

This petition was filed 5th Oct. 1840; but no injunction was granted. In June, 1841, the defendant Kirby caused a writ of haberi facias possessionem, cum fi. fa. to be sued

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*out in the case of Dillard v. Crocker, under which the petitioner's tenant was dispossessed, and the defendant Kirby put in possession—the damages, (forty dollars) were collected and paid over to Mr. Bobo, the plaintiff's attorney.

All the testimony, verbal and written, which was submitted at the hearing, accompanies this decree. It is difficult to perceive on what principle the petitioner could have been ejected at the suit of Dillard, if there be no misapprehension in the statement as to the original rights of the parties. But it may be, that the Court should infer that the petitioner gave the whole tract, and not an undivided moiety, to his daughter, Patsey Robertson, (or McBee,) and that the whole was sold by the sheriff in Dec. 1833, as her property.

It is necessary then to inquire what interest, if any, the petitioner derived under the sale of Dec. 1833. It is insisted, that as the purchase money was paid by the petitioner, he had a resulting trust in the premises, which this Court would enforce.

It seems quite clear from all the cases, as Mr. Sugden says, without a single exception, that where the purchase money is paid by one man, and a conveyance is taken in the name of another, a trust results to the man who advances the purchase money. And this trust may be established by parol evidence, being expressly excepted out of the Statute

of Frauds; 2 Sugden on Vendors, 135. It was formerly questioned whether such testimony was admissible, after the death of the nominal purchaser; but in Lench v. Lench, 10 Ves. 511, Sir William Grant says, that whatever doubts might have been formerly entertained the rule was now settled—all, he said, depended upon the proof of the fact. He admitted the testimony after the death of the party, although he ultimately regarded it as too uncertain to establish the trust.

The evidence as to the payment of the purchase money by the petitioner in this case was not questioned. If the conveyance had been afterwards executed by the sheriff to Greenberry McBee, the Court would have

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declared him a *trustee for the petitioner, or would have compelled him to execute a conveyance to the petitioner. But the sale took place in Dec. 1833. The petitioner remained in exclusive possession. Greenberry McBee died in Feb. 1835, never having received a conveyance or interposed any claim to the land. As to Greenberry McBee and his heirs, the equitable title of the petitioner could not well be questioned.

But it is urged, that the petitioner is precluded by the decision of a competent tribunal on this very point; and that the defendant Dillard was a bona fide purchaser at a judicial sale, and should be protected. This renders it necessary to enquire into the proceedings before the Ordinary.

By the Act of 1824, passed to remedy the expensive proceedings in a Court of Equity, the Ordinary is authorized to make partition of real estate, where the value does not exceed one thousand dollars. It is quite manifest that this Act was only intended to apply where no dispute existed as to the right of the land. If an adverse claim was interposed by the party in possession, the right should be adjudicated in the ordinary tribunals. It may be well doubted whether a different construction would not render the Act a violation of the constitution.

It is to be regretted, that in this case the Ordinary did not act in conformity with his own inclination, and dismiss the case, leaving the parties to their appropriate remedy. But it is insisted, on the part of the petitioner, and is so charged in his petition, filed in October, 1840, that the heirs at law of Greenberry McBee were no parties to these proceedings—that they never directed or sanctioned the application to the Ordinary, and that their names were used without their authority.

Prima facie, the signature of counsel to a proceeding is regarded as sufficient evidence of their authority. Where a decree has been pronounced and a sale made under it, the Court would scarcely permit any other than the party himself to question the authority, to the possible prejudice of a bona fide purchaser. The Court is disposed to think, however, that Dillard is not entitled to this protection. He had been, if he was not then, the tenant of the petitioner. It

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*was upon his testimony alone as to the value of the land, that the Ordinary took cognizance of the cause, and it was upon his testimony that he ordered a sale of the premises. It is charged in the petition, which is taken pro confesso against Dillard, that at the time of the sale under the order of the Ordinary, he, Dillard, had full notice of the petitioner's equitable claim. He bid off the land at $51, and the money (which was paid by his security,) is still in the hands of the Ordinary. If the proceedings before the Ordinary were without authority, the Court is of opinion that Dillard must have been aware of the defect, and that this is substantially to be inferred from the state of the pleadings as well as from the evidence.

Then what are the circumstances on which the petitioner relies, as he urges, to cast the onus on the defendant of producing the authority of the heirs of Greenberry McBee, for the proceedings before the Ordinary. In October, 1840, the petition was filed, making the charge to this effect.

The Ordinary testified that "none of the McBees applied to him—that the application was made by attorney." The petition is filed in the name of Asa, Henry and John McBee. More than two years previously, John McBee had, under oath, submitted his dispute with the petitioner to arbitrators, who had awarded that the land belonged to the petitioner. All these McBees (as the Court understood,) had removed, and were residing in the West. They had never applied for the proceeds of sale in the Ordinary's hands. The petition to the Ordinary was signed by Henry & Bobo, for the petitioners. Mr. Henry was examined by the petitioner—he said that he did not recollect to have had any authority from the McBees —that he was never employed after the arbitration—that suit was for the rents and profits—witness never appeared before the Ordinary.

If the validity of the proceedings before the Ordinary depended on the proof of authority from the heirs of Greenberry McBee, deceased, to institute those proceedings, the Court would regard this negative testimony as sufficiently strong to repel the prima facie presumption, and put the party on further proof of authority. But so far as the rights of the petitioner are involved, the Court re-

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gards the decree *of the Ordinary as null and void. It is possible, that if the heirs of McBee had been properly applicants, they might be estopped—but that would not effect the petitioner.

Neither of the defendants, however, could protect themselves, even if they held under a conveyance from the heirs of Greenberry McBee, or from their ancestor himself. In

order to rebut the petitioner's equity, the defendants must shew that they were purchasers for valuable consideration, without notice of the petitioner's title; Sugden, 303. The money must have been actually paid, and not merely a security given for the payment, before notice of the title; Snelgrove v. Snelgrove, 4 Des. Rep. 274; 2 Atk. 241; 3 Ib. 304, 814. Nor will the defence be allowed, where the purchaser might, by due diligence, have ascertained the real state of the title. It is enough, if he has been put on the enquiry. G. & Jackson v. Rowe, 2 Simmons & Stuart. 472.

It is hardly necessary to recapitulate the testimony in order to shew that the defendants have not brought their case within these rules.

It is ordered and decreed, that the defendant, John T. Kirby, do within thirty days after notice of this decree, deliver up unto the petitioner, the premises of which the petitioner was dispossessed, under the execution issued in the case of Dillard v. Crocker, and that he account for the rents and profits of the same since he took possession. It is further ordered and decreed, that the damages and costs paid by the petitioner, in the last mentioned case at law, be refunded to him; and that the defendant Dillard pay all the costs of the proceedings in this Court, except the costs in the answer of his co-defendant Kirby, which are to be paid by himself—and it is finally ordered, that in the event of the insufficiency of Dillard's estate to satisfy the costs in this Court, then that all these costs, except those on the answer of Dillard, be paid by the defendant, John T. Kirby.

The defendants appealed, and moved the Court of Appeals to reverse the decree, upon the grounds.

1st. Because the decree of the Court of Ordinary was final and conclusive as between all the parties to the record, in the case adjudicated by him.

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*2d. Because Dillard was a bona fide purchaser of the land at the sheriff's sale, without notice, express or implied, of any resulting trust in the complainant.

3d. Because the adjudication in the case of Dillard v. Crocker, was conclusive of the title's being in Dillard.

4th. Because a resulting trust is a legal estate, and might have been set up at law, between Dillard and complainant.

5th. Because Kirby was a bona fide purchaser of the land at sheriff's sale, for a valuable consideration, and as against him, defendant could not set up his resulting trust in equity.

6th. Because the decree is ambiguous, as to who shall pay the recovery and costs in the case at law of Dillard v. Kirby, leaving it doubtful, in the opinion of the counsel, whether Kirby is or is not liable to execution for the same.

7th. Because neither Kirby nor Dillard can properly be made liable for the costs and money in Dillard v. Crocker.

8th. Because the legal estate was in Greenberry McBee, in fact, and after his death, parol proof was inadmissible to affect the rights of Dillard and his assigns.

9th. Because the award was improperly considered, the submission being entirely on the demand for rents and profits.

10th. Because the decree is contrary to law and equity.

Curia, per DUNKIN, Ch. This Court is satisfied with the conclusions of the Circuit Chancellor. But, lest some misapprehension might arise from a general affirmance of the decree, it is deemed proper to state, as the unanimous opinion of this Court, that the authority to act for the heirs of Greenberry McBee, in the proceedings before the Ordinary, could not be properly questioned, on a collateral issue, in a controversy between third persons. With this explanation, the decree of the Circuit Court is affirmed, and the appeal dismissed.

D. JOHNSON, and J. JOHNSTON, Chancellors, concurred.

Henry & Bobo, pro appellants.
H. H. Thomson, contra.

Speers, Eq. *29

*J. P. PRINCE and Wife v. WILLIAM LOGAN.

(Columbia. Dec. Term, 1842.)

[1. *Guardian and Ward* ⇐30.]

As a general rule, the Court will not sanction an encroachment on the capital of a minor's estate. If the estate is large, the income should be sufficient. If it be inconsiderable, the income should aid in supporting the minor, if necessary. In those cases in which the Court will permit the application of a portion of the capital, the emergency should be great, and the expediency manifest.

[Ed. Note.—Cited in Villard v. Robert, 2 Strob. Eq. 43, 49 Am. Dec. 654; Holmes v. Logan, 3 Strob. Eq. 33; Ashley v. Holman, 44 S. C. 166, 21 S. E. 624.

For other cases, see Guardian and Ward, Cent. Dig. §§ 116–135; Dec. Dig. ⇐30.]

[2. *Guardian and Ward* ⇐30.]

A. D. was appointed guardian of his sister, the wife of complainant, in 1830, and made regular returns until December 1836. The capital of the ward's estate was $662.94; the annual income not quite $50, and the aggregate of interest about $240. The entire expenditure of the guardian until his last return was about $130, leaving from the income about $110. Until 1832 it was inferrible from the testimony that the family were living together. The negroes of the mother worked on the farm. No charge was made for board in the returns of 1831 or 2, nor until the return of June 1833. The guardian made returns in June and December, 1833, and in April 1836. No charge

was made for board after June 1835. Allowing board from June 1832 to June 1835, it was held that $110 was not so inadequate as to warrant an encroachment on the capital of the minor's estate, it appearing also that the ward and sister of the guardian resided on the farm with him, and that he had not paid any sum for board.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 116–135; Dec. Dig. ⟸30.]

[3. *Guardian and Ward* ⟸162.]

In each annual return of the guardian was a charge of $4.00, paid to the commissioner and register for passing the account. There is no warrant for this charge. The Act of 1827 is explicit; "for examining and filing each return of a guardian or trustee, one dollar." The additional $3 is for a supposed report made in each case. No such report is made, or required to be made. The Commissioner is required to make one general annual report of all guardians who have made or failed to make their returns.

[Ed. Note.—Cited in Huson v. Wallace, 1 Rich. Eq. 25.

For other cases, see Guardian and Ward, Cent. Dig. § 538; Dec. Dig. ⟸162.]

Before Dunkin, Ch., at York, June Term, 1842.

The facts of this case are fully presented by the reports of the commissioner, the complainant's and defendant's exceptions, and the decree.

Commissioner's Report.

On the 2d day of July, 1830, Amos Davis was appointed by this Court the guardian of the estate of Mary A. Davis and Sarah C. Davis, now Mrs. Prince, wife of the complainant J. P. Prince. On the 30th of Octo-

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ber of the same year, he ex*ecuted his bond with Gordon Moore as security. Afterwards, by leave of the Court, William Logan and Sarah Davis were substituted in place of said Gordon Moore, and joined said Amos Davis in another bond for the faithful performance of his duties as guardian aforesaid. Said Amos Davis made regular returns to the Commissioner of this Court from the time of his appointment up to 1836, when he, with his wards, and Sarah Davis, one of his securities, left this state. Amos Davis has since died, and is totally insolvent, as it is alleged, and without administration having been taken out upon his estate. The bill in this case was filed to make the defendant, William Logan, account to the complainants for their portion in the hands of their guardian aforesaid. At June Term, 1840, the matter of account was referred to the commissioner. On the reference no evidence was offered to charge the defendant, so far as Mary A. Davis was concerned; and it was stated, and seemed to be admitted, that since the filing of the bill in this case she had married and died.

In making up the account between the defendant and Mrs. Prince, I have allowed the defendant credit for sums paid by Amos Davis, and boarding his ward, which together exceed the income of the estate, and to meet which the guardian had to break in upon the capital of the estate. As a general rule, the Court will not suffer a guardian to touch the capital of the estate in his hands, without special leave. But under particular circumstances the Court will sanction the guardian in doing that which the Court would have allowed. The credits allowed are for boarding, cash paid for tuition fees and clothing, all of which were necessary and proper. I have rejected some credits allowed to the guardian by the former commissioner in his settlement, because there was no proof before me as to their payment by Davis. I have allowed the defendant no interest on the balance in his favor. According to the plan adopted, the amount due by the defendant on the 1st of June, 1841, was $404.96. Should the Court decide that I have erred in allowing the defendant credit for sums exceeding the income of the estate, then the balance due will be $800.23, the capital of the estate, deducting, I suppose, the commissions for receiving and paying out.

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*Complainant's Exceptions.

The complainants, J. P. Prince and wife, except to the commissioner's report in this case, on the following grounds.

First. Because the commissioner has allowed charges made by the guardian, Amos Davis, against his ward Sarah C. Davis, to an amount greater than the income of her estate—whereby the principal sum which went into his hands is diminished near one half.

Second. Because the commissioner should have charged the defendant with the sum of eight hundred dollars and twenty-three cents, the amount of the estate of Sarah C. Davis, (now Sarah C. Prince,) with interest from January, 1836—as no return has been made or proof offered of expenditures made by Amos Davis, for his ward, since that period —and the principle adopted by the commissioner, of allowing the excess of expenditure beyond the income, would in effect be allowing him to break in upon the capital of his ward.

Third. Because the commissioner has allowed usual commissions, when the guardian is only entitled to commissions for receiving, his return having been made since 1836, and no sum paid to his ward.

Defendant's Exceptions.

The defendant, William Logan, excepts to the report of the commissioner, on the following grounds:

First. Because the commissioner should have allowed to the defendant all credits allowed to the guardian, Amos Davis, in his settlements with the commissioner in Equity.

Second. Because the commissioner has not allowed the defendant interest on the credits.

Report of Commissioner, June Term, 1842.

It being referred to the commissioner to ascertain and report how much of the amount received by the guardian, Amos Davis, was principal, and how much interest; also, what would be a suitable allowance for the board of Sarah C. Davis, if any thing should be allowed—

He begs leave to report, that from an examination of the proceedings in partition of the estate of Elnathan Davis, he finds $662.-94 cents, the principal amount received by Amos Davis, and that interest computed on

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the sum of *$392.85, from 1st October, 1832, and on the sum of $270.09, from the 1st January, 1832, up to this time, would be the interest.

The commissioner then reports the principal amount received by Amos Davis.. $662.94
And interest up to the 22d January,
1842 ..... $457.34

Making principal and interest.....$1120.28

The commissioner would further report, that the guardian charges himself with $9.-40 received upon the bond of J. Williams, which does not appear from the return whether it was all principal or a part interest.

The commissioner would further report, that from the testimony offered before him, he would suggest six dollars per month, as a suitable allowance for the board of Clarissa Davis. That there is no evidence that she was ever engaged in any of the duties of the household—but on the contrary, all the testimony seems to conflict with that idea. One thing is certain, that from the testimony of the witnesses, Amos Davis was unable from his circumstances to board his sister for nothing.

Dunkin, Ch. This case was heard on report and exceptions.

The estate of Elnathan Davis, the father of Sarah Clarissa Prince, (formerly Davis,) was divided in 1830 and 1831. At the time, the widow and children resided on the farm. At the division, the real estate was set off to Amos Davis, brother of Clarissa, and who had been appointed her guardian. He was to pay her for her share of the realty, $270.-09, with interest from 1st January, 1832. Two of the negroes, Ben and Sylvia, were allowed to the widow, the remainder to Amos Davis, who was to pay Clarissa for her share of the personalty, $392.85, with interest from 1st October, 1832. It seems that the capital thus amounted to $662.94.

There was another sister, who is since dead. The girls were small at the time of their father's death.

The returns of Amos Davis, as guardian, were duly rendered, until December, 1836, after which he removed from this country, and is since dead.

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*In the account filed with the commissioner's report, the guardian is allowed credit for sums exceeding the annual interest on the ward's capital. The complainant is content that the interest should be absorbed, but objects to any allowance beyond that sum.

It is conceded as a general rule, that the Court will not sanction an encroachment on the capital of the minor's estate. If the estate is large, the income should be sufficient. If it be inconsiderable, the income should aid in supporting the minor, if necessary. But there are cases in which the Court permits the application of a portion of the capital. The emergency, however, should be great, and the expediency manifest. It is contended that this case constitutes such an exception, and that as the Court would originally have authorized the excess of expenditure, it will now sanction it.

The annual income of the ward's estate was not quite $50. Closing the account in Dec. 1836, the aggregate of interest would be about $240. Deducting the charge for board, (on which the Court will presently comment,) the entire expenditures of the guardian during these years, according to his own returns, was $145.51. Scarcely any thing was paid until the last two years.

It has been said, that the guardian made his annual returns, six in number. In each return is a charge of $4 paid to the commissioner and register for passing the account. There is no warrant for this charge. The Act of 1827 is explicit; "for examining and filing each return of a guardian or trustee, one dollar." The additional $3 is for a supposed report, made in each case. No such report is made or required to be made. The commissioner is required to make one general annual report of all guardians who have made, or failed to make, their returns. If no compensation is allowed for this, it is, or may be, proper matter for the Legislature. But the impropriety of allowing such charges, is fully illustrated by the returns in this case. In the first year, nothing was received, and there was one payment of seven dollars, besides the four dollars for making the return, or settlement as it is termed. The second year, the sum of $9.40 was received, and $2.11 paid away—and in making

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this return, the estate was charged *$4. The two next years are scarcely different. This misapprehension on the part of the officer, works an injury to those who are least able to bear it, and it should be corrected.

The entire expenditure of the guardian, then, till his last return in December, 1836,

was about $130, leaving from the income about $110.

Then as to the board—It is very questionable whether any allowance should be made for board, until after the year 1832. The Court rather infers from the testimony, that the family were living together. The negroes of the mother worked on the farm. No charge for board is made in the returns of 1831 or 1832, nor until the return of June, 1833. Again, the guardian made returns in June, 1835, December, 1835, and April, 1836. No charge is made for board after June, 1835; but allowing board from June, 1832, to June, 1835, the only inquiry is, whether the sum of $110 is so inadequate as to warrant an encroachment on the capital of the minor's estate.

This would allow the guardian nearly $40 per annum. It is to be observed, that he has not paid this, or any other sum, for board, but his ward and sister lived on the farm with him. The testimony is loose and inconclusive enough; but if under the circumstances stated, an application had been made in June, 1832, to encroach on the capital, in order to allow a larger sum than $40 per annum for board, the Court would not have regarded this testimony, as presenting a case sufficiently strong to authorise a departure from the ordinary rule.

It is ordered and decreed, that the defendant pay to the complainants, the sum of six hundred and sixty-two dollars and ninety-four cents, with interest from 31st December, 1836, deducting therefrom, a commission of two and a half per cent on the aggregate amount of principal and interest so to be paid. Benj. F. Dunkin.

[L. S.] Sealed and examined, Sept. 19th, 1842.

W. I. Clawson, C. E. Y. D.

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*South Carolina, York District.

I, W. I. Clawson, Com'r. in Eq'ty. for York district, do certify that the above and foregoing is a true copy of an original report, filed in my office in this case.

In testimony whereof, I have hereunto set my hand and seal.

W. I. Clawson, C. E. Y. D.

Nov. 13, 1842.

The defendant appealed, on the following grounds:

1. Because his Honor refused to allow for the board of Clarissa Davis.

2. Because his Honor should have overruled complainant's exceptions to commissioner's report.

3. Because his Honor erred in deciding that this case was not one which would justify a breaking in on the capital of the estate of ward.

4. Because his Honor should have decreed the complainants to pay the costs, as they never called on the defendant to account before the filing of the bill.

PER CURIAM. This Court concur in the views taken by the Circuit Chancellor. The appeal is dismissed.

HARPER, Ch., absent.

Williams and Witherspoon, for the appellant.

Dawkins and Allston, contra.

COLUMBIA, MAY TERM, 1843

CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
" WM. HARPER,
" JOB JOHNSTON,
" B. F. DUNKIN.

*T. N. GADSDEN ads. BROWN & WELLSMAN.

(Columbia. May Term, 1843.)

[1-4. *Subrogation* ⟸1, 23.]

C. gave his bond to P. on the 13th Jan. 1837, conditioned for the payment of $11,000, and to secure the payment gave him, also, a mortgage of 34 negroes, of the same date, recorded 1st Feb. 1837. On the 5th June, 1842, C. also gave his bond to B. and W. for the payment of 4,000, and a mortgage of the same date, recorded the same day, of 22 negroes, fifteen of those contained in the first mortgage being embraced in both.

To prevent a sale under the prior mortgage, defendant, in March, 1841, at the request of C. advanced $5,000, in part payment of a balance then due on it, and took from C. his bond for the amount, as well as a mortgage of eleven negroes, to secure the payment. On the payment of the money advanced by defendant, a partial release of the negroes contained in this mortgage was executed—those still retained, with the exception of one, being embraced in both mortgages.

On the 24th Jan. 1842, defendant sold four of the slaves embraced in both mortgages, and received the money, C. having confessed judgment on his bond, in August, 1841.

Under these circumstances it was *held*, that on the execution of the release by the prior mortgagee, an absolute title at law vested in

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complain*ants; and that defendant, on the ground of his payment to the former mortgagee, did not thus acquire an equity paramount to their title, so as to entitle him to be subrogated to the rights of the former mortgagees, and take precedence of a subsisting mortgage.

[Ed. Note.—Cited in Livingstain v. Columbian Banking & Trust Co., 77 S. C. 309, 57 S. E. 182, 22 L. R. A. (N. S.) 442, 122 Am. St. Rep. 568; Eureka Cotton Mills v. Western Union Tel. Co., 88 S. C. 514, 70 S. E. 1040, Ann. Cas. 1912C, 1273.

For other cases, see Subrogation, Cent. Dig. §§ 2, 63; Dec. Dig. ⟸1, 23.]

[This case is also cited in Spratt v. Pierson, 4 S. C. 305; Ex parte Reynolds, 68 S. C. 439, 47 S. E. 728; Livingstain v. Columbian Banking & Trust Co., 77 S. C. 310, 57 S. E. 182, 22 L. R. A. (N. S.) 442, 122 Am. St. Rep. 568, on the doctrine of subrogation.]

The cause was heard before Chancellor Johnson, at Charleston, February Term, 1843.

By a decree of his Honor Chancellor Johnston, in July, 1842, this case was referred to the master, Mr. Gray, from whose report the facts and the objects of the bill of complainants will be fully understood. The report sets forth that B. R. Carroll gave his bond to Dr. Pinckney, dated 13th January, 1837, conditioned for the payment of $11,000, and to secure the payment, give him also a mortgage of 34 negroes, of the same date, which was recorded the 1st February, 1837. The schedule No. 1, annexed, contains the names of the negroes so mortgaged.

That B. R. Carroll, on the 5th June, 1840, gave his bond to Browns & Wellsman, for the payment of $4,000, and to secure the payment, gave them also a mortgage of the same date, recorded the same day, of 22 negroes, of which schedule No. 2, annexed, is a list, the first named 15 negroes in schedule No. 1, being embraced in both mortgages.

That on the 8th March, 1841, there was due on the mortgage to Dr. Pinckney, $6726.43, and Burbage & Pinckney, who were the holders of it, lodged the same with the sheriff of Charleston district, to be enforced. That to prevent the sale of the negroes at that time, Mr. Gadsden, the defendant, at the request of Mr. Carroll, agreed to advance Burbage and Pinckney, $5,000, of the balance so due them, and wait for the future sales of the negroes to reimburse him. The $5,000 were paid by drafts made by Mr. Carroll on Mr. Gadsden, in favor of Burbage & Pinckney, or their creditors, which were discounted in bank and taken up by Gadsden at maturity; on the following day, the 9th March, 1841, Burbage & Pinckney, in writing, released all the negroes contained in their mortgage, except Frank, Joe, Jack, Betty, Sylvy, Phillis and Sophy, of whom all except Sylvy, were embraced in both mortgages, and on the same day assigned the bond and mortgage for the balance then due, to wit: $1726.43, to A. P.

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*Collins. The receipts on this bond, prior to March, 1841, amounted to $6,200, but it is not in proof from what funds these payments were made.

That on the 24th January, 1842, Mr. Gadsden sold the slaves, Hardtimes, Miley, Jack and George, for $784.02, and has received the money, and these negroes are embraced in both mortgages.

That on the 18th August, 1841, Mr. Carroll confessed judgment in the Court of Common Pleas, to Mr. Gadsden, for $6,750, which was intended to secure him, as well for the $5,000 advanced, as above stated, as for other debts due by Mr. Carroll, which Gadsden agreed to pay, and Mr. Carroll placed all his property, both land and negroes, with Mr. Gadsden for sale, to pay off the incumbrance above, of which Gadsden had notice, and to repay himself. There was no proof, however, that Mr. Gadsden sold any more of the negroes than the four above named.

That in March, 1842, Browns & Wellsman lodged their mortgage with sheriff Brown, and directed him to sell the negroes contained in it, for payment of their demand; and that on the 8th March, 1842, the sheriff sold 27 negroes named in schedule No. 3, annexed, for $6,614.50, nett, but Mr. Burbage, who was the purchaser of seven of them, for $1,560, not having complied, they were re-sold by the sheriff on the 28th of the same month, and the whole nett sales amounted to...$6,262.66

Which were paid thus:

To Mr. Collins.....	$1,847.28
Mr. Gadsden.....	2,043.84
Browns & Wellsman.	1,393.79
	$5,284.91
Leaving a balance in the sheriff's hands, of.....	$977.75

That of the negroes sold by the sheriff, two, to wit, Simon and Daniel, were contained in the mortgage to Browns & Wellmans alone, and brought $245, and that the other negroes contained in their mortgage only, were not sold by the sheriff. That seven of the negroes embraced in both mortgages, viz: Joe, Daniel, Phillis, Betty, Scipio, Sophy and Jack, were sold by the sheriff for $2,105.

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That four *of the negroes contained in the mortgage of Pinckney only, viz: Dolly, Sary, Ben and Sylvy, were sold for $645, and the remaining thirteen negroes, not embraced in either mortgage, were sold for $3,230. These were all the negroes of whose sales there was any specific proof before the master, although Mr. Carroll, in his testimony, states that all the negroes had been sold. The master further reported, that from the statement of Mr. Gadsden, under oath, submitted to him, there had been received by him, $3,244.43, on account of the $5,000 advanced by him, leaving a balance due him of $1,755.66.

It is reported, that by a like statement under oath, submitted by Browns & Wellsman, there was due on their bond a balance of principal with interest, to the 21st Feb. 1843, of $1,528.57.

Both parties claimed the balance of $977.75, in the sheriff's hands.

The master submitted, that if the balance be regarded as part of the sales of the thirteen negroes not contained in either mortgage, Mr. Gadsden would be entitled to receive it under his judgment and execution; and if he had a right to be subrogated to Burbage & Pinckney, he would also be entitled to retain the proceeds of sale of the four negroes sold by him, contained in both mortgages. If he had no such right, he ought to refund that sum to the complainant.

Schedule No. 1.

Dr. Pinckney's bond, 13th January, 1837, condition $11,000; mortgage do. do., recorded 1st February, 1837, of the following slaves, viz: Scipio, Frank, Joe, Bossar, Hardtimes, Jack, Edward, Cynthia, Phillis, Mily and two children, Sophy, Betty, Jack, Silvy, Polly, Sam, Sary, Siddy, Little Ben, Ben, Sandy, Marian, Dick, Peggy, Hector, Phillis, Sam, Cuffy, Hercules, Venus, Henry, Edward.—In all, 34.

Schedule No. 2.

Browns and Wellman's bond, 5th June, 1840, condition $4,000,—mortgage ditto., recorded same day, of the following slaves. The first named fifteen as above, with Si-

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*mon, Daniel, Sary, George, Tom, Carpenter Tom and Joe. In all, 22.

Schedule No. 3.

Sheriff Brown sold Simon, Silvy, Susan, Joe, Phoenix, Frank, Daniel, Caroline, Sary, Phillis, Mary, Stephen, Betty, James, Scipio, Dolly, Sampson, Sary, Sophy, Mahaly, Mary, Charity, Edward, Ben, Jack, Sary, Scipio. In all, 27.

Johnson Ch. The report of the master, Mr. Gray, contains in detail most of the leading circumstances of the case. There is, however, another fact which appeared at the hearing, and is not stated in the report, which is regarded as important to the rights of the parties. It is, that at the time the defendant agreed to advance the $5,000, to be appropriated towards the satisfaction of Carroll's bond and mortgage to Pinckney, he took from Carroll a bond for the amount and to secure the payment, Carroll gave him a mortgage on eleven slaves, and on this bond the judgment referred to in the report was confessed by Carroll to Gadsden, the defendant; and the question is, whether under these circumstances, the defendant Gadsden is entitled to be subrogated to the rights of Pinckney and Burbage under the bond and mortgage held by them, to the extent that they had been extinguished by the money advanced by him.

The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature, never could have been intended

for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound, and as far as I have been enabled to learn its history, it never has been so applied. If one with the perfect knowledge of the facts, will part with his money, or bind himself by his contract, in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract, would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the penalty. Sureties, for example, who have before become bound, are amongst

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*the especial objects of its care. Thus, if a surety pays the debt of his principal, he is entitled to stand in the place of the creditor, and to have the benefit of all securities, funds, liens and equities, to which the creditor was entitled; 1st. Story's Eq. 477-8, 589, et seq; [Perkins v. Kershaw] 1st Hill's Eq. 351. If he be bound for a specialty debt for his principal, and the principal die, and he afterwards pay the debt, the surety is entitled to the right of a specialty creditor of the principal, although it would have been otherwise, if he had paid the debt in the lifetime of the principal. Pride v. Boyce, Rice's Eq. Rep. 275, [33 Am. Dec. 78;] so if the creditor take a mortgage or other security from the debtor, and release it, the surety will be discharged. 1st Story's Eq. 481; 4 J. C. R. 130.

Another example of the application of the principle, will be found in the case where two creditors have mortgages or other liens on the same property of the same debtor. There, if the subsequent creditor pay the prior debt, he is entitled to be substituted to the rights of the prior creditor, as a means, without injury to the prior creditor, of enabling him to secure the payment of his own debt. But I have seen no case, and none has been referred to in the argument, in which a stranger, who was in a condition to make terms for himself, and demand any security he might require, has been protected by the principle.

Defendant Gadsden was not the surety of Carroll, but the creditor—he advanced the money, confiding in Carroll's ability to repay him; and it would seem he intended to put the matter beyond all controversy, by selecting his own security, a mortgage on his own property. He did not pay the money to Burbage and Pinckney, but lent it to Carroll to pay them.

The reasoning of my brother Johnston, in the decree pronounced in this case, at the last June Term, would seem to lead to a different conclusion, and is relied on as conclusive of the question, but it does not profess to decide it—on the contrary, he remarks in the conclusion that "it is impossible to determine any thing on the obscure proof" furnished him, and refers the case back to the master, to ascertain the facts; and it is apparent that some at least of the most important facts were not brought to his view; and however much respect I may feel for

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the opinions of *my learned brother, I am constrained to differ from him on the question, if indeed they were formed on a knowledge of the facts.

It is therefore ordered and decreed, that the defendant Thomas N. Gadsden, do pay to the complainants, seven hundred and eighty-four dollars and two cents, with interest from the 24th January, 1842, with the costs of these proceedings.

From this decree the defendant appealed, on the following grounds.

1st. Because it is submitted, that the defendant was entitled to be subrogated to the rights of Burbage and Pinckney, the mortgage creditors of B. R. Carroll, and the negroes in question being part of those relieved by the defendant's payment, he was entitled to the proceeds of sale.

2d. Because the defendant was a surety, and as such having paid his money was entitled to subrogation.

3d. Because it is respectfully submitted, that the defendant's money went to obtain a release from the first mortgage creditor, and to permit the release thus obtained to operate in favor of the complainants, whose mortgage was subsequent, is contrary to the whole equity of the transaction.

4th. Because the payment of the money by the defendant to the first mortgage creditor, the release by that creditor of part of the mortgaged premises, and the agreement between the first mortgage creditor and the debtor on the one hand, and the defendant on the other, that the latter should sell and reimburse himself from the property which had been relieved of the incumbrance, was a clear equity, sustainable against the complainants, the said mortgagees, who took their lien subject to the first incumbrance.

5th. Because the mortgage mentioned in his Honor the Chancellor's decree, was no part of the evidence in the case. It was produced as evidence by Mr. Memminger, in the case of Thomas N. Gadsden v. Alexander H. Brown et al. The only testimony in the present case was the report of the master.

6th. Because if the mortgage alluded to

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had been in *evidence in the present case, it was a mere nominal security, embracing the very negroes contained in the mortgage by Carroll to the complainants.

7th. Because the decree was otherwise against the equity of the case, arising out of the facts embraced in the report of the master.

Curia, per DUNKIN, Ch. This Court concur in the views of the Chancellor. So soon

as Burbage and Pinckney executed the release, an absolute title at law vested in the complainants, Brown & Wellsman. The defendant attempts to set up an equity, paramount to this title, on the ground of his payment to the former mortgagees. But there was no agreement that he should be subrogated to their rights as mortgagees; there was no assignment—on the contrary, the defendant took other securities for his advancements. The authorities cited in the decree are conclusive that, under such circumstances, there is no right of subrogation, and no equity to take precedence of a subsisting mortgage. The appeal is dismissed.

HARPER, Ch., concurred.

JOHNSTON, Ch., absent at the argument.

J. B. Thompson, for the appellant.
Magrath, contra.

Speers, Eq. *45

*WILLIAM P. FORBES v. SARAH DEHON.

(Columbia. May Term, 1843.)

[*Appeal and Error* ⇐811.]
The Court does not consider itself bound to adhere to the strict order of the docket, if there be any reason of justice, necessity or convenience for departing from it; and if upon looking into the judgment and grounds of appeal, it plainly appears to the Court to be frivolous, it is a good ground for a departure from the ordinary course. In such case appeal dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3193; Dec. Dig. ⇐811.]

HARPER, Ch.—This cause was taken up out of its order on the docket, on the application of the counsel for the appellee, on the ground that the appeal was frivolous. The Court certainly does not consider itself bound to adhere to the strict order of the docket, if there be any reason of necessity, justice or convenience for departing from it. This is the practice of every day. If upon merely looking into the judgment and grounds of appeal, it plainly appears to the Court to be frivolous, we think this affords a very good ground for such departure from the ordinary course. Such cause ought not to be permitted to encumber the docket and delay the parties.

Counsel having been heard in this case, and the appeal still appearing to be frivolous, it is accordingly ordered that it be dismissed.

D. JOHNSON and J. JOHNSTON, Chancellors, concurred.

Yeadon & Macbeth, defendant's solicitors.
Petigru & Lesesne, contra.

Speers, Eq. *46

*E. D. KOTTMAN et ux. v. WM. H. PEYTON, Adm'r., et al.

(Columbia. May Term, 1843.)

[1. *Husband and Wife* ⇐33.]
Marriage settlement executed by and between complainants in November 1838. The husband became of age in August, 1839. Bill filed Feb. 1843 to set aside the settlement, on the ground of the alleged minority of the husband. Under ordinary circumstances, it would be too late to ask the aid of the Court in vacating the deed on account of non age.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 196–202, 204, 885; Dec. Dig. ⇐33.]

[2. *Infants* ⇐26.]
The settlement being of the wife's estate only, the assent of the intended husband was only necessary to repel any presumption of fraud on his marital rights; and for this purpose, it was no more necessary that he should have attained twenty-one years of age, than to the validity of the marriage ceremony. Knowledge would be presumed to supply the deficiency of age.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 34; Dec. Dig. ⇐26.]

Before Dunkin, Ch., at Barnwell, February, 1843.

(In this case the Reporter was not furnished with a brief, but it will be observed from the decree of the Chancellor that a statement of the facts is not essential to the understanding of the point decided.)

Dunkin, Ch.—The principal object of this suit is to set aside a marriage settlement, executed by and between the complainants, in November, 1838. The ground is the alleged minority of the husband. He became of age in August, 1839, and this bill was filed 15th February, 1843. Under ordinary circumstances, it would be rather late to ask the aid of the court in vacating the deed on account of non-age. But the settlement is of Mrs. Kottman's (then Mrs. Higgenbottom,) estate only. The assent of the intended husband was only necessary to repel any presumption of a fraud on his marital rights. For that purpose, it was perhaps no more necessary that he should have attained twenty-one years of age, than to the validity of the marriage ceremony. Knowledge would be presumed to supply the deficiency of age. It occurs to the Court that this is the end of the case, except for the appointment of a trustee in the place of Aaron Gellett, deceased.

Something is said in the bill about the residence of the parties in Virginia, and the effect of the laws of that State. But no evidence was offered that the parties were ever domiciled in Virginia. The recitals in the deed, and all the circumstances, lead to a

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different conclusion. For all *the purposes, except the appointment of a trustee, the bill must be dismissed.

It is ordered, that it be referred to the

Commissioner to recommend a fit and proper person to be appointed trustee to the marriage settlement of the complainants, in the place of Aaron H. Gellett, deceased, and that for that object the bill be retained until the hearing of the report.

From this decree the complainants appealed, and moved to reverse the same, on the ground, that the complainant, E. D. Kottman, not being of age when the marriage settlement was executed, and never having confirmed or assented to the same after attaining age, the same is not valid.

Bellinger & Hutson, for the appellants.—Acquiescence in a deed made under age after he become of age is not a confirmation. 2 Kent, 244. Atherly on Marriage Settlements, 28, 41; 18 Ves. 259; 1 Ib. 213; 1 Baily Rep. 28.

His acknowledgment after he had come of age that he had made the deed, was not enough. 2 Hill Ch. 538; Dudley's Eq. 45.

Patterson & Bauskett, contra.

We concur in this decree, for the reasons given; the appeal is therefore dismissed.

DAVID JOHNSON,
WM. HARPER,
J. JOHNSTON,
BENJ. F. DUNKIN.

Speers, Eq. *48

*FERRIS PELL and MARY ANNA, His Wife, ALBERT SUMNER and CATHARINE S., His Wife, Complainants, v. E. O. BALL and T. WARING, Executors of Hugh Swinton Ball, Deceased, ELIAS NONUS BALL, AUGUSTUS TAVEAU, MARTHA CAROLINE TAVEAU, His Wife, WILLIAM E. HASKELL, SUSAN S. HASKELL, ELIZA L. SIMONS, LYDIA C. WARING, Wife of T. Waring, JOHN LAURENS, CAROLINE LAURENS, CAROLINE BALL, ISAAC BALL and ALWYN BALL, Defendants.

(Columbia. May Term, 1843.)

1. H. S. B. executed his will on the 4th May, 1835, and devised as follows: "Should I die without leaving issue, I give and bequeath to my beloved wife, the said A. E. B. all the property, personal and real, that I received, or may receive hereafter, from her father's estate, or from any of her relations, and sources owing to my marriage with her, independent of my own property, to do with and dispose of as she pleases." Testator died in June, 1838, leaving his wife surviving, but leaving no issue. Both the testator and his wife were minors at the time of their marriage. The father of Mrs. B. having died previously to their union, one T. B. became their guardian, and on the 29th Oct. 1829, shortly after Mr. B. attained his majority, accounted with him, and paid over to him the funds which had come to his hands. Subsequently, Mr. B. received large sums of money from the estate of his father-in-law and mother-in-law, part of which was paid him before and part after the date of his will. Between October, 1827, and July, 1829, the guardian received in cash, from the administrator of Mrs. B's. father, the sum of $45,608.70; and on the date last mentioned, had received in further payment from the administrator a mortgage, then amounting, principal and interest, to $4500. Retaining the mortgage, the guardian invested of the cash received by him, the sum of $10,885.13 in shares in the United States Bank, and deposited the residue in the Massachusetts Hospital, Life Insurance and Trust Company. On the 29 Oct. 1829, (as before stated,) he delivered to him the mortgage, paying him the interest and dividends on the bank shares and deposites, then assigned. On 31st Oct. 1830, Mr. B. collected the money due on the mortgage, principal and interest. On the 5th Nov. 1829, a few days after the deposites were assigned to him, he drew them out, and re-deposited them, with a small addition in his own name, making the sum of $35,000. Of this latter sum, on the 20th of April, 1832, (before the date of his will,) he drew out $10,000; and on the 20th May, 1835, after the will, drew out the residue, investing it in various stocks, changing them from time to time by sale and the purchase of others, and receiving the dividends as they accrued, until his death.

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*2. Testator kept a book, in which under the head, "memorandums of bank stocks and their value, when purchased," are many entries of stocks, all purchased after the date of his will. These stocks, when disposed of, were marked sold; and notice is taken of the manner in which they were reinvested. The investments were always in stocks, except $1250 paid for furniture, and other stocks invested in a house. On every page was a remark to this effect, subscribed by the testator. "The stocks enumerated in this page belong to my wife, though they stand in my name." The last entry of this description was: "The stocks enumerated in this page belong to the property of my wife, A. E. B. though standing in my name; H. S. B." At the end is added:—"also, the house in Newport, cost $8,000." These entries were made from time to time as the stocks were purchased, sold and replaced. There were certain stocks which remained unsold at the testator's death.

[3. *Wills* ⟸490.]

It was *held*, that the memorandum book kept by the testator was inadmissible in evidence, to shew that the stocks remaining undisposed of constituted the property to which the testator intended to refer in his will, inasmuch as it did not ascertain a subject for the operation of the will, suiting to what the will described.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1049; Dec. Dig. ⟸490.]

[4. *Wills* ⟸487.]

Extrinsic parol evidence cannot be received to show an intention on the part of a testator, which his written will does not express; and the same is as true on principle of extrinsic written evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026–1032; Dec. Dig. ⟸487.]

[5. *Wills* ⟸487.]

Held, that evidence to shew the nature and extent of the property received by the testator, in consequence of his marriage, was admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026–1032; Dec. Dig. ⟸487.]

[6. *Wills* ⟸490.]

If the will be not of a specific thing, but of something to be ascertained by some test contained in the instrument, it can only be deter-

mined by evidence, whether the subject matter conforms to that test.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1047; Dec. Dig. ⟸490.]

[7. *Wills* ⟸559.]

Property is a general term to designate the right of ownership, and includes every subject, of whatever nature, upon which such a right can legally attach. It is not necessary that the subject of it should be either lands, goods or chattels, for it extends to money and securities. Vide 6 Binney, 98; Cowper, 299; 11 East, 370; Public Laws, 147.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1208; Dec. Dig. ⟸559.]

[8. *Wills* ⟸559.]

The words real and personal, used by the testator, lay no just ground for supposing that he thereby intended to restrict—as the words themselves, in their legal import, do not restrict the property to things tangible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1207–1209; Dec. Dig. ⟸559.]

[9. *Wills* ⟸756.]

Also *held*, that the legacy to Mrs. B. was pecuniary, for the amount received, and to be estimated by excluding from the computation all the income and interest which accrued after the receipt by the guardian or by the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1949–1955; Dec. Dig. ⟸756.]

[10. *Wills* ⟸756.]

Whether a legacy is specific or not, must necessarily depend upon the nature of the thing referred to and described in the will. If

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the thing *be capable of individuality, as a ring or a picture; or if it be an assemblage of things, as a library or a cabinet; or something capable of being separated by sensible distinctions, as the property on a particular estate; in all such cases, the descriptions in the will set forth with distinctness the subject of bequest, and make it specific. But this is only because specific things alone can answer to the description given.

[Ed. Note.—Cited in McFadden v. Hefley, 28 S. C. 323, 5 S. E. 812, 13 Am. St. Rep. 675; Rogers v. Rogers, 67 S. C. 172, 45 S. E. 176, 100 Am. St. Rep. 721.

For other cases, see Wills, Cent. Dig. § 1951; Dec. Dig. ⟸756.]

[11. *Wills* ⟸753.]

Whether a bequest couched in general terms is specific, or otherwise, depends on this; if the things falling within the terms, when enumerated, (or if they had been enumerated by the testator,) are in their nature specific, then the legacy is specific; otherwise, it is not.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1939–1944; Dec. Dig. ⟸753.]

[12. *Wills* ⟸756.]

The words "property, personal and real," may, in a secondary sense, extend to money, conceding that in their primary meaning they include only lands, goods and chattels.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1949–1955; Dec. Dig. ⟸756.]

[13. *Wills* ⟸486.]

Where a testator has used the words in which he has expressed himself in their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any secondary sense, of which, with reference to these circumstances, they are capable.

[Ed. Note.—Cited in Laurens v. Read, 14 Rich. Eq. 269; Rogers v. Rogers, 67 S. C. 174, 45 S. E. 176, 100 Am. St. Rep. 721.

For other cases, see Wills, Cent. Dig. § 1016; Dec. Dig. ⟸486.]

[This case is also cited in Brown v. James, 3 Strob. Eq. 30, and in Brown v. James, 3 Strob. Eq. 26, 28, as to construction of wills, and in Williams v. Hollingsworth, 1 Strob. Eq. 107, 47 Am. Dec. 527, as to the authority of courts of equity to order partition sales of real property in cases other than that of intestacy.]

[For subsequent opinion, see Speers, Eq. 518.]

Hugh Swinton Ball was married to Ann Elizabeth Channing, at Boston, on 8th March, 1827. Both he and his wife were then minors, and without a father living. Thomas Barclay, Jun., was appointed guardian of the young married people, and during the minority of Mr. Ball, received from Mr. Channing's administrator the sum of $50,108.70, which he paid over to Mr. Ball, after he had attained the age of 21 years, on 29th October, 1829. Some small sums were afterwards received by Mr. Ball himself, from the administrator of Mr. Channing, making the personal estate which came to Mrs. Ball, as one of her father's distributees.....$51,124.93

Between September, 1828, and October, 1835, Mr. Ball received from sales of Mr. Channing's real estate in Rhode Island, for his wife's share	3,797.14
And in 1831 and 1833, from sales of real estate in New York.....	9,247.82
And from Mrs. Channing's estate, 31st May, 1833, a legacy of.....	3,000.00

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*Besides this amount, received from Mr. Barclay as interest on the funds in his hands.....	3,917.95
	$71,187.84

On the 4th May, 1835, Mr. Ball made his will, in which, among other things, he gives as follows: "Should I die without leaving issue, I give and bequeath to my beloved wife, the said Anna Elizabeth Ball, all the property, personal and real, that I received, or may receive hereafter, from her father's estate, or from any of her relations, and sources owing to my marriage with her, independent of my own property to do with and dispose of as she pleases; but should I leave a child or children the said property will be disposed of in manner as hereinafter mentioned she however to enjoy the interest during her lifetime."

After giving some legacies the testator proceeds: "Should I leave no issue, that is, a child or children, I order and wish the nett proceeds of the crops of my estate to be disposed of in the following manner: After hav-

ing paid my debts, &c., one half of the clear or nett profits to be given to my beloved wife, Anna Elizabeth Ball, during her natural life, for her sole use and benefit; the other half to be equally divided between my brothers, Alwyn and Elias Octavus Ball, until my nephew Elias Nonus Ball is of age, after which period I bequeath the said half to him, or in case of his death, to the next eldest, of my brother Elias Octavus Ball's sons, and their issue. Should the said Elias Nonus Ball leave a son or sons, they will have precedence to the sons of the others. Should my wife die before the said Elias Nonus Ball is of age, then the whole income from her decease will be divided between my aforementioned brothers, until Elias Nonus Ball is of age or the next eldest in the event of his death leaving no son or sons. * * * * But in case I die leaving issue I leave my property in the following manner: If only one child the whole of my wife's property at the death of my said wife and the whole of my property when he or she attains the age of twenty one my wife to have half of the income until that period and her son or

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daughter the other half; if more *than one child I order my whole estate personal and real (not including my wife's,) to be sold when my eldest child is of age, or sooner, if my executors think it advantageous to do so, and the money to be equally divided and paid to them respectively, as they become of age. And at the death of my wife, I bequeath them an equal portion in her property."

At the date of making this will, the only property that could be designated as that which Mr. Ball had received in right of his wife, was $25,000, in the Massachusetts Hospital. Life Insurance and Trust Company, which he drew out and disposed of on the 20th May, 1835, sixteen days after the date of his will, and $1,787.50, for his wife's share of real estate in Rhode Island, belonging to her father, which the heirs had sold, and which he received on the 17th October, following.

On the 2d April, 1836, the testator wrote a codicil to his will, in his own hand, by which, in the event that he and his wife should die together, and she make no disposition of her property, he gives all her property to his adopted daughter, Emma Ball, and concludes with these words: "This codicil, however, is only good, provided my wife should make no disposal of the property she is entitled to: If she survives, she has the right to do so; if she neglects to will away her property, this codicil will hold good, in the event of her dying intestate.

H. S. Ball. [L. S.]

"As the above involves no real estate, I concluded witnesses unnecessary. (See Grimke's Law of Executors.")

The testator kept a book of accounts. Under the head of memorandum of bank stock, and their value when purchased, are many entries of stocks purchased. The first entry relates to stock in New Orleans Commercial Bank, purchased 1st July, 1835. The statements are continued through several pages, and the stocks when disposed of, are marked sold, and notice is taken of the manner in which the money was re-invested. The investments are always in other stocks, except $1,250 paid for furniture in Newport, and other stocks, price not mentioned, invested in a house in Newport. And on every page

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there is *a remark to this effect: "The stocks enumerated in this page belong to my wife, though they stand in my name." At the end is added: "Also, the house in Newport, Rhode Island, cost $8,000." The only stocks not sold, are 100 shares in the American Life, Insurance and Trust Company, Baltimore; 100 shares in the Farmer's Loan and Trust Company, New York, and 25 shares in the bank of Charleston.

Alwyn Ball died 1 June, 1835. Hugh Swinton Ball, and Anna Elizabeth Ball, his wife, and Emma Ball, perished in the Pulaski, 14th June, 1838. And Mrs. Ball survived her husband.

On the 12th June, 1840, it was referred to Mr. Gray, one of the masters of the Court, to take an account of the estate, real and personal, of which Mr. Ball was possessed at the time of his death, and of the debts owing by him; of the property he had received in right of his wife, distinguishing between income and capital, how received and how invested, and what remained in his possession; and also to inquire and report the particulars of Mr. Ball's fortune that did not come to him by marriage.

Mr. Gray's report sets forth the particulars as to the property herein before mentioned, and states that Mr. Ball, after his marriage, but while a minor, received his share of his father's estate, amounting to $75,000. That he purchased the house in Newport, and a house in Charleston, after the date of the will, and that his estate at the time of his death amounted to $196,818.69, and his debts to $25,545.72.

Ferris Pell and Mary Anna his wife, with Mrs. Barclay, administered on the estate of Mrs. Ball. Mrs. Pell and Mrs. Barclay, (now Mrs. Sumner,) are the sisters, and next of kin, of Mrs. Ball, who left no issue, nor father or mother, surviving her.

The bill states, Mr. Ball died without issue, and besides his widow, left surviving him, his mother, Mrs. Taveau, wife of Augustus Taveau, his brother Elias Octavus Ball, his sisters Susan E. Haskell, wife of William E. Haskell, Eliza Lucila Simons, widow, Lydia Catharine Waring, wife of Thomas Waring, John Laurens and Caroline Laurens, infants, son and daughter of a de-

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ceased sister, Caro*line Laurens, Caroline, Isaac and Alwyn Ball, sons and daughter of

his deceased brother, Alwyn Ball, his next of kin; and also, his nephew, Elias Nonus Ball, mentioned in his will.

The object of the bill of complainants was to obtain an account, settlement and distribution of the estate of H. S. Ball, dec'd.

The case was heard by his Honor Chancellor Dunkin, 16th June, 1840, who made the following decree:

Dunkin, Ch. By the decrees heretofore pronounced, it was determined that Mrs. Ball survived her husband, and that the complainants were entitled to all her interests, as well under the will of her husband, as by the statute of distributions.

The only question of difficulty, arises under the first clause of the will, in which, after an absolute bequest of furniture, and certain family negroes, to his wife, Anna Elizabeth Ball, the testator declares as follows, viz:—"Should I die without leaving issue, I give and bequeath to my beloved wife, the said Anna Elizabeth Ball, all the property, personal and real, that I received, or may receive hereafter, from her father's estate, or from any of her relations, and sources owing to my marriage with her, independent of my own property, to do with and dispose of as she pleases; but should I leave a child or children, the said property will be disposed of in manner as hereinafter mentioned, she, however, to enjoy the interest during her life time." And after other provisions in regard to his estate, it is said: "But in case I die leaving issue lawfully begotten, I leave my property, real and personal, in the following manner, to wit: If only one child, the whole of my wife's property, at the death of the said wife, and the whole of my property when he or she attains the age of twenty-one; my wife to have half of the income until that period, and her son or daughter the other half; if more than one child, I order my whole estate, personal and real, (not including my wife's) to be sold when my eldest child is of age, or sooner, if my executors think it advantageous to do so, and the money to be equally divided, and paid to

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them *respectively as they become of age. And at the death of my wife, I bequeath them an equal portion of her property."

The testator died without leaving issue, and the question is, what passed to the wife, on this event, under the clause which has been in part recited. The inquiry is, perhaps, solved, by determining the character of the legacy.

Mr. Roper distinguishes legacies into general and specific. But the former are so commonly applied to money, that many authors divide legacies into pecuniary and specific. The distinction may or may not be important, according to the circumstances of the case. If the legacy be general or pecuniary, it must be postponed to specific legacies, and must abate or become extinguished on a deficiency of assets, but it is a general charge on the testator's estate. On the other hand, a specific legacy, although preferred to general legacies, is not subject to debts until general legacies have been exhausted; can only be demanded, so far as the thing given can be identified, and is subject to extinction by the destruction of the thing, or to deterioration or improvement in value by any change it may undergo.

A specific legacy has been defined to be "the bequest of a particular thing, or money, specified and distinguished from all others of the same kind; as of a house, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest, with the assent of the executor." "A legacy is general, when it is so given as not to amount to a specific part of the testator's personal estate; as of a sum of money generally, or out of the testator's personal estate, and the like."

These definitions do not very much aid the inquiry; the object is to ascertain what was the intention of the testator, and in prosecuting the investigation, it is the duty of the Court to expound the will, if possible, without resorting to extrinsic evidence. In 1 Ves. Jun. 285, it is said that "external evidence as to the state of the testator's property, cannot be admitted to control what would be the legal import and effects of the terms of the bequest, upon a fair construction of the

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whole will, without collateral aid." *And in Innes v. Johnson, 4 Ves. 574, the master of the rolls says that "if upon the face of the will, the legacy is to be presumed not to be specific, I ought not to travel into the account of the effects, to turn it into a specific legacy." He afterwards adds that "if he saw a ground for holding the legacy specific, he should then be obliged to see whether the effects of the testator afforded any foundation for it."

Looking then to the language of the will only, what construction shall be given to the terms, "all the property, personal and real, that I received, or may hereafter receive, from her father's estate," &c., it is not very material, perhaps, whether the popular meaning of the term "property," is correctly stated in Stuckey v. Stuckey, 1 Hill Eq. 309; nor is it necessary to determine whether it may not be sometimes construed to pass money, or choses in action; but in the ordinary acceptation, it cannot be doubted that "all a man's property, personal and real," refers to something tangible and in esse—it may be lands, negroes, stock, any thing, perhaps, which he can call his. When the terms occur in a will, the first inquiry would be, where is the property, personal and real, to which the testator referred. If he gave to his youngest son all his estate, personal and real, in the parish of A., it would not be contended, that on the face of the will, the right of the son could extend beyond the real and

personal estate found in that parish; in other words, that the entire legacy was not specific. But the terms are, "all the property, personal and real, which I received, or may hereafter receive," &c. It is not perceived that this affects the construction. It is equivalent to the expression, "which came into his possession." When the testator uses the language, "should I die without leaving issue, I give and bequeath to my beloved wife, all the property, personal and real, that I received, or may hereafter receive, from her father's estate, &c., independent of my own property, to do with and dispose of as she pleases," it would be inferred, without looking beyond the will, that the testator had property of his own, which he had not derived from any sources owing to his marriage; that he had also other property, personal or real, or both, which he had so de-

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rived; and *that he thought it not improbable that more would come into his possession from similar sources. He leaves to his wife absolutely all the property, personal and real, which had been so derived, independently of his own property. On the clause itself, it would be difficult to say that this was not a specific bequest, a bequest of a particular part of the testator's estate, specified and distinguished from the rest of his estate, and which he purposed at his death to pass differently from his general estate.

But it is proper to refer to the whole instrument, in order to ascertain the intention of the testator. In a subsequent part of the same clause, he provides for the event of his death, leaving issue: "I leave my property, real and personal, in the following manner, to wit: If only one child, the whole of my wife's property, &c.; if more than one child, I order the whole of my estate, personal and real, (not including my wife's,) to be sold when, &c., and the money to be equally divided, &c.; and at the death of my wife, I bequeath them an equal portion of her property." The context confirms the impression derived from the language of the original clause. If the property which he had received from his wife's father, had been lands and negroes, which the testator had employed with his own, the construction would seem obvious and palpable. But it would also appear to the Court, the natural construction without reference to extrinsic circumstances. Taking the whole paper together, and looking to nothing else, the Court would infer, that at the date of the will, the testator had in his possession real and personal property, received by his wife, which was capable of being distinguished from the rest of his property, and which he desired to pass to her, independent of the provision which he made for her out of his own property. This constitutes a specific bequest. It is a gift of specific property, and must follow the fate of that property. It is necessary to look into the condition of the testator's effects, at the date of his will, or at his death, in order to create a difficulty as to the correctness of this construction. But this is not a case in which such evidence is admissible to aid the Court in giving construction, much less to control the apparent construction. The Court must, if possible, find the interpreta-

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tion in the *will alone. The language of the will admits a construction which the Court thinks natural, and not doubtful. To authorize a different construction, and give any other character to the bequest, it would be necessary to ingraft words not now existing in the will. In examining the books, the Court has been unable to find any case in which a legacy has been declared pecuniary, or a general charge on the estate, unless a sum of money was expressed, or terms used which plainly referred to a money value, as the amount, proceeds, &c. Questions have commonly arisen out of bequests of a sum of money, in connexion with the funds in which it was invested, or out of which it was payable, as a bond, bill of exchange, stock, policy of insurance, &c.; and the doubt presented was, whether the testator intended to give the sum of money, or the security itself.

If, in this case, the bequest had been of the amount or value of the property, personal and real, which the testator has received, &c., it might have been contended, with great force, that the testator had no reference to the specific property, but only to the pecuniary value, and mentioned the property merely as the measure of the pecuniary legacy which he wished to bequeath. But when the language is, "all the property, personal and real," how can the Court say, that on the face of the will, the testator did not mean the property, but the pecuniary value of the property? Giving to the term property, the most comprehensive meaning that could be desired, must not the word real be struck out, or other words inserted, in order to warrant a construction which would convert this into a pecuniary bequest? If the complainants had demanded the whole of the testator's property, real and personal, and identified it, as received from the estate of his wife's father, could these words be ingrafted, in order to place his wife on a footing with pecuniary legatees? The complainants would have a right to stand on the integrity of the bequest, and resist the introduction of any extrinsic testimony which would throw doubt on the construction.

A testator may give a pecuniary legacy, payable out of certain stocks, or perhaps described as the amount of certain stocks, Raymond v. Broadbelt, 5 Ves. 109; but if he

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*mentions no sum, and merely bequeath the stock, or all his stocks, it would hardly be contended, that the legatee was entitled to

the value of the stocks, or that he was entitled to any thing, if the testator had no stocks at the date of his will, or had subsequently sold them, and spent the proceeds. In 1 Rop. Leg. 163, it is said, that although the form of the bequest be of a sum of money, in a particular species of stock, if it clearly appear, from reference made to the stock, by additional expression, that it alone was intended to be the subject of disposition, the legacy will be specific, as if the words were, £500 in my stock of 3 per cent. Consols, 4 Ves. 750; or £500 which I now have in Navy 5 per cents. In Humphreys v. Humphreys, 2 Cox. 184, testator bequeathed to A. and B. "all the stock which I have in the 3 per cents, being about £5,000, except £500, which I give to C." Lord Thurlow decided that the stock which the testator had was specifically given, so that there was an ademption pro tanto, in consequence of his having sold £2,000, part of it. And in Fontaine v. Tyler, 9 Price Exc. R. 94, it was held that a legacy may be specific, although the testator was not possessed of it at the time of making of his will, but of which he may be possessed at his death. In Nesbitt v. Murray, 5 Ves. 150, after certain dispositions of lands and slaves in the Island of Jamaica, testator gave the residue of his real and personal estate, in the said Island, to trustees, to sell, and remit and lodge the proceeds, and all other moneys belonging to his estate, in safety in England; which proceeds and moneys, he bequeathed in sums currency, to several persons. It was determined, that the Jamaica property was specifically bequeathed. Nor is it always necessary, in order to render the legacy specific, that the security itself should be given. It is sufficient if it clearly appear, that the money due on that security was intended to be the sole subject of the gift. An illustration is stated in 1 Rop. Leg. 173. A bequest to B of "the money due to me on the bond of A," which is specific, "because (says the author) nothing is given distinct from the identical money and interest secured on the bond of A." And in Fryer v. Morris, 9 Ves. 360, Sir William Grant held the legacy to be specific, where the testator bequeathed

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"to B. all such *sum and sums of money as my executors may after my death receive on the interest note of £400, given to me by Messrs. Cook & Co." In Smith v. Fitzgerald, 3 Ves. and Bea. 2-5, the distinction is adverted to, between a bequest of a precise sum of money, with reference to the fund out of which it is payable, and a bequest of the fund or security itself. The legacy may be of about the value of the fund, but still, says the Judge, "a gift of a sum of money, though with ever so plain a reference to the amount of the fund, is very different from the gift of the fund itself, with all the chances of the actual amount." Applying the principle of these cases to the clause under consideration, the legatee is entitled, not to any sum of money, but to the "property itself, with all the chances of its actual value."

It has been already stated, that questions have usually arisen on bequests in form pecuniary, but which, from other expressions of the will, might be regarded as specific. But it may be well questioned, whether the term pecuniary, can, in any sense, be applied to the provision herein made. It is, in its terms, not a pecuniary legacy, but a bequest of general personal estate; and it may be added, of real estate. A devise of real estate is necessarily specific, so distinctly specific, that in Howe v. The Earl of Dartmouth, 7 Ves. 137, it was contended (though without success,) that a bequest of general personal property was specific, because included in the same sentence with a devise of real estate. A bequest of general personal estate, will be specific or not, according to the intention of the testator, as deducible from the language used. A bequest of all the testator's personal estate, is, in its terms, a general legacy. On the other hand, a bequest of all his personal estate in a particular parish, or house, or in the hands of a particular person, is specific. The inquiry always is, whether that which is given, is distinguished and separated from the general estate, and specifically bequeathed, and capable of being delivered, in specie, so that the legatee can say to the executor, deliver to me all A's. personal estate, at C., or in the particular house, or parish, for I am entitled to receive it in specie. 1 Rop. Leg. 184. Applying this description to the terms used in this bequest, and looking only to the will for

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the *construction, might not the legatee, on the death of the testator, demand all the property, personal and real, which the testator had received from the relatives of his wife, and insist that she was entitled to receive it in specie? If it could be identified, it would seem that possession of the land must be forthwith given, and the personal property transferred on the assent of the executor. The facility or difficulty of the proof, cannot vary the construction of the bequest. It would be not more an answer, that the stocks had advanced in price, than that the land was improved in value. The legatee is entitled to the property given. That is certain, which can be rendered certain. Property received by the testator's wife, can be as well identified as personal property in a particular house or parish. But this point has received the consideration of our own Courts. In Warren v. Wigfall, 3 Des. R. 47, the words of the bequest were, "I leave her (meaning testator's wife,) the whole of the property that she brought me, (except John and Maurice,) to her and her heirs forever." Chancellor Desaussure held this to be a specific legacy. The cause was carried to the Appeal Court, but on this point

the decree was affirmed. "Upon considering these words, (says the Chancellor,) and the cases cited, I have no doubt that they constitute a specific bequest, and this construction is strengthened by the other circumstances of the case. It is true, that the general leaning of the Court is against considering legacies as specific, because of the consequences, &c. But if the words clearly indicate an intention to separate the particular thing bequeathed from the general property of the testator, this will make it specific, and shall prevail." After commenting on the cases cited, "apply (says he) these doctrines and authorities to the bequest to the wife, and it is manifest that it is a specific legacy. 'The whole of the property that she brought me,' is plainly indicative of an intention to separate the thing bequeathed from the general property of the testator; and it is easy to ascertain what the wife did carry in marriage to the testator. The maxim 'id certum est quod certum reddi potest,' applies decisively to this case," &c. The Court agree with the counsel, that the exception of the

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two slaves, by name, adds to the force *of the argument in favor of the construction adopted by the Chancellor. But this circumstance does not seem to have been adverted to in the discussion or the decision, nor, in the opinion of the Court, was it necessary, in order to sustain the judgment.

Regarding the legacy then as specific, on the face of the will, it is proper, in the language of Innes v. Johnson, to look into the effects, to see if there any foundation for the conclusion may be found. "Although extrinsic circumstances should not be resorted to, in order to give construction to the will, it is proper to inquire into them, with a view to the manner in which the property should be disposed of."

If, in the examination of the testator's effects, nothing can be found at his death, which would answer the description of the bequest, however much the result might be regretted, it is the misfortune of the legatee —he can take nothing. It could not vary the construction, which must depend on the will itself, if it speak a language susceptible of a plain interpretation. If the testator bequeath his parade horse to A, and he has no horse, or afterwards sell his parade horse, the legacy is gone. And so I suppose of a specific legacy of general personal estate. If the testator bequeath all his personal property in the parish of A, and he should have no personal estate in that parish, or should sell a portion of his negroes there, and spend the money, the legatee would take nothing, or the legacy would abate pro tanto, as the case might be. If, in Richardson v. Richardson, Dudley's Eq. Rep. 184, the bequest to the wife had been of "all the ready money in his house," the legatee could not claim any sum which was in his house at the date of the will, but only that which was there found when the will spoke, to wit, the death of the testator. If, on the other hand, the intention be plain to give something, the Court will aid any misdescription of the thing given, nor will it suffer a slight change to work an ademption.

The testator having made a specific bequest to his wife of "all the property, personal and real, which he had received, or might hereafter receive, from her father's estate," &c., the inquiry to be prosecuted is, what part of the estate left by the testator can be brought within this description.

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*And the inquiry is not so much, what in fact answers the description, but what the testator intended to include in that description. He may call his white-horse, grey, yet if he have but one horse, "the mistake," says Mr. Roper, 151, "is obvious, and easily remedied, and the legatee will be entitled to the specific horse, although not of the color described, for there can be no doubt of that being the horse intended for him, and the legacy will be specific." And so on a change of stock, by the testator, the newly purchased stock has in some cases been held to pass; although in Stanley v. Potter, 2 Cox, 180, Lord Thurlow said, that the question in such cases (of ademption,) did not turn on the intention of the testator, and that the ground of proceeding in the animus adimendi had introduced confusion. "Where the testator gives a specific chattel in specie, the ademption follows, of course, on a sale or change or destruction of the chattel, and the ademption becomes a rule of law, and not a question of intention." How far this position may be sustained, it is not important now to inquire. But it may not be improper to add, that this opinion was afterwards cited with approbation by Sir John Leach, in 1 Madd. R. 174.

In conformity with the decretal order, heretofore made, the master has reported a statement of the property received by the testator, on account of his marriage, both before and after the date of his will. He also states the condition of his estate, real and personal, at the time of his death. It does not appear, at this latter period, any part of the estate could be identified as strictly and specifically property received from the sources indicated in this clause of the will. From the statement of Walter Channing's real estate, it is not quite clear whether the whole of that estate had been sold at the date of the will, or in whose possession it then was. A part of the proceeds of sale must have been received subsequently.

The will bears date 4th May, 1835. A book was given in evidence, which is in the handwriting of the testator, and is particularly noticed in schedule E. of the master's report. The question of the admissibility of this testimony, was elaborately discussed. The ob-

jection was chiefly urged by the counsel of
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the complainants. But in the view *taken by the Court, this evidence is essential to the maintenance of their claim, under this portion of the will. It was necessarily incumbent on them to show what property the testator had received from the estate of his wife's father, &c. This they have done satisfactorily. It consisted principally of United States 6 per cent stock, shares in the United States Bank, a mortgage of one Packwood, and certificates of deposit in the Massachusetts Hospital Life Insurance and Trust Company. It may be remarked, that these certificates are like notes of the Company, bearing a certain interest, and are an ordinary mode of safe investment. He had also received real estate and moneys to a considerable amount. In identifying this property in the hands of the executors, the complainants were less successful. Neither the stock, certificates of deposit, nor perhaps any part of the estate, remained in possession of the testator at his death, and the cash could not of course be identified. The complainants then must look further. A book is produced in the hand-writing of the testator, commenced probably soon after the date of the will, which, it is suggested, points to what the testator regarded as included in that description, and sufficiently identifies the subject of the bequest. It is necessary then to examine the principle which was adopted in Pulteney v. Lord Darlington, 1 Bro. C. C. 222, and recognized by Lord Eldon, in Druce v. Denison, 6 Ves. 383, as now settled law.

The effect of the decision in the former case, was to disinherit the heir, to take from her £23,000, which were prima facie real estate, and to which she would have been entitled in the event of General Pulteney's intestacy. On the death of Lord Bath, the steward, Mr. Garden, had drawn up, (for the use of General Pulteney,) a state of his property, and in that account all that was personal then, and that could be claimed as part of the trust fund, was stated as personal property. This was shown to the General. It was contended, that he acted on this representation in making his will, and that it was admissible testimony, to show what he meant. The cause was originally heard by Lord Bathurst, who received the testimony and dismissed the bill of the heir, and this was a re-hearing before Lord Thurlow. The
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Lord Chancellor says, in *pronouncing his judgment, "If it is real estate, it is not disposed of by the will of Harry Pulteney, eo nomine, which he has done, if it is to be considered as personal estate. If he meant to give it as personal estate, it will be sufficient; it must go as such; and I hardly know any thing that is not sufficient to show such an intention. It was argued, says he, that evidence dehors the will, ought not to be admitted to weigh in construction of it, but the question did not turn upon his will. The question principally is what presumption arises, as to his intention, from the acts he has done."

In the course of the argument, it was allowed by the counsel of the complainant, (afterwards Lord Roslyn,) that the question rested on the acts of Gen. Pulteney. "I admit," says he, "that it was in the power of Gen. Pulteney to say of this, let it be land, or let it be money. But if there was no act done to show what the intent was, with respect to changing the nature of the property, the Court will expect as great certainty, to disinherit an heir in this case as in every other." And he insisted that the view of Garden's paper, was only to show Gen. Pulteney the income. The description used there is not engrafted in the will. "It is necessary, in order to take away the interest of the heir at law, to produce evidence of acts of Gen. Pulteney, to shew an intent so to do; without the testator's marking such intent, it must continue land." All the authorities were reviewed by the Lord Chancellor, who finally concurred in opinion with Lord Bathurst, and held that the bill had been rightly dismissed.

Druce and Denison was decided by Lord Eldon, about twenty years after Pulteney v. Lord Darlington. The testator by his will, dated 26th Nov. 1792, made provision for his wife, and in a subsequent clause disposed of the residue of his real and personal estate. A question arose whether property which belonged to the testator's wife, and would have otherwise survived to her, passed under the terms "my personal estate," and thus compelled the wife to an election. A paper in the testator's hand-writing was found after his death, in a box of his papers in his chamber, together with his will, entitled thus: "Statement of my property, 26th Nov.,
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1792, when I made my *will." He then enumerated his free hold, copy hold, and lease hold estates, including those of his wife, &c. In discussing the admissibility of this paper, as evidence, Lord Eldon refers to the cases, and especially notices the judgment of Lord Thurlow, in Pulteney v. Lord Darlington. He says, that if that decision stood nakedly on the ground that the steward had put down as personal estate, that which was prima facie real estate, and sometime after receiving the account, the testator had made his will, it was very strong to say, that therefore the testator had the same idea as the steward, and that he must have used the terms in the will, in the same sense as the steward had used them. "But," proceeds he, "the circumstance to which I advert is, that, de facto, that paper was admitted in evidence, and that is a judgment of this Court, upon the admissibility of evidence, and that judgment recognized in the highest place."

And he then adduces the authority of Lord Alvanly, in Hinchcliffe v. Hinchcliffe, 3 Ves. 530, as pursuing this rule.

But whatever doubts Lord Eldon may intimate, as to the use which had been made of these decisions, he expresses his entire concurrence with the judgment of Lord Thurlow, in Fonnereau v. Poyntz, 1 Bro. C. C. 477, and says that "it does not carry the old cases upon parol evidence, one tittle further than they had gone." In that case Lord Thurlow held it to be a clear proposition, that "every evidence as to the description of the subject the testatrix had described, must be admitted, as in the case of a specific legacy; you must hear evidence concerning the subject to which the will applies, in order to see whether the description applies aptly or not. It is impossible to deny that the statement of her fortune is external evidence, &c. And this seems not irreconcilable with what is afterwards stated as the law of the Court, that the intention of the testatrix, making a specific bequest, a pecuniary bequest, cannot be controlled by the statement of her fortune." Neither her declarations at the time of making the will, nor statements of her fortune, are admissible for this purpose. "But," says the Lord Chancellor in Druce v. Denison, "Lord Thurlow looked at the property, in order to prove what she meant; the will proving that she

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meant to *give something, but the description of the subject not being intelligible. That was not contradicting any description in the will. It was not saying that was the personal estate of the testatrix, which was not her personal estate; but that she meant by these words what she might be taken to mean; because upon the words, attending to the different species of stock at the Bank, it could not be ascertained what species she did mean; it being clear that she meant some." Without regard to the authority of Pulteney v. Lord Darlington, and Hinchcliffe v. Hinchcliffe, (which, however, he held to be conclusive,) Lord Eldon doubted whether in Druce v. Denison the paper ought not to be admitted, on principle, and without any violation of the rule as to parol evidence, which he held that to be. The paper was admitted, and the testator declared to have well bequeathed his wife's property, as his own personal estate.

By the will of Mr. Ball, he bequeaths to his wife "all the property, personal and real, which he had received or might hereafter receive from her father's estate." A paper is offered in evidence, in the hand-writing of the testator, marking, it is said, the subject of the bequest, purporting to shew what he might be taken to mean. In the language of Fonnereau v. Poyntz, the testator "has described the property he intended to give. Every evidence as to the description of the subject the testatrix has described, is admissible." You must hear the evidence, in order to judge of the description. Not, whether in a strict legal, or even ordinary acceptation, the description is accurate, for that is comparatively unimportant, in ascertaining the intention; but whether from the acts and conduct of the testator, he must have regarded this as an apt description, and used the language in that sense. As if in Pulteney v. Lord Darlington, the testator had himself made the written statement, in which the property was classed as personal estate, which would be otherwise held realty; and in Druce v. Denison, the acts of the testator treating his wife's property as his own. The book submitted, cannot be called a regular book, but it is certainly of a higher character than any loose paper. The testator was a planter, not a merchant, a man of business.

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The book was *kept by himself, contains important entries on other matters, and affords indubitable internal proof, that some of the entries, at least, were made after much care and deliberation. The caption of the first page, relating to this subject, is "memorandum of Bank Stocks, and their value when purchased. The stocks on this page are the property of my wife, although in my name. (Signed) H. S. Ball." On the subsequent pages on the same subject, the caption varies but little. The stocks are said to "belong to my wife, Anna E. Ball," or "belong to the property of my wife, Anna E. Ball." It is probable that the first or original entries on this matter, were made at different periods, between 26th June, 1835, and 9th March, 1836, certainly prior to 1st June, 1836. The aggregate original price paid by the testator, was about $29,832. The first investment thus entered, was made a few weeks after the date of the will. At that date, (4th May, 1835,) the testator held, in the Massachusetts Hospital Company, $25,000, being part of an amount which had been received from the guardian of his wife, on 5th Nov., 1829, and re-deposited the same day in his own name. On 20th May, 1835, he drew out this sum, and in June and July, invested in stocks enumerated in this book, $23,550, which was, prior to 10th March following, increased by other investments to $29,832. All these investments are described by the testator, as "the property of my wife, although in my name." The Court may err in some of the calculations, but not so as to affect the inference. These stocks were in no respect the property of the testator's wife, except so far as he thought proper to make them so. She had no separate estate. They were his property, although they might very well be regarded by him as property which he had received in consequence of his marriage. The only apparent object, then, of making these entries, was to indicate what property the testator regarded as received by his wife, and which he looked upon, for certain pur-

poses, as different from his own, and which he intended to pass to his wife, under his will, independent of the provision he had made for her out of his own property. It is difficult to illustrate this matter without reference to the book itself. But if these entries, and these stocks, had remained at the

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*death of the testator, as they originally stood, it appears to the Court that the right of the complainants to demand them, as a specific legacy, could only have been successfully resisted by violating established principles of evidence.

But it is said that this is not all the property received by the testator's wife, that the testimony proves other property to have been received, and it is insisted that not only all the moneys, stocks, real estate, &c., received by the testator from the estates of the father and mother of his wife, but also all interest, dividends, rents, &c., received by the testator down to the period of his own death, must pass under this clause, in order to satisfy the bequest. And with this view, an account has been taken of what was so received. In passing, it might be remarked that there would be some difficulty in conceiving that the testator intended to include dividends, rents, interest, &c., which he had from time to time received; that he would have left this provision for his wife to depend on the proof she might be able to make, from receipts to various individuals, in other States, Corporations, Courts of Justice, &c., as to what he had at any time received; and this, too, when the book kept by himself shewed his anxiety that she should not be put to such difficulty, or be so restricted. It is impossible, however, to conjecture what might or might not pass, if the Court may look beyond the will, for the purpose supposed; and it is a subject of congratulation that the Court regards itself relieved, by the principles of the law, from this embarrassing inquiry. In the view taken by the Court, evidence of the amount received by the testator, is inadmissible. The terms of the bequest do not, on their face, constitute a pecuniary legacy. The Court cannot look beyond the will for its interpretation. The language imports a specific bequest; whether it be of a specific chattel, or a specific bequest of general personal property, is immaterial. In either case nothing passes but what can be found at the death of th testator to answer the description. The inquiry only is, not what might have been embraced in those terms, but what of the property so bequeathed, could be identified by this description at the death of the testator. It

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is not like a covenant *standing upon articles, or the case of a trustee called to account. For the purpose of verifying the description, any evidence is admissible, but not for the purpose of shewing that all could not be identified which the clause purported to give, and thence to change the character of the bequest, and convert what on its face is specific, into a general legacy. The paper left by the testator, marks property which may answer the description. With that object, it is admissible. If the stocks there specified, had, at his death, been double in value the amount which could be proved to have been received by his wife, the Court would hold this testimony sufficient to mark the subject of the bequest, and carry the stocks to the legatee. The book is not offered as satisfying the full terms of the bequest, but only to shew what could be found to answer the description.

Before dismissing the subject, the Court would remark on a circumstance which would rather warrant the inference that the testator was not unaware that his wife could take under the clause only what could be identified, or what he had so characterized as to include in the description. The deposit in the Massachusetts Hospital Company, on 5th Nov. 1829, has been already noticed. The original sum was $35,000. On 20th April, 1832, the testator drew out $10,000. He had, in November previous, commenced building Mepshew House, which, with the out-buildings, cost him, according to his statement in the book, $10,362. By his will, Mepshew House and 40 acres of land surrounding it, are devised to his wife, without limitation, unless he should leave issue. Whereas, the provision for his wife out of what he might regard as his own property, is, with some unimportant exceptions, restricted to a life interest. The inference is not unlikely, that the testator spent the money drawn from the Massachusetts Hospital Company, on the Mepshew House and improvements. It was not spent at one time, and he might not call it an investment of the fund, or suppose that it could be so construed or regarded by others. But in his will, he places this devise on precisely the same footing. The inference may or may not be well founded. It is only suggested to shew that the testator may have

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well *apprehended that his wife could only take, under this clause, property which could be identified, and he therefore secured the Mepshew House, &c., which had probably been purchased with these funds, by a special provision of his will.

Certainly the case is not free of difficulty. After much consideration, the Court is quite conscious that any view which may be presented, is obnoxious to criticism. But the conclusion of the Court is, that the terms of the will imply a specific bequest; that to include within this bequest the income received by the testator, and other moneys not capable of being identified, would be, not to construe the instrument by itself, but to make a will for the testator, which he did not make for himself, and which he probably never intended to make; that, under

this clause of the will, and on testimony adduced, the complainants are entitled to all the property, real and personal, included in schedule E, of the master's report, which was found at the death of the testator, and to nothing more.

Several very grave questions might have arisen, as to the effect of the several changes through which the property specified in schedule E passed, after the execution of the will, and more especially as to the real estate purchased in Rhode Island, after that period. But these objections were not pressed, nor argued, at the hearing, and the Court understood them to have been waived by the defendants. It may be only necessary, therefore, to say, that the Court does not regard these changes of the property as having constituted an ademption. See Ashburner v. McGuire, 2 Bro. C. C. 108, and Patridge v. Patridge, Fonb. 226, cited in Warren v. Wigfall.

The law of Rhode Island was not brought to the view of the Court. If, by the statutes of that State, subsequently acquired real estate would not pass, and lands would not go to the same persons, as in South Carolina, a difficulty might arise, for which the Court can only provide when it is distinctly presented.

In regard to the complainants's first exception to the master's report, the Court concurs in the view of that officer. It is true that the defendant, Elias O. Ball, and perhaps the defendant Thomas Waring, who are

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executors, had *an interest, in common with several other persons, in the main question. But it is not every interest which, in the opinion of the Court, will deprive an executor of the right to charge a counsel fee paid by him. An executor may be, often is, one of the next of kin. May he not pay for disputing an ancient debt, or any other doubtful claim, but at his peril, at the risk of refunding such payment, if the debt should be established, and the assets prove insufficient? It must be a question for the sound discretion of the Court, under the circumstances of each particular case. The defendants, as executors, held a large fund, which they might well hesitate how to distribute. The complainants's claim rested on the alleged survivorship of Mrs. Ball; according to the opinion of the Court, heretofore pronounced, it was their province to establish the facts on which the right was to be sustained. The bona fides with which the claim was resisted on the part of the executors, is not questioned. Had the question been differently determined, one of the executors, in right of his wife, the other in his own right, would, in the event of a surplus, after payment of debts and legacies, have been entitled to a portion of the residue. It does not seem to the Court, that this is such an interest as would render them litigants at their own hazard. If they had omitted to defend the estate, unwilling, for a contingent interest, to incur the risk, it is not unlikely that as executors, they might have been held responsible to those who could have proved themselves injured; and shall they now lose the whole amount of what is admitted to have been judiciously paid, because of their contingent interest? The establishment of such rule would, in the judgment of the Court, be rigorous in itself, and would discourage the faithful discharge of fiduciary responsibilities. The report on the general account of the executors is confirmed.

It is further ordered and decreed, that Elias O. Ball and Thomas Waring, executors of Hugh S. Ball, deceased, transfer to the complainants, the legal representatives of Mrs. Anna E. Ball, one hundred shares in the Farmers Loan and Trust Company, New York; one hundred and twenty-four shares in the American Life Insurance and Trust Company, Baltimore; and twenty-five shares in the Bank of Charleston, being property of

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the testator, derived *from his marriage with Mrs. Ball, and remained undisposed of by him; and that they also pay to them the sum of nine hundred and two dollars and eighty-five cents, being the amount sales of the furniture sold by the executors in Newport, with interest from the sale. And that they also surrender possession of Mepshew house and the forty acres of land devised to Mrs. Ball.

It is further ordered, that the executors apply the proceeds of the twenty-five shares of the new stock of the Bank of Charleston, purchased with the crops of the estate, and also the sum of two thousand seven hundred and fourteen dollars, (and the interest thereon,) now deposited in the Charleston Life Insurance and Trust Company, arising from the sales of the testator's books, wine, &c. to the payment of the testator's bond secured by the mortgage of the Cannonsborough house and lot; and from the crops, pay off the remaining debts of the testator, as directed by his will; that they also make a permanent provision for the payment of Mrs. Taveau's annuity, of three hundred dollars during her life.

It is further ordered, that the Cannonsboro' house and lot be sold by Mr. Gray, one of the masters, at such time and on such terms as the solicitors of the parties may fix, and the proceeds be divided in equal moieties, between Mrs. Taveau or her trustee, and the complainants, who are the heirs at law of Mrs. Anna E. Ball.

It is further ordered, that after the payment of the debts, and provision made for the annuity aforesaid, from the crops of the estate, the executors pay one half of the crops, as they shall accrue, to Elias O. Ball, until Elias Nonus Ball attain the age of twenty-one years; and the other moiety be

equally divided between Mrs. Taveau, or her trustee, and the complainants. And it is finally ordered, that when Elias Nonus Ball shall have attained the age of twenty-one years, parties shall be at liberty to apply under this decree for such other orders and proceedings as may be necessary and proper for carrying into effect the principles heretofore established.

From so much of the decree as restricts the devise of all the property, real and per-

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sonal, which the testator had re*ceived, and might afterwards receive, in right of his wife, to a legacy of the stocks, furniture and house, which testator designated in his account book as the property of his wife; and also from so much of the said decree as directs that the crops of testator's estate shall be distributed between the complainants, and Elias O. Ball, and Caroline Taveau, until Elias Nonus Ball become of age, and that the parties shall be at liberty to apply for further directions, the complainants appeal, and hope the same may be reversed, for the following among other reasons.

1. That when the testator made his will, he had received in money about seventy thousand dollars, in right of his wife, and he received a small sum in money afterwards; and that, therefore, the effect and meaning of words employed by the testator, amount to a legacy of the money so received, and can be satisfied in no other way; and that this conclusion is not inconsistent with the argument, that if Mrs. Ball's fortune had come to her husband's hands in other things besides money, the words of the will would have operated as a specific legacy of those things; for such a change of circumstances would have changed the subject of the legacy.

2. The parol evidence contained in testator's account book, cannot be allowed to control or contradict the words of his will, by substituting a small part of the whole of his wife's fortune, when the expressions of the will plainly require the whole.

3. That the testator died intestate as to the moiety of his estate, and that the complainants are entitled to have their part of that moiety, being one half of the same, assigned to them. And in case the circumstances of the estate require it, a sale should be ordered for a settlement and partition.

The executors appeal from so much of the decree of his Honor Chancellor Dunkin, as directs them to apply twenty-five shares of the new stock of the Bank of Charleston, purchased with the crops of the estate, and also the sum of $2,714 deposited in the Charleston Insurance and Trust Company, arising from the sale of the testator's books, wine, &c., to the payment of testator's bond

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secured by *mortgage of the Cannonsboro' house and lot, and move that the same be reformed. Because, as they respectfully submit, the said order is founded on mistake of fact apparent from the accounts on which the master has reported. In fact, no shares in the bank of Charleston were purchased with the crops of the estate, but twenty-five new shares in the said bank were purchased with funds of the general estate and charged to the general account. And there is no sum of $2,714 deposited with the Insurance and Trust Company, arising from the sale of books, wine, &c. The sum of $4,596.51, arising from the sale of the furniture, &c. in Charleston, was deposited with the said Company on the 19th December, 1838, and another sum of $3,579.10, from the sale of furniture, books, wine, &c. at testator's country house, was deposited with the said Company on the 5th February, 1838, both which had been withdrawn and disbursed before the date of the report on which the cause was heard.

From so much of the decree as directs the executors to make provision for the annuity of Mrs. Taveau, out of the crops of the estate, as they accrue, before paying to the defendant, Elias O. Ball, one half of the said crops, the said defendant appeals, and moves that the same be reversed. Because the said annuity is not charged by the will upon the crops, but is payable out of the undevised residue of the testator's estate. The defendant, Elias O. Ball, is entitled, as a specific legatee, to one-half of the crops after payment of the testator's debts alone, and the effect of the decree is to make his specific legacy contribute one-half of the annuity, instead of throwing the whole upon the residue. If the annuity is to be paid out of the crops at all, it ought to be out of the moiety to which the complainants and Mrs. Taveau are entitled as intestate property.

Curia, per JOHNSTON, Ch.—There are but three or four questions in this case, the principal of which arises under the following clause in the will of the late Hugh S. Ball.

Should I die without leaving issue, I give and bequeath to my beloved wife, the said

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Anna Elizabeth Ball, all the *property, personal and real, that I received, or may receive hereafter, from her father's estate, or from any of her relations, and sources owing to my marriage with her, independent of my own property, to do with and dispose of as she pleases.

The will was executed the 4th of May 1835, and the testator died in June 1838, leaving his wife surviving, but leaving no issue. The plaintiffs claim, through the wife, the provision thus made for her; and the question is, what is the extent of that provision. It appears from testimony taken by the master that the testator married the

daughter of the late Walter Channing, of Boston, who died previously to the marriage. Both husband and wife being minors at the time of their union, which took place the 8th of March 1827, Thomas Barclay, Jun. became their guardian; and on the 29th of October 1829, eleven days after Mr. Ball attained majority, accounted with him and paid over to him the funds which had come to his hands, amounting, principal and interest, to something over fifty thousand dollars. Subsequently, Mr. Ball received large sums of money from the estates of his father-in-law and mother-in-law, which, coupled with what he had already received from his guardian, exceeded seventy thousand dollars; part of which sums, collected by Mr. Ball himself, were paid him before, and part after, the date of his will. The amount paid him by Mr. Barclay, the guardian, arose in the following way. The guardian had received, in cash, from the administrator of Mr. Channing, between the 8th of October 1827, and the 21st of July 1829, the sum of $45,608.70; and on the day last mentioned, had received in further payment from the said administrator, a mortgage on one Packwood, then amounting, principal and interest, to $4,500. Retaining the mortgage, the guardian invested $10,885.13, of the cash received by him, in shares in the U. States Bank; and deposited the residue, ($34,723.57,) on interest in the Massachusetts Hospital, Life Insurance and Trust company. On the 29th of October 1829, as before stated, he delivered the mortgage to Mr. Ball, and assigned the bank shares and deposits to him, and paid him the interest and dividends thereon. On the 31st of March 1830, Mr.

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Ball collected the money due *on the mortgage, amounting, at that time, principal and interest, to $5,190.70. In the mean time, to wit, on the 5th of Nov. 1829, seven days after the deposits in the life insurance and trust company were assigned to him, he drew them out, and redeposited them, with a slight addition to make the round sum of $35,000, in his own name. Of this latter sum he drew out $10,000, on the 20th of April 1832 (before the date of his will;) leaving $25,000 on deposit. On the 20th of May 1835, sixteen days after the will, he drew out the whole of said $25,000. This sum he invested in various stocks, which he changed, from time to time, by sale and purchase of others, receiving the dividends, as they accrued, until his death. A book kept by him was given in evidence; in which, under the head memorandums of bank stocks, and their value when purchased, are many entries of stocks, all purchased after the date of the will: beginning with an entry of stock in the New Orleans Commercial Bank, purchased the 1st of July 1835. The statements are continued through several pages, and the stocks, when disposed of, are marked sold, and notice is taken of the manner in which the money was reinvested. The investments are always in stocks, except $1,250 paid for furniture in Newport, and other stocks (price not mentioned,) invested in a house in Newport. And on every page is a remark, subscribed by the testator, to this effect: The stocks enumerated in this page belong to my wife, though they stand in my name. The last entry of this description stands at the head of page 11, and is as follows: Dec. 12, 1836. The stocks enumerated in this page belong to the property of my wife, Anna E. Ball, though standing in my name, H. S. Ball. At the end is added:—Also the house in Newport, cost $8,000. These entries appear to have been made, from time to time, as the stocks, were purchased, sold and replaced. The only stocks remaining unsold at the testator's death, are: 100 shares in the American Life Insurance and Trust company, of Baltimore, purchased June 1st, 1836; 25 shares in the Bank of Charleston, purchased March 9th, 1836; and 103 shares in the Farmer's Loan and Trust company, of New York, purchased August 16th, 1836.

The Chancellor, holding the provision made

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for Mrs. *Ball to be specific, and seeing that not a vestige remained in specie of all that the testator received in consequence of his marriage, felt himself constrained to reject the evidence shewing its amount and value. On the other hand, upon the authorities quoted by him, he admitted the book kept by the testator, as evidence that the stocks remaining undisposed of constituted the property to which the testator intended to refer in his will. The appeal makes the question whether either of these classes of evidence is admissible in the case before us.

It must be allowed that the view taken by the Chancellor, in his judgment, is very strong: and it has been supported here with much ingenuity and learning, by the defendants's counsel. But it appears to us that principles well settled in law and founded in reason; principles indispensable to the execution of testaments according to their true intention, necessarily conduct to a different result. The distinction between the two classes of evidence before mentioned, seems to be this: The one is intended to ascertain the thing actually described in the will; the other is intended to shew by extrinsic evidence that the testator intended by his will to refer to a thing which his will does not describe. The one is employed in finding a subject for the operation of the will; which subject, when found, is taken hold of and operated upon, by the very terms of the will itself. The other is employed in proving an intention on the part of the testator different from that expressed by him as testator; to wit, that he intended that the terms of his

will should embrace a subject matter which they do not describe. This latter kind of evidence is wholly inadmissible. It sets aside the will, and substitutes extrinsic evidence in its place.

If cases can be found countenancing such a practice, they are as much opposed to the current of decisions as to principle and to reason. The cases upon the authority of which the book kept by the testator was admitted, seem to us to be of doubtful application to the point before us; if, indeed, their authority has not been too much shaken to leave them for safe guides, even within the narrow limits of the particular subjects upon which they were decided. Druce v. Denison (6 Ves.

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385,) was a case where extrinsic evi*dence was admitted to prove that by the words my personal estate, the testator meant personal estate subject to a power: but this testimony was received for the specific purpose of raising an election, and the decision applies only to cases of that description. (See Wigram's examination, 39, prop. 2, pl. 48, 49, 3d Lond. edition; and Sug. on Powers, 385, 3d edit.) It is evident from his observations, as reported, that Lord Eldon admitted the evidence, even for the purpose of raising a case of election, with great hesitation—as bowing to authorities which he felt it his duty to follow, rather than as being satisfied that, upon the rules of evidence, as formerly understood, the proof could be received. Besides, "it may be questioned," says Mr. Wigram, "whether Lord Eldon has not since repudiated the decision attributed to him by the report of that case in Vesey. See, per Lord Eldon in Doe ex dem. Oxenden v. Chichester, 4 Dow. 65; and see Blomart v. Player, 2 Sim. and Stu. 597; and Dummer v. Pitcher, 2 Myl. and K. 262." Pulteney v. Darlington, (1 Bro. Ch. C. 223,) was much doubted by Lord Eldon in Druce v. Denison. But whatever opinion may be formed of the correctness of the point decided, it forms no precedent for the admission of the book kept by Mr. Ball, as declaration of the meaning of his will. For the purposes of this case, the case of Pulteney v. Darlington may be briefly stated thus: Lord Bath, as executor of Henry Guy, being in possession of money and stocks which were directed to be laid out in the purchase of real estate, to be settled upon Genl. Pulteney, remainder over, &c. mortgaged certain real estate to the General as security for his, Lord Bath's, laying out said money and stocks in lands, and settling them to the uses of Guy's will. Those entitled in remainder having all died, and all the uses having centred in Genl. Pulteney, Lord Bath died, leaving a last will by which he gave his whole estate, real and personal, to the General, and appointed him his executor. Then Genl. Pulteney died, leaving his real estate, by particular description in his will, to Mrs. Frances Pulteney, who was his heir and the heir general of the family. His money, securities for money, and personal estate, he directed to be laid out in lands, to be settled on Lord Darlington, whom he ap-

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pointed execu*tor. The bill was brought to have the personal estate of Guy, formerly in the hands of Lord Bath, laid out in lands, to be conveyed to Mrs. Pulteney in fee; upon the principle that money directed to be laid out in lands, must, in this Court, be considered as land; and that the personalty belonging to Guy's estate, which had come to the hands of Genl. Pulteney, must be regarded in the light of realty, and did not pass, under the description of his personal estate, to Lord Darlington. The question was, whether the fund received, in the shape of personalty, by the Genl. who was the only person interested in the execution of the direction to lay it out in land, passed, as personalty, under his will, or retained the impression of realty given to it by the will of Henry Guy, and was liable to be invested in land for the benefit of Mrs. Pulteney, who was the heir as well as devisee of Genl. Pulteney. There were two points in the case: 1st. whether the General had not, by his acts, elected to take the personal fund, as personalty, in satisfaction of the interests he had under Guy's will:—and under this head the evidence spoken of by the Chancellor was offered:—the 2d question was, whether the fund was not, in the hands of Genl. Pulteney, at home, as the cases express it, (see 1st Bro. Ch. C. 238, note,) and liable to go according to the quality in which it was left by him at his death. Lord Thurlow said, "where a sum of money is in the hands of one, without any other use but for himself, it will be money, and the heir cannot claim. But, whether that is clearly so or not, circumstances of demeanor in the person, (even though slight,) will be sufficient to decide it." "I have no doubt, upon all the cases, that the slightest intention to take it as money, would make it so." "It was argued that evidence dehors the will ought not to be admitted in the construction of it. But the question does not turn upon the will. The question principally is, what presumption arises as to his intention from the acts he has done." "I am of opinion with Lord Bathurst, that the money, under the circumstances, continued money."

It appears pretty clearly from this statement, that the evidence was not admitted to enlarge or otherwise control the words of the will:—but to rebut an equity claimed

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*by Mrs. Pulteney to take a subject matter of bequest clearly within the testamentary description, out of the range and operation of the will, by imputing to it a new and merely ideal character. The case is, there-

fore, no precedent for admitting evidence for the purpose of extending the words of a will from things described to things not suiting to the description. The fault of the evidence admitted in the present case is, that it does not ascertain a subject for the operation of the will suiting to what the will describes. The evidence introduces property said to belong to the wife, (which, by the way, was in no sense her property:) the will calls only for property received by the husband from the wife's relations. These stocks were never received in that way. They may be the result of the husband's speculations and labors, based upon capital which was so received. But even here the evidence fails. It is not declared in the memorandums that they are the product of what the husband received. Not only does the evidence not declare that the stocks are what the husband had received; or that they constitute all that he received; or that they are the product of the property received:—the fact is manifest that they had no existence at the date of the will, and could, by no possibility, have been referred to in the will as that which the husband had then received. They come to his hands after the execution of the instrument; but they do not come within the description of property received from the wife's relations; and, therefore, in no view that can be taken, do they fall within the operation of the will. If this memorandum book had never existed, it is not easy to perceive why the particular stocks enumerated in it should be selected as falling within the description or meaning of the testator; any more than any other property in which he may have happened to vest the funds received by him in consequence of his marriage. And if not, then it is not by virtue of what the testator has said in his will, but by reason of what he has said out of it, in the book entries, that it is to operate specifically on this property. What is this but to make the book, and not the will, the real testament? To make the evil of admitting this evidence more palpable: is it not apparent that the will might have been made to extend to

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almost *any other property in the custody of the testator as well as to these stocks, and to a larger or smaller amount of property, according to the entries which accident or caprice might have led the testator to make? If the testator had stopped at his entries of 1835, the stocks there enumerated would have constituted the exclusive subject of bequest: or if he had been cut off at the first entry for 1836, that would have determined the operation of his will: so that his testamentary intention would have varied from day to day, although the words in which he had expressed it remained unchanged. This, it is conceived, would subvert the soundest and best established principles. It is said, (and correctly,) says Mr. Wigram,[1] that the statute, by requiring a will to be in writing, precludes a Court of law from ascribing to a testator any intention which his written will does not express; and, in effect, makes the writing the only legitimate evidence of the testator's intention. "No will is within the statute which is not in writing: which is as much as to say, that all that is effectual and to the purpose must be in writing, without seeking aid of words not written." Brett v. Rigdon, Plow. 340; and see 2 Vern. 625; Hobart, 32; and Hiscocks v. Hiscocks, Wigram, Pl. 183. What is said here respecting extrinsic parol evidence, is as true, on principle, of extrinsic written evidence. What the intention of the testator was, in purchasing and keeping an account of these stocks, or in designating them as stocks of his wife, we can only conjecture; nor is it necessary to ascertain it: the duty of the Court being to discover and execute the intention expressed in the will, and not in the memorandums. But it may well be conceived that the testator was engaged in accumulating convenient means for satisfying the legacy left to his wife; and if he had lived he might have made ample provision for doing so. Be his object what it might, the book cannot be admitted to declare the intention of his will: nor is it at all certain that he desired that it should, since in his memorandums there is no reference whatever to his will.

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*The next question is, whether the evidence to shew the nature and extent of the property received by the testator, in consequence of his marriage, was admissible. I do not hesitate to express the belief, that no case can be found, where evidence to ascertain the existence of a subject matter, suiting to the description contained in the words of a will, was ever rejected. Such evidence is absolutely indispensable to the execution of all testamentary papers; and is habitually and uniformly resorted to. Nor is it confined to wills; it is received in every case, whatever be the form of the instrument. The identity of the thing granted or devised, can be ascertained in no other way. The identity of the person to whom the gift or conveyance is made, is ascertained by precisely the same kind of evidence. Thus, where a testator or grantor gives to his eldest son, the tract of land or the slave which he bought from A., and the conveyance becomes the subject of dispute, how is the dispute to be determined but by proof that the claimant is or is not the eldest son of the benefactor, and that the land or slave falls within the description? And if the will be not of a specific thing, but of something to

[1] Wigram's examination of the rules of law, respecting the admission of extrinsic evidence, in aid of the interpretation of wills. 3d. Lond. edit. p. 8, Pl. 9. And see same author p. p. 132, 146; Pl. 177, 182.

be ascertained by some test contained in the instrument, it can only be determined by evidence whether the subject matter conforms to that test. Here, the testator declares his intention to give all the property, real and personal, that he had received or might afterwards receive, &c. Whatever falls within the description of property, real or personal, and was at any time received by him from the sources indicated in his will, must pass under the will, or his intention will be defeated. Nothing can be forced into the legacy which is not included within the legal import of the word property; nor any property which the testator did not receive from his wife's relations, either before or after the date of his will; but all the property thus received is clearly given.

Property is a general term to designate the right of ownership; and includes every subject, of whatever nature, upon which such a right can legally attach. It is not necessary that the subject of it should be either lands, goods or chattels; for it extends to money and securities. For the import of the term, see 6 Bin. 98; Cowp. 299; 14 East, 370; Pub. Laws, 147. As to its popular

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meaning, we *speak familiarly of a man of property, and the value of his property, without, at all, distinguishing whether it consists in lands, slaves, stocks or money. If any stress is laid upon the words personal and real, used by the testator; the employment of these words lays no just ground for supposing that he thereby intended to restrict—as the words themselves, in their legal import, do not restrict, the property to things tangible. They included every species of property or right. And when we see that the testator bequeaths not only what he had already received,—the nature of which he might know; but, also, all the property he might afterwards receive from any relation of his wife,—the precise nature of which he could not possibly foretell,—we have reason for supposing that these words, real and personal, were superadded to the word property, not for the purpose of restriction, but by way of giving it its most enlarged signification, and to indicate his intention that all property, of whatever description, thus received, should pass under the bequest. What the testator received before the date of his will, must, in the absence of an enumeration of it by him, be ascertained by evidence; and what he received afterwards, and could not enumerate, can be ascertained in no other way.

It has been argued, that this legacy is specific; and that, therefore, the evidence cannot be admitted. But in such a case as this, —where the bequest is in terms of general description,—it is a perversion of the proper order of inquiry to discuss the class or grade of the legacy, before the subject matter of it is ascertained. Before it can be pronounced that a legacy is specific, it must be ascertained what is given. Whether a legacy is specific or not, must, necessarily, depend upon the nature of the thing referred to and described in the will. If the thing be capable of individuality, as a ring or a picture; or if it be an assemblage of things, as a library or a cabinet; or something capable of being separated by sensible distinctions, as the property on a particular estate; in all such cases, the descriptions in the will set forth with distinctness the subject of bequest, and make it specific. But this is only because specific things alone can answer to the description given. But where, as in this case, the terms of the will are general, it is impossible to determine whether the bequest

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is specific, *or otherwise, until you ascertain the nature of the things falling within the general description; and, then, the legacy is specific, general or pecuniary, according to the nature of the things themselves. It may be safely affirmed, I think, that whether a bequest couched in general terms is specific or otherwise, depends on this; if the things falling within the terms, when enumerated, (or if they had been enumerated by the testator,) are in their nature specific, then the legacy is specific; otherwise it is not. As the testator here has not enumerated the property he had received, and could not enumerate what he should afterwards receive, how are we to know what he did receive, until we learn it from the evidence? Suppose he had received a family of slaves at one time from one of his wife's relations, can there be any doubt that they would pass, specifically, under this will? Suppose he received a sum of money, at a different time, from another relation, is there any reason why this should not pass, as a pecuniary legacy? Now, the fact that he had received property from different family connexions at different times, and might receive other property, the nature of which was necessarily unknown to him, from various other relatives, at various times, was the very reason which led the testator to employ the general terms used by him in his will; and no reason is perceived why the character of his legacy should be limited by the Court, when he did not limit it himself. The intention here was to give what the testator received, or should receive. If what was received was in part specific and in part pecuniary, the will, in fulfilment of the testator's expressed intention, must operate accordingly; but in order to ascertain this, the evidence must be heard. This evidence establishes that every dollar received by the testator himself, and by his guardian for him was in money. The only apparent exception was Packwood's mortgage; but that was received by the guardian in place of money and was so passed over to him. The effect is that this is a pecuniary legacy for the amount received;

which is to be estimated by excluding from the computation all the income and interest which accrued after the receipt by the guardian or by the testator as the case may be. The capital sums received are alone to be accounted for.

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*Let it be conceded however that the words property, personal and real, in their primary meaning, include only lands, goods and chattels, as is intimated in the decree, upon the authority of Stuckey v. Stuckey, (1 Hill Eq. 309,) still it will not be doubted, that in a secondary sense, they extend to money. Then, the cases quoted by Mr. Wigram, and to which I refer, sustain his third proposition, (page 42,) that where a testator has used the words in which he has expressed himself, in their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any secondary sense, of which, with reference to these circumstances, they are capable. If one who had in fact received nothing but money from a particular source described by him in his will, should bequeath the property he had received; his intention could not be that the legatee should take no benefit;—but must be that he should take that kind of property which he, himself had received. Now this is what Mr. Ball has done; and his legacy is, therefore, pecuniary. In receiving this testimony, and giving this construction to the will, we are placing ourselves, (to use the words of Mr. Wigram, p. 64, pl. 76,) in the situation of the testator and leaving the words of the will to their natural operation; (see, also, his 5th proposition, and the cases cited, with his remarks and references.)

The other grounds of appeal were not argued, but appear to be plain. The ground taken by the executors seems to be well founded; and must be sustained. That taken by Elias O. Ball, is also well founded. The annuity of Mrs. Taveau is not charged by the will upon the crops; and the provision for its payment should be made out of the residue of the estate, before resorting to them.

Let the decree be reformed according to the foregoing opinion; and let an account be taken of the different legacies; deducting such payments as may have been made, by the executors, thereon; and let an inquiry be made as to the means of discharging them, and what provision should be made therefor; with leave to the master to report any special matter; and with leave to the

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parties to apply *for further directions; and also, for the sale of any property of the estate which it may be necessary to sell, for the more easy execution of the testator's will; for which purposes let the cause be remanded to the Circuit Court.

JOHNSON and HARPER, Chancellors, concurred.

Petigru, Legare and Seldler, for complainants.

Mazyck, Memminger, and DeSaussure, contra.

Speers, Eq. 87

JACOB HARMON et al. v. GODFREY DREHER et al.

(Columbia. May Term, 1843.)

1. In 1787, certain ministers, partly of the Lutheran and partly of the Reformed or Presbyterian denomination, but all of them of German Protestant Congregations, convened and formed themselves into a Ministerial Society.

2. The congregations composing this Society were, by an Act of the Legislature, passed in Feb. 1788, (8 Stat. at Large, 144,) incorporated as "The Ecclesiastical Union of the several German Protestant Congregations in the back part of the State of South Carolina."

3. On the 18th of August, subsequent to this Act of incorporation, certain of the ministers, together with fourteen lay delegates of the various congregations, (fifteen in number,) assembled, read the Act of incorporation, proposed a system of discipline consisting of various articles, which was considered, adopted, signed and sealed.

4. It was declared that the congregations incorporated, should form one corpus evangelicorum, under the title of Unis Ecclesiastica of the German Protestant Churches in the State of South Carolina—that "each and every congregation is depending on this corpus; by which all things concerning Church and religion shall be managed and directed, and the free course of the gospel be promoted within its bounds." It was provided that this union should not deprive the members of the respective denominations (Lutheran and Reformed) who belonged to the

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associated congregations, of their dis*tinctive, denominational character, but that each should continue to enjoy his rights and privileges. Each member was bound to attend, when cited, before the officers composing the General Directory.

5. Each congregation, by and with the approbation of the General Directory, was to elect its own Pastor, to appoint, annually, Elders and Wardens, keep a register of its proceedings, and in every congregation the articles of union were to be kept and subscribed by every member.

6. It was further provided, that when the majority of any congregation belonged to the Reformed Church, the formula, catechism and liturgy adopted in the Palatinate, or Switzerland, were to be used: where the majority were Lutherans, the Wirtemberg or Halle formula.

7. A general directory for the government of the United Churches, was stipulated to be kept up, so long as a majority of said Churches agree to the same; consisting of the Ministers of the associated churches, and two suitable Lay Delegates from each church; to which directory, belonged the care of whatever might have an important influence upon the welfare of the associated body, as well as of each church; and it was further provided, that the directory should have power to alter, add to, or annul, any article, as experience might render it necessary to do so; and such amendment should become a part of the articles of union.

8. The particular churches, by virtue of their incorporation, were endowed with power to enact by-laws, in subordination to the general constitution.

9. The association thus constituted, continued to meet till January, 1789, after which date, there was no certain account of their proceedings. The body expired, but at what time, did not certainly appear.

10. The Rev. Mr. W., one of the ministers who had assisted in forming the Ecclesiastical Union, was the minister of a Lutheran Church, called St. John's; but part of the congregation living at an inconvenient distance from this church, it was determined to erect a new one for their accommodation. A survey of one hundred and twelve acres of land, on which St. Peter's Church (now in controversy) was erected, was made, and a grant obtained to certain persons for the same, in "trust for the incorporated Church of St. Peter's on Camping Creek, and to their successors, trustees of the said church," to have and to hold "to the said persons and to their successors, trustees of the said church." This was done in anticipation of an Act incorporating the church, which was passed 17th December, 1794; and at the same time, the congregation of St. John's was incorporated. The Rev. Mr. W., officiated as minister in these churches from 1794, for several years, not accurately fixed by the testimony. Mr. W. was succeeded by a series of Ministers, as Pastors of St. Peter's, but during his pastorship, neither of his churches ever be-

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came united to any Synodical body. *His immediate successor was not connected with any general Ecclesiastical association. A Mr. M. supplied the pulpit of St. Peter's for a few years, who was connected with the Lutheran Synod of North Carolina. His successor was also a member of the Synod of North Carolina, but it did not appear, that at the annual Conventions of that body, St. Peter's sent any lay delegate with him.

11. In 1824, six Lutheran Ministers, with some lay delegates, assembled and organized a Synod for South Carolina, and those parts of the South naturally connected with it. It was resolved, that the Augsburg confession should form the point of union among their churches. It did not appear that there was any lay delegate from St. Peter's at this meeting, but this church was subsequently represented in the Synod, and contributed to its funds. The delegates always carried their commissions with them, which was required by a standing regulation of the Synod.

12. It also appeared in evidence, that the congregation of St. Peter's, from time to time, petitioned the Synod for the services of a minister, (Rev. Mr. D.)

13. Mr. D. was in full connexion with the Synod, down to 1837. In 1834, Mr. D. was charged by one of the churches connected with the Synod, with unsound opinions, which, upon investigation by Synod, resulted in his acquittal, and the temporary restoration of harmony. Subsequently to the latter date, Mr. D. introduced into his pulpits, a preacher, holding opinions adverse to those entertained by the rest of the Southern Synods; and at the former date, it was recommended by a special committee, that he be declared "no longer a minister of our church, that he is beyond the control of our Synod, and that we are not responsible for his faith or conduct." The report of the committee was unanimously agreed to.

14. The doors of the church were closed against that portion of it adhering to the Synod, by the adherents of Mr. D.; and the surviving grantee of the church land executed a deed for the same, to the Lutheran Congregation of St. Peter's, which was delivered to the defendants opposed to the Synod.

15. The bearing of the case was, to elicit a judgment, which of the parties is the true Church of St. Peter's, as incorporated, each claiming an exclusive right.

16. Mr. D., who was a defendant, put in a special plea in advance of his answer, in which he contended, that he was not a member of the congregation, and, therefore, not implicated in the trial of their rights—which was not sustained.

17. It was *held*, that as regards the expulsion of Mr. D. by the Synod, it belonged not to the civil power to enter into or review its proceedings.

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[18. *Religious Societies* ⟸12.]

*In this country, no ecclesiastical body has any power to enforce its decisions by temporal sanctions. Such decisions are, in this sense, advisory—they are addressed to the conscience of those who have voluntarily subjected themselves to their spiritual sway; and, except where civil rights are dependent upon them, can have no influence beyond the tribunal from which they emanate. Where a civil right depends upon an ecclesiastical matter, it is the civil court, and not the ecclesiastical, which is to decide. The civil tribunal tries the civil right, and no more; taking the ecclesiastical decisions out of which the right arises, as it finds them.

[Ed. Note.—Cited in Morris Street Baptist Church v. Dart, 67 S. C. 341, 45 S. E. 753, 100 Am. St. Rep. 727.

For other cases, see Religious Societies, Cent. Dig. §§ 87–98; Dec. Dig. ⟸12.]

[19. *Religious Societies* ⟸12.]

This court cannot look into the regularity of the process by which an ecclesiastical body proceeds to its judgment. Every competent tribunal must, of necessity, regulate its own formulas. Where, as well from the testimony, as from the terms of a charter incorporating a church, it is apparent that it was in full connexion with a synodical body, and not independent of it as a congregation, if a portion of it secede, the rest, however small their number, secure their corporate existence, and are entitled to all the privileges and property of the corporation—but before corporators can forfeit their membership, they must be proved to have seceded from the corporation of which they are members.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 95; Dec. Dig. ⟸12.]

[20. *Religious Societies* ⟸23.]

It seems that if a portion of corporators are guilty of such misconduct towards a body on which the corporation depends as tends to forfeit the connexion, while another portion still acknowledges the connexion and fulfils its duties, the faithful party will be entitled to stand for the corporation, and claim such remedies as may be necessary to avert the forfeiture.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 150; Dec. Dig. ⟸23.]

This cause came up on an appeal from a decree of his Honor Chancellor Johnston, before whom it was heard, at Lexington, June Term, 1841. The facts and the testimony connected with the case will be fully understood from the circuit decree.

Johnston, Ch.—I have withheld the decision of this cause for a length of time very unusual with me, not so much from the intrinsic difficulties of the case, though these

are very considerable, as from a hope that an amicable adjustment might be effected. For I would not allow myself to believe, that parties professing that religion which, above all others, inculcates peace, humility and forgiveness of injuries, would reject the suggestions of christian friends, proposing terms of reconciliation, or fail to seize with avidity the opportunities so frequently afforded, since the hearing, to accommodate a dispute

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so dishonoring to the Saviour *whom they follow, so disreputable to themselves, and so destructive to the church. Being, now, painfully convinced that there is an unhallowed bitterness in this lamentable controversy, (arising, possibly, from circumstances which have not transpired,) which forbids the hope of reconciliation among the litigants, I am reduced to the deplorable necessity of delivering the judgment of a civil tribunal in a case of a spiritual nature. I unfeignedly profess, that no duty I have ever been called upon to perform, has inflicted such pain upon me; and there is no sacrifice that could have been reasonably demanded, which I would not have made, or that I would not now make, (if there were left any hope of its succeeding,) to compose the differences I am called upon to adjudicate.

This dispute originates in certain unhappy dissensions which have sprung up in the Lutheran Congregation of St. Peter, situated in Lexington, in the pine-wood between Broad River and Saluda.

This congregation was incorporated by a clause of an Act, passed the 17th of December, 1794, which declares, "that all those who have subscribed the petition for incorporating the Lutheran Congregation of St. Peter, who now are, and all those who shall be hereafter duly admitted or become members of that society, according to the rules, orders and constitution of the same, to be formed, shall be, and they are hereby, also, declared to be, a body corporate and politic, by the name and style of the Lutheran Congregation of St. Peter." Certain transactions had previously taken place in the German Protestant Churches of this State, which we will notice here, as they may serve to explain the status of this church, thus incorporated. It appears by the evidence, that on the 13th of November, 1787, a little upwards of seven years before this Act of incorporation, seven ministers, part of them belonging to the Lutheran, and part of them to the Reformed or Presbyterian denomination, but all being ministers of German Protestant Congregations, met at Zion Church, on twelve-mile creek, and formed themselves, by written articles, into a Ministerial Society. These ministers were the Rev'd. Frederick Daser, Christian Theis, J. G. Bamberg, M. Carl Binnicker, Fred. August Wallberg,

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Fred. Jos. Wallern, and Carl Fred. *Froehlick. After adopting a constitution, and appointing Mr. Daser, Senior of the ministry, they adjourned to the same place, on the 8th of January following, "to take into consideration the various petitions, signed by different German Protestant Congregations, and further to regulate the affairs of the society."

On the 8th of January, 1788, the same ministers met according to adjournment, with the exception of Mr. Wallern and Mr. Binnicker. Petitions for incorporation, subscribed by most of the congregations, were laid before the ministers. The next day, (January 9th,) the meeting re-assembled, and the congregations, through Messrs. Wallberg and Bamberg, who were, probably, their ministers, sent in petitions, which, with those of the other congregations, it was determined should be laid before the Legislature; and the meeting adjourned, to re-assemble upon notice from the senior minister.

It appears, (see 8 Coop. Stat. 144,) that the Legislature, on the 29th of the next month, (February, 1788,) incorporated the following fifteen churches, constituents of "The Ecclesiastical Union of the several German Protestant Congregations in the back part of the State of South Carolina"—to wit:

1. [1]The Frederician Church on Cattle's Creek.

2. The German Calvinistic Church of St. John, on the Fourhole.

3. The German Lutheran Church of St. Matthew, in Amelia Township.

4. The German Lutheran Church of Salem, on Sandy Run.

5. The German Lutheran Church of Mount Zion, on the Twelve-mile Creek.

6. The German Lutheran Church of St. Peter, on Eighteen-mile Creek.

7. The German Lutheran Church of Bethel, on High-hill Creek.

8. The German Lutheran Church of St. Martin.

9. The German Lutheran Church of Bethlehem, on Forest's (Faust's) Ford.

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*10. The German Protestant Church of Bethany, on Green Creek.

11. The German Protestant Church of Appii Forum, Cedar Creek.

12. The German Protestant Church, dedicated to Queen Charlotte, on Slippery Creek, 96 district.

13. The German Lutheran Church of St. George, on Hardlabor Creek.

14. The German Lutheran Church of St. Jacob, on Wateree Creek.

15. The German Protestant Church of St. George, on Indianfield Swamp.

On the 18th of August following this Act, Messrs. Daser, Theis, Bamberg and Wallberg, four of the ministers, assembled at Salem, (Sandy Run,) one of the incorporated and associated churches, together with fourteen lay delegates from the congregations; and, probably, in consequence of some mis-

[1] 9 Lutheran; 6 Presbyterian.

conception of the denominational character of Bethlehem, in the Act of incorporation, resolved that that church should, henceforth, be known as the German Reformed Church at Faust's Ford.

The act of incorporation was read, and a system of discipline proposed by President Daser, consisting of twenty articles, was considered, adopted, signed and sealed. If appears that Mr. Froehlick, a minister, then absent, afterwards signed and sealed it.

The first article declared that the congregations incorporated shall form one corpus evangelicorum, under the title Unis Ecclesiastica of the General Protestant Churches in the State of South Carolina; and that "each and every congregation is depending on this corpus; by which all things concerning church and religion shall be managed and directed, and the free course of the Gospel be promoted within its bounds." The second provided that this union should not have the effect to deprive the members of the respective denominations, (Lutheran and Reformed) who belong to the associated congregations, of their distinctive denominational character; but that each should continue to enjoy his rights and privileges. But by the fifth article, every such member was bound to attend, when cited, before the officers composing the general directory.

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*Each congregation was to elect its own pastor, by and with the approbation of the general directory; and was to appoint, annually, elders and wardens; and to keep a register of its proceedings. And in every congregation, the articles of union were to be kept, and subscribed by every member.

Where the majority of any congregation belonged to the Reformed Church, the formula, catechism and liturgy adopted in the Palatinate or Switzerland were to be used; where the majority were Lutherans, the Wirtemberg or Halle formula should be adopted.

A general directory for the government of the united churches was, by the 3rd article, stipulated to be kept up, so long as a majority of said churches agree to the same; consisting of the ministers of the associated churches, and two suitable lay delegates from each church; to which directory it belonged to superintend all affairs relating to the churches; for instance, the reception and dismission of ministers; their education, election and ordination; the establishment and regulation of churches and schools; the manner of divine service; and, in short, whatever might have an important influence upon the welfare of the associated body, as well as of each church. And by the 20th article it is provided, that the directory should have power to alter, add to, or annul any article, as experience might render it necessary to do so; and such amendment should become a part of the articles of union.

[2]The particular churches, by virtue of their incorporation, were endowed with the power to enact bye-laws, in subordination, of course, to the general constitution.

This directory met again at Zion Church, on the 14th of January, 1789. The ministers present at that meeting, were the Rev'd. President Daser, Secretary Wallberg, and Messrs. Theis, Bamberg and Wallern. Lay delegates attended from the congregations; and while Mr. Daser was elected President of the directory, Mr. George Hook was appointed President of the Laymen.

At this meeting, the articles of union were again read; and Mr. Wallern was appointed

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to preach at the next ses*sion, which was to be held at Salem, on Sandy Run, on the second Wednesday of August next ensuing.

These four sessions of their association, beginning in Nov. 1787, and ending in January, 1789, are all of which the fragmentary records of their proceedings that have descended to us give any account. However, the Rev'd. Dr. Hazelius, who was examined as a witness, testified that he had seen records of their proceedings so late as 1794; but they were partly so torn, and partly so illegibly written, as to be unsusceptible of orderly arrangement. The body expired, but at what time does not clearly appear.

It will be observed that Mr. Wallern was one of the Ministers who assisted in forming this Ecclesiastical union; and that after its incorporation he sat in the directory, as one of its members, and took part in its deliberations, at the meeting of January, 1789, and that he was appointed to preach before the succeeding meeting.

This gentleman was the minister of a Lutheran Church, called St. John's, whose congregation occupied a neighborhood near the present north eastern corner of Lexington. A part of the congregation living at an inconvenient distance from this church, it was determined to erect a new church for their accommodation. Accordingly, a survey was made, February 15th, 1794, of a tract of 112 acres of land, on which the present church of St. Peter's in the pine-wood, is situated, and a grant was obtained for the same on the 5th of May following "to Peter Jumpert, Ulrich Mayer, Senr., John B. Capelman, John Wern, Mathias Quattlebum, John Shealy, Lawrence Young, Thomas Frick and Nicholas Hamiter, in trust for the incorporated church of St. Peter's, on the waters of Camping creek, and to their successors, trustees of the said church," to have and to hold "to the said Peter Jumpert and others, and their successors in the said office of trustee for the said church." The church building was erected by the joint labours of

[2] Coop. Stat. 145, compared with 126.

the new congregation. All this was done in anticipation of the Act incorporating the church, which, it will be remembered, was not passed until the 17th of December following. [3]At the same time, in the same Act,

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*and in the same terms, the congregation of St. John's, of which that of St. Peter's was an offset, was also incorporated. Mr. Wallern, who was the minister of the former, became the minister of the latter, and continued to officiate in both from 1794, for several years, not ascertained by the evidence. Then the Rev. Mr. Winkhouse became the Pastor of St. Peter's, and preached to them for a number of years, not accurately fixed by the testimony. There is no evidence that after the expiration of the Ecclesiastical union of which I have spoken, Mr. Wallern, or either of his churches during his pastorship, ever became united to any Synodical body; and it pretty clearly appears that Mr. Winkhouse was never, at any time, connected with any general Ecclesiastical Association. His habits were irregular.

He was succeeded as Pastor of St. Peter, by the Rev. Mr. Meetze, who supplied that pulpit for a few years. This gentleman was connected, I believe, wtih the Lutheran Synod of North Carolina.

Then succeeded the Rev. Michael Rauch, who was and had been from about 1812, a member of the Synod of North Carolina, just mentioned. He acted as Pastor of St. Peter's from about 1818 or 20, and remained a member of the North Carolina Synod up to 1824, although it appears that in the annual conventions of that body, the churches under his charge (for he supplied others as well as St. Peter,) did not send a lay delegate with him, as by the constitution of the body they were entitled to do.

In the progress of years, the churches of South Carolina, formerly constituting the Ecclesiastical Union of 1787, had dwindled away. Their ministers had died; and inroads had been made upon them by emigration, and by the proselyting practices of other sectarians. Their youth had grown up without instruction, and had lost the influences of spiritual discipline. Still there lingered among them many of the aged who adhered to their faith; and there was not wanting even among the young, a generous and reverential recollection of the institutions of their fathers. Among the Lutherans, the people clung with pride to the name of the great reformer. A few ministers were raised up among them, or came to supply

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them. So few as not *to be able, if willing, to constitute a respectable and efficient Ministerial Association; and being far removed from other Synods, scarcely any of them maintained a connexion with such bodies.

[3] 8 Coop. Stat. 186.

But a few years from the last traces we have of the Ecclesiastical Union of 1787, the only member of that association, and indeed the only Lutheran Minister, of whom we hear, within its district, was Mr. Wallern. Occasionally the desolated churches were visited by ministers from distant parts, who administered the ordinances to the people, and kept up a feeble organization in the congregations. For the greater part of the time from the close, and some years before the close, of the last century, up to 1815 or 16, there were but two or three resident ministers. But these acted faithfully and diligently in their sacred calling, and at length their members began to increase.

After some preparatory movements, an assemblage took place on the 14th of January, 1824. It consisted of six Lutheran Ministers and five lay delegates. The ministers were:

Rev. John P. Franklow,
" John Y. Meetze,
" Godfrey Dreher,
" Michael Rauch,
" Jacob Mozer,
} Of Lexington.

Mr. Samuel Herscher, of Orangeburgh.

Most of these ministers were members of the Synod of North Carolina. It is recorded in their proceedings that Mr. Dreher "proceeded to detail the anterior rights and titles which were established by our ancestors in the year 1788, and sanctioned by the government of this State, for the benefit of the Evangelical Lutheran Churches, within the limits of its jurisdiction." After consultation, it was determined to organize a Synod for South Carolina, and those parts of the South naturally connected with it. Mr. Dreher was chosen President, and Mr. Herscher Secretary of the new Synod.

It was resolved, that the Augsburg confession should form the point of union among their churches. Sundry other regulations

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were made relating to the qualifications, *licensure and ordination of ministers; regulation of baptisms, &c., the qualification of communicants; and among the rest it was provided that for each minister in the Synod, there should be allowed one lay deputy, to represent the church or college of churches under such minister; the deputy to produce written evidence of his appointment.

Mr. Rauch, it will be recollected, was at this time the minister of St. Peter, the church whose case is now before us, though it does not appear that there was any lay delegate from that church in this meeting. But it is in evidence that copies of its proceedings were published to that congregation.

It is material to pursue this statement with particularity, however fatiguing it may be, because one of the questions in the case is, whether the congregation of St. Peter ever acceded to this Synod. On the 18th of November, 1824, the Synod met for the second time. This meeting took place at St.

John's Church, in the immediate neighborhood of St. Peter's. Two new ministerial members were added, in the persons of Mr. (now Doctor) Bachman, of Charleston, and Mr. Bergman, from Ebenezer, in Georgia.

Mr. Jacob Rauch is set down as a delegate from St. Peter's, but whether from the church of that name in the pine wood, or from the other church of St. Peter, which was under the pastoral care of Mr. Meetze, there is no evidence; unless the very slight circumstance of coincidence in the name of the deputy with that of the minister of the pine wood church, be regarded as evidence. Be this as it may, St. Peter's, in connexion with Bethlehem and St. Paul's Churches, also under the care of the Rev. Mr. Rauch, sent up contributions to the funds of the Synod, which funds were entrusted to Mr. Dreher, who was chosen treasurer of that body; an office which he continued to hold, by annual re-appointment, until about 1835.

The Synod met again in November, 1825, 1826, 1827, 1828, 1829, 1830; December, 1831; November, 1832, 1833, 1834, 1835, 1836, 1837, and still continues to meet annually. The

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meeting of 1836 was in a neighborbood *very near to St. Peter's, and the majority of these meetings took place in the same district.

Up to 1833, Mr. Rauch remained Pastor of that church, and during that whole time was never absent from any meeting of the Synod. During the whole time, and up to 1836, without a single exception, St. Peter's continued her contributions to the funds of the Synod. In 1828, Michael Witt, Junr. appeared as the lay representative of this and the other churches under the care of Mr. Rauch. In 1829, Jesse Bates came from St. Peter's, itself, as the delegate of these collegiate churches. In 1830, Herman Aull came as a delegate from Mr. Rauch's churches, though not a member of St. Peter's. In 1833, Mr. Bates came again from St. Peter's; and in 1836, by which time that church had been placed under the pastoral care of Mr. Dreher, John H. Franklow appeared and sat as the delegate of the churches under the charge of that minister.

It is in evidence that these delegates always carried their commissions with them, which was required by a standing regulation of the Synod. A certificate appointing Mr. Franklow to the meeting of 1836, was produced; part of which is in the hand writing of Mr. Dreher, then Pastor of St. Peter's. It certifies that Mr. Franklow was duly elected to represent the churches of which Mr. Dreher was Pastor, and is signed, among others, by Jacob Wheeler, Jacob Mayer, John Seas and Jacob Harmon, elders of St. Peter's. Another paper, bearing date Nov. 1834, was produced, which, it appears by the minutes of the Synod of that year, was before that body; and imports that Mr. Rauch, while minister, did, on the 19th of October, 1833, resign his charge of St. Peter's into the hands of Mr. Dreher, in consideration that a majority of the congregation were in favor of that measure. It is therein stated to the Synod that the congregation, from the proof they have had of Mr. Dreher's qualifications, are desirous that he should be continued as their minister for the next year. The paper is signed by thirty male members of the congregation, and among them by the elders. By the minutes of 1834, as I have stated, it appears that this paper was laid before the Synod, as a petition for the services of Mr. Dreher, and as such was considered, and the

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church was in con*sequence committed to Mr. Dreher for the time specified in the application.

It also appears from the Synodical Journal of 1833, that a similar application had been made in that year, (probably in consequence of Mr. Rauch's resignation,) and Mr. Dreher had been required to preach in this congregation as often as practicable.

In 1835, as appears by the Journal of that year, this church again sent up a communication to the Synod, stating that the congregation had elected Mr. Dreher as their Pastor, and petitioning that the election be confirmed.

I have thus stated the facts, (beginning with the Ecclesiastical Union of 1787, which it was argued had a material bearing on the point,) from which a connexion between the Synod and St. Peter's Church may be inferred. Before I close this statement, I must add, however, (what had nearly escaped me,) that it was proved that year by year it was the habit of the Synod to print generally about 1000 copies of its minutes for distribution among the congregations; and Mr. Rauch testified that he received copies and distributed them in the congregation of St. Peter's Church. It is proper also to state, in relation to the mode of choosing the delegates by that congregation, that this was usually done by the minister stating that it was customary and proper for the churches to send a delegate; he then named the person whom he preferred; and if no objection was made, he was declared to be the delegate, and received the certificate of the elders.

It now becomes necessary to state the facts relating to another point in the case. The subject is very painful, but necessary to be fully explained, because, in fact, this whole case has arisen out of what I am about to state. I refer to the dissolution of the connexion between the Rev. Mr. Dreher and the Synod, which took place in 1837, while he was acting as the pastor of the church so often mentioned. Whatever doubt may be entertained with regard to there being a connexion between the Synod and this congregation, there is none that Mr. Dreher was fully joined to that consistory. He had been for many years a member of the Synod of North

Carolina, before this Synod was formed.

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*He was probably the most influential member of this at its formation; and was chosen its first President; and then held the office of treasurer as long as by its constitution he was eligible to the appointment. I am very sure that the separation must have been indescribably painful, not only to his colleagues but to him, and that the memory of all must revert with mournful pleasure to the spiritual connexion which once so happily existed between them, and to the many endearing associations to which it gave rise. Indeed, it is impossible for any one possessed of the least generosity to contemplate the history of this Synod without emotion. A few humble ministers, of feeble and dispirited churches, convened for the purpose of corroborating the interests of their people by organization and concerted action. They are without funds and without the means of educating and training up successors to themselves in the sacred office of spiritual instructors. Their communicants are few and dispersed; and they are without missionaries to collect them or add to their number. Yet, in the short space of thirteen years, by the exercise of an admirable energy, notwithstanding this almost hopeless beginning, this association nearly trebled their communion; extended their territory by most spirited missionary efforts; planted new churches and strengthened the old; educated and brought into the ministry a greater number of ministers than those who instituted the Synod; and besides collecting and disbursing large sums in these noble enterprises, accumulated and funded $10,000 to support a school and Theological Seminary, for still further extending and perpetuating their success. And besides this, they had in the treasury a large and productive balance for all contingencies. While we admire these liberal operations, the fruits of pious conduct, and lament the discord which threatens to destroy what was so nobly projected and so happily begun to be executed, is it possible to dismiss the hope that in some happy moment the memory of what they have done when united, may beget a relenting tenderness in the breasts of those now separated christian brethren; and that regretting their differences, those who are in the wrong will concede, and those who are less erring will forgive? I forbear to press the many topics

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which might be urged *upon them, trusting that a contemplation of what is past must convince them how much their dissentions have wounded and retarded the cause which, while united, they shewed themselves so willing and able to advance; and duly impress them with the obligations they owe to their common Redeemer, as well as to themselves, to unite again to recover the ground they are in so great danger of losing.

But I must return from what may be regarded as beyond my official duty, to the case of Mr. Dreher. This gentleman, up to 1824, was a member of the Synod of North Carolina. Of what took place in that body, it is necessary only to notice, that about 1819 or 1820, certain persons now called Henkelites, or followers of one David Henkel, were separated from the Synod on account of certain alleged irregularities of doctrine and practice, which have been subjected to the general condemnation of the Lutheran Churches and Synods throughout the United States. In the proceedings of the North Carolina Synod, by which they were cut off and disowned, Mr. Dreher bore a large and influential part. It is not my business or purpose to express any opinion upon the justice or necessity of these proceedings, but simply to state the fact that they took place. The charge against the excommunicated party, and the allegation against the Synod which they have since formed for themselves, is that in doctrine they hold to dogmas inconsistent with the principles entertained by the Lutheran Church; and that in practice, they indulge a radicalism destructive not only of subordination and wholesome discipline, but of evangelical enterprise.

When Mr. Dreher came into the Synod of South Carolina and the adjacent States, (such is its style,) there is nothing to shew that he had the least sympathy with these sectaries. He co-operated zealously with his brethren in all their proceedings. In the formation of rules for the government of the Synod and the churches under its care, he was one of the most active, if not the most active member. And in the most energetic measure which ever took place in the body he acted as chairman, and bore the principal part of the proceeding. I refer to the expulsion of the Rev. Mr. Herscher in 1825, (see minutes, pp. 6, 10.) If there was at any time

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an act of questionable accuracy *performed by this Synod, it would seem to be the taking up a case against an absentee, and expelling him, without specific charges, without notice, and without trial. Yet, Mr. Dreher concurred in this measure; and although the nature of the offence is nowhere stated, it is not difficult to conceive of a case which might justify such a proceeding.

The principal measures of the Synod respecting the regulation of the discipline, from 1824 to 1837, when Mr. Dreher was separated from it, relate to the union of the Synod to the Synod of the United States, and the formation of a constitution for the government of the Synod itself, and the procuring that body to be incorporated. These all appear to have been acts of great deliberation and publicity; although now complained of by the defendant.

The subject of connexion with the general

Synod, seems to have been broached in 1830 —yet, it was not till 1831, that a correspondence was opened with that body, leading to that measure. It was voted that the congregations should be consulted. At the next session, (1832,) the subject was postponed; and it was not until 1833, after the most prudent inquiry, and the most satisfactory evidence that the powers of the general Synod were advisory merely, and then, not until the subject had been again committed, reported upon, and thoroughly considered, so that every member of the Synod, clergyman or lay delegate, was convinced of the safety, as well as the utility, of the union that was adopted.

As to the constitution, the caution was equally great. The Synod had, from year to year, adopted certain standing regulations. A committee was raised, as early as the second meeting, in November, 1824, to draft rules. This committee was continued in 1825, Mr. Dreher among them. This committee was again continued in 1826. In 1827, the committee reported, but the consideration of the report was postponed. It appears, by the minutes of 1829, that the report consisted of a system of rules, in the form of a constitution; and in that year it was resolved, that the committee collect the regulations adopted at former meetings, and that the constitution be postponed. In 1830, the consideration of a constitution was further postponed.

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In *1833, the subject was again postponed, and a committee, of which Mr. Dreher was a member, directed to draft a constitution, and report next year. In 1834, the committee brought in the draft; after being laid on the table for due examination, it was taken up in committee of the whole, a lay delegate in the chair, and after full consideration and amendment, it was unanimously adopted.

There is nothing in this constitution to startle the fears of the most jealous. It substantially embraces the rules which had, for years before, governed the body, and of which the congregations had the fullest notice by the journals of the previous years. The powers assumed by the Synod were barely sufficient to preserve organization; too feeble, one would be apt to think, for discipline; and there runs through the whole, a studious exclusion of every thing that could possibly enslave the feeblest member of the church. So much for the disciplinary power of the Synod; which has been much misrepresented, and very much misconceived.

I am now prepared to state the facts which eventuated in the separation of Mr. Dreher from the Synod; though, as there are some points left obscure by the evidence, the statement cannot be otherwise than obscure. As early as the meeting of 1834, two communications, (of the particular contents of which the Court is not informed, as they were not put in evidence,) were laid before the Synod, coming from the church of St. Jacob, touching dissensions in that church. It appears, that in the discussions, Mr. Dreher was charged with unsound opinions, and Mr. Moser, another minister, with misconduct. The following minutes were entered.

"Whereas, it has come to the knowledge of this Synod, through various communications addressed to this body, that certain difficulties exist in St. Jacob's Church, Lexington district, which cannot be settled without the mediation of this Synod.

"Therefore, Resolved, That a committee of four be appointed to take into consideration the difficulties in St. Jacob's Church; that this committee, in case of disagreement, be authorized to add a fifth; and that they report to this body, at an early day, such in-

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formation as they conceive *necessary to be laid before this Synod; also, the best mode of settling the difficulties existing in said congregation.

"It was proposed, also, that each of the ministers involved in these difficulties, select one clergyman and one lay member, to compose this committee. The Rev'd G. Dreher, one of the ministers concerned, nominated Messrs. Bachman and Purse. The Rev'd J. Moser, the other minister concerned, nominated Messrs. Haltiwanger and Schirmer. This nomination was confirmed by the Synod." This was on Saturday, the 15th of November. On the next Monday, the committee, unanimously, brought in the following report:

"The committee to which was referred the petition of St. Jacob's Church, and other papers connected with difficulties existing in said congregation, respectfully report:

1st. That they would recommend that both the ministers who have recently officiated in St. Jacob's Church, be required to discontinue their ministerial labors in said church, in order that harmony be restored.

2d. That the Synod enjoin on the members of said congregation, not to employ either of said ministers.

3d. That we recommend that the church be placed under the pastoral care of the Rev'd Dr. Hazelius, who is required, in case of his being unable to attend, to supply his place from the Theological Seminary.

4th. That it be recommended to the congregation of St. Jacob's Church, to appoint a day of humiliation and prayer, in special reference to the unhappy differences which have so long existed among them.

A number of papers have been referred to this committee, which properly belong to the Ministerium; to which body we refer them."

The Ministerium, to which the papers last mentioned in the foregoing report were referred, was a body consisting of the ministers, who, for certain purposes, sat apart from the lay delegates.

It appears from the Synod's Journal, that the reference had been attended to by the Ministerium, and on the next day, (Tuesday,) the President of the Synod laid their report before that body. The minute is as follows:

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"The *President offered the following report of the Ministerium, in relation to Messrs. Dreher and Moser, as information to the Synod. As certain unpleasant difficulties, known to have existed for some months, between the Rev. Messrs. Dreher and Moser, calculated to destroy the peace of the church and materially to affect the usefulness of these brethren, were referred for adjustment to the decision of this Ministerium. After a patient and impartial examination of the testimony on both sides, the Ministerium unanimously come to the conclusion: 1st. That both of the Rev'd Brethren, by lending too ready an ear to the vague and founded reports circulated against them, and giving way to the feeling of unkindness and suspicion towards each other, have, in the opinion of this Ministerium, trespassed against that spirit of love which should ever obtain among brethren, and which beareth all things, believeth all things, hopeth all things, and endureth all things."

"In accordance with this decision, it was resolved: 1st. That the Rev. Messrs. Dreher and Moser, in obedience to the earnest and affectionate request of this Ministerium, and in the spirit of mutual forbearance, do make such acknowledgements as shall be mutually deemed satisfactory; and that, forgetting all past differences, they will endeavor to be more united for the future. The brethren who had so long been estranged, acceded to the terms of this proposition, and promised to cultivate more friendly sentiments towards each other. 2d. As certain doctrinal errors had been alleged against the Rev. G. Dreher, this gentleman consented, at the request of his ministerial brethren, to submit to an examination of his religious sentiments and views. And as the result of this examination, this Ministerium take pleasure in stating, that from Mr. Dreher's confession they found him sound in the faith, and deem it a duty they owe to their brother, to express their unanimous conviction, that there existed no sufficient grounds for the accusation of heterodoxy. 3d. As certain charges were made against the Rev. J. Moser, the ministerium examined the papers and documents relating to them, and as the results of this examination, this ministerium take pleasure in stating that the evidence is insufficient, and deem it a duty they owe to their brother to express their conviction that there existed no sufficient grounds for the

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accusation. *The report was received as satisfactory to the whole Synod." The report was adopted.

The next meeting of the Synod took place on Saturday the 14th of November, 1835. The constitution had been adopted at the previous meeting, by which the treasurer was required to be a layman. Mr. Dreher, who had been treasurer up to this time, was therefore ineligible. Nevertheless, it had been the habit of the Synod to refer the treasurer's accounts to a committee, at the first of each meeting; but Mr. Dreher was absent from this assemblage, and that business was consequently delayed. Besides, it was required by the constitution, founded upon a very early rule of the Synod, that every minister should attend its meetings, unless prevented by unavoidable necessity, and that voluntary ministerial engagements should not be reckoned as amounting to such necessity. If necessarily absent, he was required to send a written apology; and it was required of the President to enforce this rule, by calling the delinquent to account upon his first appearance, if such apology was not sent and accepted. Mr. Dreher did not make his appearance until Tuesday, the third day of the session, when, in conformity with this rule, he was called upon for the causes of his delay in attending the meeting; and stated he was prevented by an engagement to preach in one of his churches on the preceding Sunday. Of course, his excuse was not sustained. On the next day, it appears from the minutes, that a committee reported upon the accounts of Mr. Dreher as late treasurer; from which report it appeared that his accounts were duly vouched, and that the balance left in his hands in cash and securities, was $1,995.40¾ cents. Upon which he arose and acknowledged his grateful sense of the confidence so long reposed in him, and returned his thanks to the Synod for now relieving him from the burdensome duties of treasurer. The Synod voted thanks to him for his long and faithful performance of those duties. In the closing session, which took place the same evening, a proceeding took place which promised lasting harmony in the body. In the course of the year, it appears that Mr. Mealy, the President of the Synod, had visited Mr. Dreher, for the purpose of obviating certain feelings, which it

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was feared were *alienating him from his clerical brethren; and at this closing session, Mr. Dreher, at the request of his brethren, signed the following pledge:

"I solemnly pledge myself to co-operate with my clerical brethren, in the spirit of true friendship, in the future, in promoting peace and harmony in the churches.

Godfrey Dreher."

Here should have been a close of all litigation. The veil of oblivion should have been dropped over the past. How happy for themselves and for the church if this course had been adopted! On the second day of the next meeting of the Synod, which opened

its sessions at St. John's (Calk's road,) Saturday the 12th of November, 1836, upon the reading of the minutes of the last year, Mr. Dreher expressed dissatisfaction with them. He brought forward, however, no specific motion or proposition to alter the minutes, or otherwise to obviate the causes of his discontent. It does not appear that he even specified the grounds of his dissatisfaction. A desultory (and, as there was no motion before the house, of course unprofitable) discussion ensued, in the course of which, he desired to be exonerated from the pledge he had given at the previous meeting. The reasons for this request being demanded, he turned the attention of the Synod from one part of the minutes to another, demanding explanations. When these were given, he introduced for discussion a paper signed by several persons, the import of which is not to be gathered from the evidence before the Court. This vexatious and disorderly proceeding resulted in the following minute.

"Whereas, this Synod judges that it has given all necessary explanations to the requests and queries of the Rev'd. G. Dreher, and that further discussion on these matters is altogether unnecessary; and whereas, the Rev'd. Mr. Dreher manifests an apparent satisfaction with this Synod again; and moreover, to put to an entire rest this troublesome and mournful subject; therefore,

Resolved, That after all the investigation of the difficulties in the case of the Rev'd. G. Dreher, which has agitated this Synod for two successive meetings, and has been brought forward again at the present meet-

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ing, the Synod, *believing that it has given every necessary explanation on that subject, rejects the further consideration of this business, either at this or any succeeding meeting."

Shortly after the adjournment of the Synod, Mr. Dreher revived the charges against Mr. Moser which had been heard and decided at the session of 1834, and wrote to the President, insisting that an extra meeting should be called to try Mr. Moser upon them, in the face of the former decision; in the face of his own professions of satisfaction with that decision, made at the time; in the face of the mutual forgiveness which he and Mr. Moser had extended to each other, at the termination of that trial, in the presence of the whole ministerium; and in direct violation of his own most solemn pledge, given at the meeting of 1835. The request was, of course, refused.

With this refusal Mr. Dreher was much displeased. In April and May following, after he had paid a visit to North Carolina, a minister of the Synod commonly called the Henkelite Synod, which had been generally repudiated as an irregular and schismatical body, throughout the Lutheran Churches and Synods of the United States, paid a visit to the section in which Mr. Dreher's churches lay, and, with his permission, preached in his pulpits. He had himself assisted in the expulsion of these sectaries from the North Carolina Synod; and was well aware how dangerous and disagreeable their ministrations were considered by his brethren and by many in his own congregations. This conduct occasioned, as was to be expected, deep anxiety in the members of the Synod of South Carolina. Under the 6th section of the 5th chapter of the constitution of the Synod, according to their interpretation of it, a meeting was held, and resulted in the following firm but affectionate letter to Mr. Dreher, under date of the 11th of May, 1837.

"Rev'd. Dreher:

As a committee appointed by consent, at a meeting of clergy, on the day of the above date, to take into consideration the late movements in some of our churches, in the introduction of Mr. Miller, of North Carolina, a member of the Henkelite Synod, we now

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come forward in the spirit *of candor, to seek some information from you on the subject. We base the right of thus calling on you for satisfaction, on these grounds:

1. Because you have signed the constitution of our Synod, which is to govern us, so long as we are members of the body.

2. Because you pledged yourself to be at peace with us, in attending to the concerns of the churches.

3. Because you introduced this Henkelite preacher among the churches, knowing that he was of that order; an order created in opposition to the rest of the Southern Synods, and now disturbing the peace of our beloved church.

4. Because there are three ordained ministers of our body, who have heard Miller, and can testify that he held forth views which are in direct opposition to some of the fundamental doctrines which we hold as a body.

You will now understand, that we have reason to hold you responsible for the doctrines which Mr. Miller advanced in our churches; and have a right to believe that you sanction and further his views, until you deny them, or give us satisfaction that you do not. This committee believes that you will be ready to give us an answer on this subject, if you wish to be at a friendly understanding with us, and to continue a peaceful member of our Synod. We conclude, therefore, that in a week from this you will furnish us with your reply. We will not be satisfied with any thing less than a positive answer, yea or nay. We are ready to say, positively and unequivocally, that if you treat our friendly request with contempt, and give us no satisfactory reply, we will then inform the President of Synod of your course; and, as there are three ordained ministers ready to testify to the unsoundness

of Miller's doctrine, as we believe; and as the only fair presumption will be, that you hold the same views, you are to rest assured, that the way is fairly and constitutionally open for the President of Synod to proceed against you, according to said constitution, and dissolve your connexion with us, at least till next meeting of Synod. But before we close our communication, permit us, who would still be your friends and

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brethren, (but only on correct princi*ples,) to exhort you seriously to reflect what course you intend to pursue. Think, with us, of the church, of death, and of our accountability at the bar of God. We would say, further, by way of concession, if you would prefer to meet us in person to explain yourself, and to put to rest our doubts on the subject, to giving an answer in writing, mention to us the time and place, within two weeks from this date, and we will cheerfully meet you. We will hope for the best; and, in the meantime, pray our Father and Saviour to direct us. We are candid and sincere, and, therefore, expect the same in your reply. We remain yours, &c.

M. Rauch,
Geo. Haltiwanger,
J. C. Hope."

Mr. Dreher sent the following reply, dated the 16th of the same month, to Mr. Rauch, as chairman of the committee.

Mr. Chairman.—Your communication of the 11th instant, was handed to me by Mr. Joseph Wingard; to which I did not, at first, intend replying. But upon reflection, as it appears that matters are now drawing to a close, I have thought proper to give you, in answer, the following, which I trust will close the whole matter.

As it appears from the minutes of 1834, that I had to undergo an examination, I now insist upon Mr. Moser undergoing the same course in a short time. If not, you all will know, before the meeting of Synod, the reason of the Rev'd. Mr. Miller's preaching in my churches. You will admit Mr. Chairman, that it is nothing more than reasonable and right, that as I had to undergo an examination, that Mr. Moser be examined also. Unless this takes place in a short time, I can assure you, sir, that I will never attend another meeting of your Synod. As you have mentioned the time for the meeting, I accordingly agree to meet you and Mr. Moser, and the committee, at Lexington Court House, on Thursday, the 25th of May, at 10 o'clock.

I remain yours, G. Dreher.

Mr. Dreher must have written this letter

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under very *strange misconceptions. He seems to have labored under an impression, that great injustice was done him, in his having been urged to undergo an examination, as to his doctrinal sentiments, in 1834. Certainly, there may have been irregularity in the proceedings; but there is not a vestige of unkindness or oppression, but on the contrary, there are strong evidences of a most mild and forbearing spirit in what was done. He was charged with unsound opinions. No doubt he had a right to stand upon the defensive, and require proof that he had ever advanced the sentiments attributed to him. The Synod had no right, and there is no evidence that they claimed any, to compel him to discharge himself by an examination. But as it was very natural to suppose, that when a charge was formally made, an impression unfavorable to his usefulness and spiritual influence, might exist in some quarters of the church, it was a kind suggestion, that by submitting to an examination, such misconceptions might be dispelled. He seems to have taken the same view, and did submit, and produced the testimonials of the Synod, of their unanimous conviction, that he was sound in the faith. There is no mistaking the spirit of the whole transaction. There was an evident eagerness, on the part of his brethren, to silence all complaint against Mr. Dreher's orthodoxy, and to send him forth to the churches and to the world, with the sanction of their approving voice. If this course wounded Mr. Dreher's sensibilities, then was his time to have stood upon his strict right. He might have refused to be examined, and challenged the proof. But having yielded to the examination, and having expressed himself satisfied with the result, and with Mr. Moser, his accuser, he was bound, by a regard to his clerical character for consistency, and even by common candor and honor, to have remained, ever after, silent upon the subject. In yielding to the examination, instead of keeping up a fretful controversy upon the charge against him, it cannot be a question, in any candid mind, that he best consulted the interest of the churches under his charge; and he was greatly mistaken when he suffered himself to fall into a persuasion that he had done wrong, or that he had been made the victim of injustice. He seems to have been im-

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pressed with a notion, that equal *justice was not administered to himself and Mr. Moser; and that as he was examined, Mr. Moser should have been examined also. But the cases were not parallel. The charge against himself, was of false opinions. That against Mr. Moser, was for misconduct. The one might be cleared up by a confession of his faith, on the part of the accused. To the other, such a procedure was manifestly inapplicable. There was, also, this further consideration;—both cases had been disposed of. There was no attempt to revive the old charge against Mr. Dreher, and to subject him to be tried again upon it, either by proof

or by re-examination. Why, then, should he wish Mr. Moser to be subjected to an examination, which, if it related to the old charge, was doubly objectionable, not only because such could not be the appropriate evidence applicable to such a charge, but because it required that to be tried again, which had been once heard and decided? Even now, when he called for Mr. Moser's examination, he made no allegation of unsound doctrines against him; so that in no view that can be taken, could the Synod, or the committee, if it had yielded to his demand, have exonerated itself from oppression towards Mr. Moser, nor from the charge of having subjected him to a process, which, in such a case as his, had never been applied to Mr. Dreher. But the most surprising misconception of Mr. Dreher, remains to be noticed. He is called to explain why he introduced Mr. Miller into his pulpits; the implication is stated, that unexplained, this conduct would be regarded as evidence of his sympathy in Mr. Miller's doctrines. In answer, he demanded the examination, not of his own opinions, but of Mr. Moser's, as if his own accordance with Mr. Miller, would be proved or disproved by Mr. Moser's orthodoxy or heterodoxy.

At the time appointed, the committee met Mr. Dreher. The meeting proved unsatisfactory, and his conduct was reported to the President. That officer, under the 7th sec. chap. 5. of the synodical constitution, appointed a committee of neighboring clergymen, with the Rev'd. Dr. Hazelius as chairman, who met Mr. Dreher again, on the 26th of July, 1837. Certain written questions, transmitted by the President, were propound-

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ed to Mr. Dreher, for *the purpose of eliciting his reasons for his conduct; and he was informed, that if he assigned no satisfactory reasons, the President, by virtue of the constitutional authority vested in him, would be compelled to suspend him, until the succeeding meeting of the Synod. Mr. Dreher refused to answer the questions, unless it were first proved that Mr. Miller advanced erroneous doctrines in his churches. After calling for the reading of sundry papers, which were read accordingly, and calling for others, which not being present, were ordered to be furnished him, he renewed his old complaint, relative to his examination in 1834. The committee in vain endeavored to explain away his dissatisfaction; and at length, the following instrument was drawn up, agreed to and signed.

"The chairman of the committee, after stating that for several years repeated attempts had been made by Synod to settle the differences existing between it and the Rev. Mr. Dreher, but all proving ineffectual, called upon the Rev. Mr. Dreher to agree to a friendly separation, on the ground that we cannot agree in our views of doctrine and church affairs; to which the said gentleman consented.

Lexington C. H., July 26, 1837.

Ernest L. Hazelius,
Chairman of said Committee.
Godfrey Dreher."

Here we must drop Mr. Dreher, for a time, and return to St. Peter's Church. There was much discontent among a portion of this congregation, with Mr. Dreher, on account of his supposed leaning to the views of the Henkelites; but a large majority deemed these suspicions groundless. Still, there were some among those most attached to him, who declared that they could not go with him, if he broke with the Synod and went over to the Henkelites. There was a large party who preferred to be independent of all Synodical bodies, but still anxiously clung to the Lutheran name.

The Rev'd Herman Aull testifies, that on his way to the meeting of Mr. Dreher with the committee, in July, 1837, he conversed with Mr. Seas, one of the elders of St. Peter's who gave it as his opinion, that if Mr. Dre-

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her left *the Synod and went with the Henkelites, the church of St. Peter's would not go with him; and declared, for his own part, that he would not. On his return from that meeting, he fell in with the Rev'd. Mr. Hope, who had also attended it. Witness requested Mr. Hope to accompany him to Mr. Seas's; and they went together. At Mr. Seas's, a conversation took place about Mr. Dreher's withdrawal from the Synod; and Mr. Seas, retaining the sentiments formerly expressed by him, observed that, nevertheless, if the congregation turned off Mr. Dreher, he did not know where they could get a minister. Upon which, witness suggested, that perhaps Mr. Hope, who was a member of the Synod, might have a spare Sunday occasionally, on which he could preach to them. Mr. Aull advised Mr. Seas to ascertain how many of the congregation would adhere to the Synod. Mr. Hope testifies, that on his way home from the July meeting, at which Mr. Dreher agreed to separate from the Synod, he called, with Mr. Aull, upon Mr. Seas. The fact was mentioned that Mr. Dreher had withdrawn. In this conversation, an opinion was advanced, that the church building might be legally claimed by such portion of the congregation as should continue to adhere to the Synod; but no purpose of making such claim, or of attempting an exclusive possession, was expressed. Mr. Aull suggested, that witness might serve that portion who adhered, by preaching on Sundays when Mr. Dreher was not to preach. It should be noticed here, that Mr. Dreher having other churches besides St. Peter's, preached statedly in that church but one Sunday in each month. It was concluded that an application should be made to the elders, with a view to a friendly arrangement, by which

the Synodical party, as they were termed, should be allowed to introduce a minister on days which would not interfere with Mr. Dreher's appointments. It appears that this witness, the next day, saw Mr. Mayer, one of the elders, and informed him of the conclusion to which he, together with Mr. Aull and Mr. Seas, had come. After some preparatory arrangements, this gentleman made an appointment to preach some time in August.

He preached one or two Sundays in the church. A misunderstanding sprung up, and

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being debarred the use of *the building, he preached in the open air near the church. Then the church was opened again to his use, and that of the adherents of the Synod. During all this time, Mr. Dreher and his friends uninterruptedly met for worship on his stated days. The keys of the church were in the hands of that party. One of the elders, (Mr. Harmon,) adhered to the Synod. Mr. Seas and the other elders began to apprehend an invasion of their rights; and when, at length, the Synodical party, embracing Mr. Harmon, Mr. Bates, Mr. Hiller and others, by whose invitation Mr. Hope performed divine service at St. Peter's, entered into an election for elders, and organized themselves, the doors were peremptorily closed on them, the keys refused, and they were ejected from the use of the church, unless on Mr. Dreher's days, and under his ministrations. The bill charges in general terms, that the Synodical party, who are the plaintiffs in this cause, were excluded from the use of the church. The defendants, in their answer, give a full and very circumstantial statement of the different steps which led to this event; and as I have been, already, very prolix in the statement of this case, I must content myself with requesting that the brief of the pleadings be taken as a preliminary to this decree. It appears by the evidence, that the defendants did not actually exclude the plaintiffs from the use of the house at the outset, though they seem to have suspected, what it appears was not intended, that the plaintiffs might set up an exclusive claim. These suspicions increased, and the use of the house was refused. The doors were opened again; when the election of the new elders, aggravated, no doubt, by false rumors and the whisperings of busybodies, led the majority to the illiberal and unchristian procedure, of withholding from the plaintiffs the loan of the keys. This proceeding, I have no doubt, they themselves now regret; and it has led to this protracted and troublesome litigation. The first closing of the doors was in September, and the last, some time after December, 1837, and before the filing of this bill. In the mean time, and during the first closing of the doors, the Synod met. It assembled in Charleston the 11th of November, 1837. A commissioner appeared to lay before that body the complaints of the Synodical body of St. Peter's

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*Church. They were referred to a special committee. On the 15th of the month, the committee reported. The report is spread upon the minutes of the Synod, and remarkable for the clearness of its statements, the moderation of its tone, and the firmness, tempered by prudence, of its recommendations. After having "consulted, with great care, the records of the Synod, perused the correspondence between the presiding officer and Mr. Dreher, and examined such witnesses as would enable them to form a correct judgment of the causes of the existing difficulties," in the congregation of St. Peter's, the committee reported a compendious narrative of the dealings with Mr. Dreher, and recommended that he be declared, "no longer a minister of our church, that he is beyond the controul of our Synod, and that we are not responsible for his faith or conduct." With respect to the dissensions in the church, after stating the case of the complainants, and that they, the complainants, would be satisfied, "if permitted to occupy the church, and be ministered to by pastors of their choice, during such Sabbaths when the church is not occupied by the other party, they forming two separate congregations, but not interfering with each other, as they will worship on different Sabbaths;" and after noticing the closing of the doors against them, the committee states that it has taken legal counsel, and been advised that "if any portion of a corporation secede, and are even erected into a new corporation, the corporate property will not be transferred or distributed in consequence of the separation, but will remain with the old corporation." "Hence, it appears," says the committee, "that the property of these churches is forever vested in those who adhere to the faith of the Lutheran Church, as understood and received in this country; and your petitioners, who have never departed from our Lutheran faith, as understood and acknowledged by the formulas of the church in this country, have an undoubted right to the churches to which they are attached, and the property invested in them." "As, however," the committee proceeds, "we profess to be the followers of a religion of peace, a religion which teaches us to bear and forbear, and to exercise a spirit of meekness and long suffering, your committee respectfully recommend, that be-

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fore a *reference be had to the equitable laws of our land, the petitioners apply for the use of the church, on such Sabbaths as it may not be occupied by the other party. That in case the doors be closed against them, they make no illegal resistance, but endeavor to preserve a Christian temper, and endure their persecutions as He bore them whom we profess to serve. Should they, however,

be denied this privilege, your committee recommend that they keep a record of their proceedings, and lay the whole transactions before the Synod, for further action at its next meeting."

The report was unanimously agreed to. No doubt the application recommended to be made to the adverse party, for the occasional use of the church, was made; as we have some traces, in the answer, of such an application, shortly after the rising of the Synod. It led to the temporary opening of the church; but it was closed again as soon as the Synodical party proceeded to organize, as they must necessarily have done, as well for the purpose of discipline among themselves, as for the administration of the sacraments of the church, unless they would consent to receive them from Mr. Dreher; which they could not consistently do. The state of affairs was deplorable, a crisis in the condition of this once united congregation was fast approaching. Whether, upon the doors being finally closed against them, the Synodical party returned to the Synod, as directed, for its decision or advice, we have no evidence. But preparations seem to have been made by the other party for a coming contest, and a deed was executed, bearing date the 6th of February, 1839, from John Shealy, the surviving grantee of the church land, to "the Lutheran congregation of St. Peter, and their successors," by way of vesting the title in them; which deed was delivered to the defendants.

The present suit was instituted the 28th of April following, by Jacob Harmon, an elder, and others, the adherents to the Synod, against Mr. Dreher, and against Jacob Wheeler, Jacob Mayer, and John Seas, elders, and others of the other party. The pleadings disclose the case at issue. The bearing of the case, is to elicit a judgment, which of the parties is the true church of St. Peter's, as incorporated. Each party claims

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an exclusive right. I have *stated, I believe, every fact and circumstance put in evidence, which, in the conception of either party, has the remotest bearing on the case. I have stated far more than, in my own judgment, has a clear application, because I wish that the facts should be so set out as to open my decision in the fullest manner to examination and correction.

Mr. Dreher has put in a special plea in advance of his answer, in which he contends that he is not a member of the congregation, and therefore not implicated in the trial of their rights. But this plea cannot be sustained. It would be exceedingly strange, if the Pastor of a congregation was no member of it. Besides, if Mr. Dreher was a perfect stranger, but, as a confederate with the other defendants, stood as an impediment in the way of the plaintiffs, (supposing them to be the congregation,) he would be as liable to a decree as they.

The case must stand on the bill, answers, and the evidence; and these seem to raise the following questions: What is the effect of the separation of Mr. Dreher from the Synod, considered in reference to Mr. Dreher himself? What is the effect of that measure, and of the proceedings of the Synod, upon the corporation of St. Peter's?

Under each of these general questions, there are many subordinate topics to be considered. In stating this case, I have, in one or two instances, thrown out my impressions as to the correctness of the proceedings of the different parties. This was done solely with the hope that my suggestions, as to a reconciliation, might be embraced; in which case it might, I trusted, be of use to point out the grounds where, as I conceived, concessions should be made. But in deciding the case, I have no right to look into the morality of the proceedings. My province is to examine the facts, and apply the law to them, without regard to my own personal opinion of the justice of the case.

Then, in what condition did Mr. Dreher's separation from the Synod place him? The grounds upon which he was called to account by the President, in July, 1837, were for a contumacious and premeditated violation of his pledge, to act in harmony with his brethren of the Synod, in introducing into his

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pulpits Ministers whose doctrines *he had himself condemned, and which he knew to be abhorrent to his brethren, and to be repudiated by the general consent of the Synods and churches, and thus giving ground to suspect that he himself favored these doctrines. While these charges were under examination, he agreed with the committee to a friendly separation from the Synod. If this fact had been reported to the Synod, without more, and the report had been accepted and adopted, I do not perceive how the separation could have worked any ministerial disqualification upon Mr. Dreher. Certainly such a transaction could not have amounted to a conviction of either misconduct or heterodoxy. But by the constitution of the Synod, this agreement to separate, was an inchoate act. The committee, moreover, had, as a committee for the special purpose committed, to it, no power to agree, on behalf of the Synod, to the separation. The proceeding was to be reported to the Synod, for its examination and approval. It came before that body at the succeeding meeting, with this aggravation of the charge already existing, that Mr. Dreher, notwithstanding his separation from the Synod, had returned into one of the churches, which they regarded as under their supervision, and occasioned dissensions in the congregation. The Synod took the matter into con-

sideration, and expelled him from their body. He stands, therefore, convicted of the offences alleged against him, by the sentence of the spiritual body, of which he was a voluntary member, and whose proceedings he had bound himself to abide. It belongs not to the civil power to enter into or review the proceedings of a Spiritual Court. The structure of our government has, for the preservation of Civil Liberty, rescued the Temporal Institutions from religious interference. On the other hand, it has secured Religious liberty from the invasion of the Civil Authority. The judgments, therefore, of religious associations, bearing upon their own members, are not examinable here: and I am not to inquire whether the doctrines attributed to Mr. Dreher, were held by him, or whether, if held, they were anti-Lutheran; or whether his conduct was, or was not, in accordance with the duty he owed to the Synod, or to his denominations. I have stated the facts,

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and I have stated the judgment rendered *on the facts, and that judgment must be conclusive here. The effect of this judgment is not weakened by the general expressions in the constitution, and in the annual journals of the Synod, that the power of the body is merely advisory. In fact, in this country, no ecclesiastical body has any power to enforce its decisions by temporal sanctions. Such decisions are in this sense advisory—that they are addressed to the conscience of those who have voluntarily subjected themselves to their spiritual sway; and, except where civil rights are dependent upon them, can have no influence beyond the tribunal from which they emanate. Where a civil right depends upon an ecclesiastisal matter, it is the civil court, and not the ecclesiastical, which is to decide. The civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions, out of which the right arises, as it finds them. Just as ecclesiastical forums would be bound to regard the decisions of a temporal court, where a religious controversy springs out of it, and is to be decided by them. How idle the fears, therefore, of those who apprehended tyranny and oppression from ecclesiastical associations! They have, and can have, no power whatever to enforce their decisions; which are moreover of no effect except upon those who enter into them. Their power is only to cut off and disown intruders who come among them, but will not be content to obey them. But that the Synod here was armed with judicial authority for trying and determining cases against delinquent ministers and churches, notwithstanding the general expressions I have noticed, appears from the constitution itself, which is the rule for all who have acceded to it: and which expressly provides for such a procedure. Neither can this court look into the regularity of the process by which the Synod proceeded to its judgment. Every competent tribunal must of necessity regulate its own formulas. If the Synod proceeded to its final judgment in the absence of Mr. Dreher, it must be considered that by the constitution and the very nature of the case, the matter adjudicated was adjourned from the committee to the next annual session. He was bound to attend, and if he did not, he could not suppose that his voluntary absence was to arrest the cause.

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*Then, we are to consider what effect the exclusion of Mr. Dreher was to produce upon the congregation of St. Peter's. It has been argued, that this congregation was, at the time of that sentence, unconnected with the Synod, and was, therefore, not effected by it. But I have no doubt the congregation was in full connexion, and still continues in full connexion, with the Synod. I think it is impossible for any candid mind to survey the evidence and come to any other conclusion. The charter granted to the Church, incorporated it as a Lutheran Church. If, according to the usages of the Lutheran Church, the congregations were to stand free from all Synodical connexion, then this congregation might at one time have set up some claim to independency. But the testimony leaves no doubt that there is no such thing known to Lutherans as independency. Their ministers are not, and never have been, congregationally appointed or ordained. They are received by the Churches under an Ordination at the hands of associated Ministers. The evidence, corroborated by the history of the denomination, is that church government among the Lutherans relates,—1st. To individual Churches. 2d. To general bodies of associated Churches. 1. With respect to the first, there is one practice of general prevalence in all quarters of the world; these churches have councils, consisting of officers of various names, chosen by the congregation, who, in connexion with their Pastor, form the government of the particular congregations. Lutheran congregations in no part of the world, (this is in evidence) are ever entirely independent of some controlling body. There are a few, a very few, anomalous exceptions in this country. But even here, the minister of such church is acknowledged by some Synod, as in good standing. Congregations who, in connexion with their Minister, are not acknowledged by some Synod, are not regarded, (whatever they may call themselves,) either by Lutherans or others well informed in sectarian distinctions, as Lutherans, or as having any status in that denomination. 2. Church government, in regard to general bodies, has three distinctions, according to general usage among Lutherans. It is either, 1st. Episcopal: as in Sweden, Norway, Denmark. 2d. Territorial: which prevails wherever the

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Civil Government *is Protestant, and interferes with Ecclesiastical affairs. In this system, there are two Presidents in the Consistorium or Synod; the first is appointed by the Civil power, from the legal profession, with rank equal to a Bishop: the second is a Clergyman. 3. The third system is the Collegiate, and prevails in countries not under Protestant rule, and where the Civil Government does not interfere with Ecclesiastical matters. It prevails here in the United States. Under this system, ministers and lay delegates meet to transact the business of the churches. A connexion of one or the other kind is, according to the testimony, referring also to standard authorities and usages of the denomination, an essential feature in Lutheranism. The characteristic of the denomination does not consist alone in the adoption of the Augustine Confession, (for that is the confession of other denominations, as for instance, the Moravians,) but also in the practice, usages and discipline of the church. The history of the denomination in the United States has been given in confirmation of this view. In the early settlements, when the ministers and churches were few and dispersed, and, of course, where correspondence was inconvenient, churches necessarily waited until opportunities for associations sprung up. But Synods were uniformly formed, and congregations came into them as soon as circumstances would allow. It is represented by the evidence, that a Lutheran Church ex vi nominis, implies one which does not claim independency, but under convenient circumstances, acknowledges Synodical authority; just as when we speak of an Episcopal Church, we are understood to refer to one acknowledging a Diocesan Bishop; or when we speak of a Roman Catholic Church, we intend one under Papal rule. If this be the import of the charter incorporating St. Peter's as a Lutheran Church, it would be a fraud upon those who have contributed to it, and those who have entered it as such, for any majority in that congregation, however numerous, to pervert the charter and convert it into a Congregational Church.

It has been argued that the majority of the congregation should govern; and that it would be a violation of liberty to deny a controlling influence to their determinations. If

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*this were a Congregational Church, this might be true. But why? Because, if the congregation had been so incorporated, it would be according to the very terms of the association that the majority should govern. But if the incorporation of the church as a Lutheran Church, imports what has been stated in evidence, it would be a breach of all liberty as well as of faith, that the majority should impose a new contract upon the minority. Suppose a majority should next year spring up in favor of the Roman Catholic or Mohammedan Religion, and introduce auricular confession and indulgences, or the Koran, into this congregation, would not these defendants, however small a minority they might form, see and feel that their liberties were trampled on, by so gross a violation of the contract of association contained in their charter? The truth is, that liberty is violated wherever contracts are infringed; as much where the infringement consists in the provision of a charter, as where a majority of mercantile co-partners choose to make their will, and not their articles, the rule of their conduct; as much where the charter is to a Religious body, as where it is to a Civil corporation.

The character of this corporation is, therefore, to be determined by the terms of the charter. The body created is a Lutheran Church. We have seen by the evidence what that means.

There is reason to suppose that the congregation, so far from being intended to be an independent body, was incorporated with a special intent to be connected with a Synodical body.

Mr. Wallern, their first minister, was a member of the Ecclesiastical Union, formed in 1788. That body, which did not expire until about the time St. Peter's and St. John's were incorporated, was to govern the churches under its charge in general matters, but the Churches themselves were to retain their denominational character, and each was to be governed in affairs of a more domestic nature, by by-laws of its own formation.

The probability is, that these two churches were incorporated as Lutheran Churches, with a view to a connexion with this general

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directory. This may serve to explain *what is meant by the phrase "according to the Rules, Orders and Constitution to be formed," which occurs in the charter; meaning the system of congregational rules allowed to the Churches under the care of the general consistory. When this Synodical body fell through, I suppose they lapsed, (St. Peter's among the rest,) into their respective denominational characters. Those that were Lutheran continued Lutheran, and those which were Calvinistic remained Calvinistic. But neither party seems to have had opportunities for forming Synods, for want of a sufficient number of ministers. Finding themselves, at their incorporation, in this segregated condition, it was very natural for the bulk of the congregation of St. Peter's, who knew nothing of the previous Synod, (which was not in fact a Lutheran Synod, but a mere convention of two distinct denominations,) to suppose that they were an independent church; especially when this state of things continued through the long, and to the Church, gloomy period of thirty years, from 1794, to 1824, when the Synod of South Carolina was formed. It was very natural that

many among them should still retain that opinion from the mere constancy of mind, and aversion to discard sentiments become habitual, with which a wise Providence has endowed men, for beneficent purposes. But the facts of the case shew incontestibly, that St. Peter's Church fell into the usages of the denomination, and acceded to the Synod formed in 1824.

From the publication of the minutes of that body among them, from the annual meetings which took place all around them, some of which most of them had an opportunity of personally attending, from the appointment of delegates with their consent, in the face of the Church, they must have known of the existence of the body and of its proceedings. They sent contributions punctually. They petitioned the body on the subject of their pastoral appointments; and they sent delegates to take part in the deliberations and votes of the Synod. It would be uncharitable to suppose that they sent their deputies to interfere with and control the affairs of other churches; which would have been an offence of no ordinary magnitude in those so fondly attached to their own independence and so

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jealous *of foreign control. The evidence is too conclusive to be doubted, that they did accede, and intentionally acceded, to the Synod.

And as to the objections now made by them to the constitution and forms of procedure of that body, it is too late to raise them. They had full knowledge, through their representatives, of the regulations proposed. Full time was allowed for deliberation. They had full opportunities to be heard, and to cast their votes against any thing objectionable in them: and they must be bound by the result. But surely there must be great misapprehension in their minds respecting the powers of the Synod under its organization; and I feel very sure, that upon a due consideration of their objections, they will become satisfied that their apprehensions are entirely unfounded.

So far, I see no difficulty in the way of the plaintiffs. But here I encounter impediments of a very serious nature.

The legal position is, I think, well established, that before corporators can forfeit their membership, they must be proved to have seceded from the corporation of which they are members. If a portion secede, and the rest, however small their number, adhere, the adherents, by their fidelity, secure their corporate existence, and are entitled to all the privileges and property of the corporation.

I suppose it would be correct, too, to say, that if a portion of corporators are guilty of such misconduct towards a body on which the corporation depends, as tends to forfeit the connexion, while another portion still acknowledges the connexion, and fulfils its duties, the faithful party will be entitled to stand for the corporation, and claim such remedies as may be necessary to avert the forfeiture.

In this case, if the defendants have seceded from the Synod, the plaintiffs, who clearly have not seceded, would perpetuate the Church in their own persons, to the exclusion of those who have declined from the duties of the corporation. This is the case which the plaintiffs have undertaken to make out. Have they succeeded? By the constitution of the Synod, when a minister is excluded, it is the duty of the Synod to give official notice of the fact to any congregation who retains him as a Pastor, and forbid

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*them from employing him; and if the congregation disobeys the injunction, then the Synod shall cut it off. I suppose, too, they may exercise this right in part; that is, that they may exscind such portion of the congregation as disobeys their injunction, acknowledging connexion with the rest. Now, when Mr. Dreher agreed to separate from the Synod in July, 1837, let it be granted that he stood upon the ground of a minister convicted of offences, yet no notice emanated from the Synod, such as the constitution requires, forbidding the people of St. Peter's from further attendance upon his ministrations. Mr. Hope went to the church, and the majority of the Church refused to receive him. But he carried no authority from the Synod; and it was the undoubted right of the congregation, unless directed otherwise by the Synod, to determine whom, among the regular ministers, they would receive for their pastor. In November, the Synod convicted and excinded Mr. Dreher, but still the notice required does not appear to have been given. It directed the adhering party how to proceed. In these directions, so far from forbidding Mr. Dreher from continuing to officiate in the church, the Synod, (clearly from the most praiseworthy motives of forbearance,) recommended an arrangement by which he was to be retained by the defendants. In the case which has occurred, of the plaintiffs' being refused the use of the church, the injunction of the Synod was, that they should report the circumstances to that body, in order that it might, upon a view of them, determine what was proper to be done. This reservation of authority to give further directions, was very prudent, because, under it, the Synod might have proceeded to give the congregation the notice required by the constitution, and if its orders were disobeyed, it might have gone on to excind the delinquent parties, by name, and to have perfected the organization of the adhering party, and declared them to be the true Church. But this has not been done. Upon the closing of the doors, this suit was instituted; while, as yet, no command of the Synod had been disobeyed by the congregation.

I cannot declare the defendants to have se-

ceded from the Synod; because it does not appear that if the Synod had given them the notice required, or had accompanied or

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*followed that notice with specific mandates, they would not have obeyed, as was their duty.

It is decreed that the bill be dismissed, but without costs.

From this decree the complainants appealed, and moved to reform the same, upon the following grounds.

1. Because the defendants do not acknowledge the authority of the Synod, and the complainants, who acknowledge that authority, are entitled to perpetuate the Church in their own persons, to the exclusion of those who have rejected that authority.

2. Because the complainants are Lutherans, whereas the defendants are not Lutherans, either in form or substance; or if they ever were Lutherans have forfeited their status.

3. Because, on the 26th July, 1837, the Rev'd Mr. Dreher signed a paper, declaring that he did not agree with the Synod in their views of doctrine and church affairs.

4. Because, at the meeting succeeding the 26th July, 1837, the Synod expelled the Rev'd Mr. Dreher.

5. Because, after this expulsion, the defendants received Mr. Dreher into the church, and attended his stated ministrations.

6. Because congregations, who in connection with their Minister, are not acknowledged by some Synod, are not regarded as Lutherans, or as having any status in that denomination.

7. Because the defendants, by their answer, admit that, warned by Mr. Wallern, they have always rejected government by Synods; and thus they disdain the authority of the Synod, and are not, therefore, a Lutheran Church in the sense contemplated by the Act of Incorporation.

8. Because it is satisfactorily established by the proof, that Mr. Dreher was formerly a member of the Synod, and acknowledged its authority; that the other defendants were represented in the Synod, by the said Godfrey Dreher, and by Lay Delegates, with their consent, and acknowledged their connection with the Synod, and the authority thereof; and it is equally well established by the proof, that the said Godfrey Dreher

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and the defendants, *have seceded, and are no longer members of the Lutheran Church.

9. Because it was clearly proved that defendants prohibited complainants from attending public worship in said building, conducted by a Minister of the Lutheran Church.

10. Because it was clearly proved, that defendants refused to allow complainants to attend public worship in said building, unless when conducted by said Godfrey Dreher, or some other Minister not belonging to the Lutheran Church.

James J. Caldwell, for defendants, and against the motion to reform the decree. The complainants claim one hundred and twelve acres of land and the building thereon, belonging to "the Lutheran Congregation of St. Peter," as the regular members of that congregation, and of the Lutheran Church, and pray for peaceable possession, and that defendants may be prohibited and restrained from the privilege and use thereof.

This congregation was incorporated in 1794, 8 Stat. of S. C., 187, and the evidence established that some of the original members of the corporation belonged to the Presbyterian Church; there was then no Synod in South Carolina.

The charter prescribed the quallfications of the corporators; but a church may be composed of white men, femes covert, infants, free persons of color and slaves; but becoming communicants, would not make them, ipso facto, members of the corporation. In this bi-formed organization, it is important to distinguish between ecclesiastical and corporate rights; and it is not a paradox to infer that a corporator might be disfranchised by law and yet remain in the Church, or that it might excommunicate a member who might still be entitled to exercise the right of a corporator, as these privileges are not inseparable, or identical.

The congregation was an integral corporation when chartered; a synod was not an indispensable ingredient in its creation, and was neither contemplated by its charter, or necessary to its practical operation.

Franchises granted to private corporations become vested rights, of which they cannot be divested, except by the consent of the corporation, or by a forfeiture declared by the proper tribunal. Dartmouth College v. Wood-

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ward, 4 Wheat. Rep. 518. *Smith et al. v. Smith et al. 3 Equity Rep. 576. In this charter there is no provision for alterations, nor has any corporate act of the congregation authorized any alteration. We have no statute similar to the Act of 1791 of Pennsylvania, vesting literary, charitable, and religious associations with the power of self incorporation, and of adopting amendments to their charters. St. Mary's Church, 7 Sergt. and Rawle Rep. 517.

The Act of 1825 incorporating "The Lutheran Synod of South Carolina, Georgia, and the adjoining States," which by its constitution adopted the name of "the Evangelical Lutheran Synod and Ministerium of South Carolina and adjacent States," neither engrafts it on the Lutheran congregation of St. Peter, nor transfers the corporate rights of the latter to the former, and no such construction can be implied from the charter.

If every member of this corporation were individually to agree to transfer the control

of the corporate property to the Synod or to any other body, it would not be the assent of the corporation—there must be a corporate act. Angel and Ames on Corp. 149, 168.

The land was granted to certain persons, in trust, for the use of the incorporated Church of St. Peter, and to their successors, trustees of the said church; such property could not be legally conveyed without a deed, and one declaring any other use would be void, as there was a trust to be executed as well as a use to be enjoyed.

There has certainly been no merger of the rights of the Lutheran congregation of St. Peter in the Synod; nor can they, as corporate bodies, exercise concurrent control over the same property, as partners, Ib. 57. Sharon Canal Company v. Fulton Bank, 7 Wend. R. 412.

The Synod has no power to try the members of this church for heresy or misconduct, much less has it any power over the corporation.

"We acknowledge but one judicatory (says the Discipline, page 75) in the church, viz: the church council, with the pastor, the jurisdiction of which body does not extend beyond the limits of the respective congregations. Our Synod, as well as the general Synod, are advisory bodies, with this reservation, that our Synod, as every other society or association, has jurisdiction, or judicial powers, over its own clergy, according to the adopted Synodical constitution." See also Ib. 106.

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*The church council is to administer the discipline of the church on all those whose conduct is inconsistent with their christian profession, and who entertain fundamental errors. Ib. 83.

The mode of trying members, and the punishment prescribed. Ib.

There is no appeal to the Synod, unless both parties agree to constitute it the arbitrary power. Ib. 84. Sec. 11. But a sentence remains in force until reviewed and altered by the church council, through the advisory recommendations of the Synod. If a congregation refuse to bear part of the expenses and services necessary, it shall not be entitled to a representation in the Synod, but it is not liable to any other penalty. Ib. 116, 117.

The government or power of the church is purely spiritual; hence it follows that all the regulations concerning the temporalities of a congregation, are left to the management of each corporation, by law empowered to do so, without any interference of the discipline. Ib. 93.

It follows as an irresistible inference, that the Synod has no power either ecclesiastical or corporate to excommunicate the members of this congregation, or to divest them of their corporate rights.

But defendants are charged with having seceded from the Lutheran Church; this they deny in their answer and avow their belief in the Augsburg Confession, in reference to which the most liberal construction has been extended. Discipline, 22.

A mere discussion, or even a difference, about doctrinal points, cannot constitute secession. The defendants have not adopted new articles of faith, or abandoned the ancient landmarks of Lutheranism, which they have preserved in their purity.

Defendants have not been cited to appear before any ecclesiastical tribunal, nor have they been tried, or excinded from the congregation. Notice to, and proceedings against, the accused, are necessary before expulsion. Commonwealth v. Penn. Beneficial Institution. 2 Sergt. and R. Rep. 141; Angel and A. 354.

Defendants have not forfeited their corporate rights. Corporate powers that have been abused or abandoned, cannot be taken away but by regular process. The forfeiture of a charter can be enforced in a court of Law only, for though a court of Chancery may hold trustees accountable for abuse of a trust, it cannot divest it of its corporate character and capacity. Slee v. Bloom, 5 John. Chan. R. 379; Angel and A. 665.

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Charitable *institutions do not form an exception. Atty. Gen. v. The Utica Ins. Comp. 2 John. Chan. Rep. 384; the case of Atty. Genl. v. Pearson, 3 Meriv. Rep. 352, was under the 43d Eliz. chap. 4, (relative to charitable uses) which is not of force in this State.

There is no prayer in the bill for such a discovery, that can sustain the jurisdiction of this court.

The case cannot be considered as a bill of peace, which is resorted to in two cases: 1, when one person claims or defends a right against many, or where many claim or defend against one; 2, where ejectments have been repeatedly brought for the same real property, by a party out of possession, against whom a verdict is not conclusive as a bar to a subsequent suit; but in these cases, the general right will be ascertained, if it be necessary, by an action or issue at law, and then the court will make a final decree binding upon all the parties.

If the plaintiff does not establish his right at law, and the right he claims has not the sanction of long possession, and he has any means of trying the matter at law, a demurrer will hold. 2 Story's Equity Juris. 175; Mitf. Eq. P. 145; Jeremy's Eq. Juris. 344.

The Writ of Mandamus is the remedy to restore a member or trustee of a corporation to his rights. Green v. The African Meth. Epis. Society, 1 Sergt. and R. Rep. 254; Angel and A. 568.

But the complainants cannot avail themselves of any remedy until they are injured,

or have been deprived of some right; the mere refusal of the defendants to permit a minister to preach in the church, or their preventing a meagre minority of the members from having an illegal election of a separate set of elders, was neither incompatible with the charter or by-laws; and no court has the right to control the majority, unless they exceed these limitations of their power.

As a grant of incorporation cannot take effect without the consent of a majority of those intended to be incorporated, the business of the corporation must, of course, proceed upon the same principle. Angel and A. 51, 52, 53.

"Corporations are subject to the emphatically republican principle (supposing the charter to be silent) that the whole are bound by the acts of the majority, when these acts are conformable to the articles of the constitution." Angel and A. 396.

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*The abandonment of this rule, where there is no directory in the government of corporations, would produce in almost every corporate body instant dissolution.

This principle has been so permanently settled, and has been so far extended, that "if a religious society purchase lands, a majority of them have a right to control their use and occupation, notwithstanding any supposed error in doctrine, shown to be a departure from the belief of the majority at the time of the purchase." Keyser et al. v. Stanisfer et al. 6 Ohio Rep. 363.

In Rex v. Beesher, 3 Term Repts. 492, a statute had authorized the church wardens and overseers of the poor to make certain contracts; all joined but one of the overseers, who refused to join, and made a contract, and the money was in defendant's hands to be paid upon it: on a motion for a mandamus to compel him to pay, he insisted that he was not bound, inasmuch as the statute required the contract to be made by the church wardens and overseers, without saying, or a majority; and that, therefore, they should all concur, and that as he dissented, the contract was void; but the motion was granted.

The difficulty in applying an appropriate remedy to control a majority is admitted, and the failure to produce any precedent, is not merely an admonition of the caution that should be exercised in attempting it, but a strong argument against its practicability.

One of the great objects in adopting a constitution or by-laws, by any society, is to restrain the powers of a majority, and the security of the rights of the minority consists in the wisdom of these provisions; when these are violated, the court of law furnishes an adequate remedy.

"So far as a member's rights, duties and obligations as a corporator are concerned, he is bound by the acts of a majority." Stetson v. Kempton et al. 13 Mass. R. 282.

The case of the Baptist Church in Hartford v. Witherall, 3 Paige's Chan. Rep. 296, is not only analogous to, but almost identical with, the one under consideration; it was held in that case, that a church judicatory cannot remove a clergyman from his situation as a minister of a congregation without the consent of a majority of the members of the congregation, or of those legally constituted trustees, if the society is incorporated; and it seems the Court of Chancery will not interfere to prevent the trustees of a religious society from employing a particular

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indi*vidual as their clergyman, although his religious tenets should be at variance with those of the original founders of the society, and from whom its temporalities were derived. The legal tribunals of the State have no jurisdiction over the Church or the members thereof as such; and the ecclesiastical judicatories are not authorized to interfere with the temporalities of a religious society.

J. Gregg, for complainants.

PER CURIAM. The Court is satisfied with the circuit decree, which is affirmed, for the reasons therein given; and it is ordered that the appeal be dismissed.

HARPER, Ch. I concur in the result, but for different reasons.

Speers, Eq. 134

PETER REDHEIMER et al. ads. ANDREW J. PYRON et al.

(Columbia. May Term, 1843.)

1. C. S. and wife, by deed of the 8th October, 1829, in consideration of natural love and affection for their children, bargained and sold to one P. R., amongst other things, certain slaves with the future issue and increase of the females, in trust, that C. S. and wife, and the survivor of them, should have and use the slaves for life; and after the death of the survivor for the use of their children, absolutely discharged from all further trust; and it was covenanted that the trustee, at the joint request of the husband and wife, or of the survivor of them, should sell and dispose of any of the property conveyed, and invest in other property, subject to the operation of all the trusts and uses expressed and declared in the deed. The wife died on the 26th October, 1836, and on the 29th of the same month and year, C. S., by deed of that date, released to the trustee all the interest he had in the property in the deed above mentioned, and requested the trustee to sell the said property and invest the nett proceeds (after payment of certain debts that he had contracted, and the funeral expenses of his wife,) in other property that might be more for the benefit of said children, and in trust, that

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he would have *them educated out of the interest and income, if possible, if not, to apply so much of the share of each to that purpose, as might be necessary.

2. Under this deed the trustee, before the death of C. S., sold certain of the slaves, paid the funeral expenses of the wife, besides certain debts and expenses of C. S.

[3. *Trusts* ⇐191.]

The trust expressed, that the trustee shall sell and dispose of the property at the joint request of the husband and wife, or at the request of the survivor; *held* not to mean that the trustee shall carry into effect any particular contract of sale which the husband and wife should indicate, but that upon the previous request of the husband and wife, or of the survivor, the trustee should make such sale as should seem to himself advisable.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243; Dec. Dig. ⇐191.]

[4. *Judgment* ⇐645.]

The Court of Law [Pyron v. Mood] 2 McMullan, 281, having decided that the title of the purchaser to the slaves sold by the trustee was good at law, both on the ground of his legal title and power to sell; *held*, that this decision must prevail.[1]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1158; Dec. Dig. ⇐645.]

[5. *Trusts* ⇐203.]

If the trustee sold in pursuance of his power, the title of the purchaser could not be affected, or the slaves directed to be specifically given up, although he may have sold with the intention to dispose of the money in violation of his trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 273–276; Dec. Dig. ⇐203.]

[6. *Trusts* ⇐202.]

It would seem that the only question to affect the purchaser in such case, would be, whether he was bound to see to the application of the purchase money; and in general our Courts have held that purchasers are not so bound. 2 Des. 375.[2]

[Ed. Note.—Cited in Jones v. Hudson, 23 S. C. 500; Webb v. Chisolm, 24 S. C. 491; Campbell v. Virginia-Carolina Chemical Co., 68 S. C. 445, 47 S. E. 716.

For other cases, see Trusts, Cent. Dig. § 272; Dec. Dig. ⇐202.]

7. The trustee being accountable for the fund in his hands, and his account being before the Master, the question whether he should be allowed for paying the debts of the tenant for life, and the funeral expenses of his wife, to await the coming in of the Report; the complainants at the same time having leave to make the question, whether if the purchasers knew that the trustee intended to misapply the money, and paid it to him with that knowledge, they might not, in the event of his insolvency, be compelled to make good any deficiency of the fund.

Before Johnson, Ch., at Charleston, February Term, 1843.

Johnson, Ch. The late Charles Simons, and his wife Rachel, also deceased, by deed bearing date the 8th day of Oct. 1829, a copy

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of which is exhibited with the complain*ant's bill, in consideration of natural love and affection for the complainant, Sarah M. C. Pyron, and the minors, their children, bargained and sold to the defendant, Peter Redheimer, amongst other things, certain slaves therein mentioned, with the future issue and increase of the females; in trust, that the said Charles Simons, and his wife Rachel, and the survivor of them, should have and use the said slaves for life; and after the death of the survivor, in trust, for the use of the complainants, their children, absolutely discharged of all further trust; and it was covenanted by the said deed, "that at any time, when it shall appear beneficial, or for the interest of the said Charles and Rachel, to sell and dispose of any of the above mentioned property, that he, the said Peter Redheimer, will sell and dispose of the same at their joint request, or at the request of the survivor of them, and vest the same in other property, which shall be immediately subject to the operation of all the trusts and uses expressed and declared in this indenture."

Rachel Simons, the wife, died on the 26th October, 1836, and on the 29th day of the same month of October, 1836, Charles Simons, by deed bearing that date, releases to the defendant, Peter Redheimer, all the interest he had in the slaves, and other property referred to in the deed above mentioned, and also a slave called Bill, stated to have been purchased with the proceeds of the sales of the life estates of the said Charles Simons and his wife Rachel, of two of the slaves mentioned in the said deed, made with their consent, for the uses and trusts expressed in the said deed first above referred to. The deed then goes on to recite that, "whereas the said Charles Simons had contracted certain debts to the amount of about $300, which he requires to be paid by the said Peter Redheimer, trustee as aforesaid, out of the proceeds of the said estate; and the said Peter Redheimer undertakes the said payments, on the terms of the deed being fully complied with; and whereas, most of the said negroes are young and unable to work, producing no revenue to the estate, this conveyance is therefore made to the said Peter Redheimer, that he will sell any or all the said negroes at the best market price, and invest the nett proceeds (after paying the said debts and

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*the funeral and other expenses of the said Rachel Simons,) in other property that will be more for the benefit of the said children; and in trust, that he, the said Peter Redheimer, will take the said children in charge, and have them educated, as far as possible, out of the income or revenue arising from the said trust estate; but should it become necessary for the said trustee to take a part, or all, of the said capital for paying the maintenance, education, and other expenses of the said children, he is hereby enjoined, and it is the true intent and meaning of these presents, that he, the said trustee, shall not

[1] See on this subject the cases collected per O'Neall, J., at the above reference, and copies of the deeds.

[2] Lining v. Peyton and others, and cases collected and commented on by the learned Reporter.

pay away for or on account of any one of the heirs, more than his or her dividend of said principal; and in trust, that the said Peter Redheimer shall use all due economy in the management of the said estate, and cause to be educated and maintained each of the said minors, according to the best of his judgment, and agreeably to the means placed in his hands for that purpose." Charles Simons died on the 9th day of November, 1836, a few days after the execution of the deed. The bill charges that the slaves mentioned in the deed of the 8th of October, 1829, are the complainant's, and the prayer is, that they may be decreed to be delivered to the complainant, and for general relief. The defendant, Peter Redheimer, states in his answer, that under the authority vested in him by Charles Simons's deed of the 29th October, 1836, he sold the slave Billy, on the 1st November; and on the 7th, he sold five others, through the agency of a factor, for the nett sum of $1,894.21, out of which he paid the funeral expenses of Rachel Simons, and certain other debts and expenses of Charles Simons, amounting in all to $376.90, leaving a balance of $1,517.31 in hands, for which he is ready to account. He further states, that Polly, one of the slaves named in the deed of the 8th Oct. 1829, is now in the possession of Mr. Thompson, the solicitor of the complainant, and prays that it may be required by what authority he holds her. The defendant, E. M. Mood, states in his answer, that in the sale referred to in the answer of Peter Redheimer, he purchased five of the slaves mentioned in the deed of the 8th of October, 1829, viz: Hannah, John, Jim, Sally,

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and Robert; and that he *afterwards sold four of them, Hannah, John, Sally, and Robert, to his co-defendant, F. C. Blum, and that he did this relying on the authority given to his co-defendant, Peter Redheimer, by the deeds before referred to. The defendant, F. C. Blum, admits in his answer that he has purchased of his co-defendant, E. M. Mood, the negroes named in his answer, believing that his other co-defendant, Peter Redheimer, had the right and authority to sell them, under the said deeds of the 8th Oct. 1829, and the 29th Oct. 1836.

The bill contains various other charges and allegations, which have been answered and denied by the defendants, and have not been supported by the evidence. It is unnecessary, therefore, to state them, especially as they are wholly irrelevant to the only question raised on the argument, and that is, whether the authority given by Charles Simons to Peter Redheimer, to sell the slaves, by the deed, on the 29th October, 1836, is in pursuance of the power reserved in the deed of the 8th Oct. 1829. The American people have been so long and so fully indoctrinated with the principle that all special powers must be strictly pursued, that it would now be something like treason to question its correctness. It is founded on good sense and sound reasoning, and commands the assent of all who have the capacity, and give themselves the trouble, of thinking of it. If it be correct in politics, it is equally so in law, for the proof of which a few examples will suffice. In Bateman v. Davis, 3 Mad. 98, the trustees of a marriage settlement were authorized by the settlement, with the consent of the wife, in writing, to sell the estate, to raise a sum of money for the husband. They did raise the sum without the written assent of the wife, but the wife subsequently gave her consent in writing, declaring that the sale had been made with her full consent; and it was held that the sale was void, because the consent of the wife had not preceded it. So where power was given to trustees to sell to raise money, to supply the deficiency of the personal estate, to pay debts, it was held that the power would not authorize the sale, unless there was an actual deficiency, and then only so much of the

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estate could be sold as was necessary *to supply the deficiency. Sugd. on Powers, 265. So in Doe. Ex. Dem. Willis v. Martin, 4 D. and E. 39, where the deed contained a power enabling the settlers to revoke the uses of the settlement, and the trustees to sell the estate, so as the purchase money should be paid to the trustees, and not the settlers, and to invest it in other lands to the same uses—the settlers revoked the settlement, but the purchase money was paid to them, and not to the trustees; and it was said that the power of revocation was conditional; and as the condition, the payment of the money to the trustees, had not been performed, the revocation was a nullity. Now all the interest which Charles Simons had in the property settled here, was divested by the deed of the 8th Oct. 1829, except what is expressly and specially reserved in the deed. The rights reserved are for the joint use of himself and wife for life, and of the survivor for life, and the power of assenting to the sale by the trustee, to be by him vested in other property, which shall be immediately subject to all the trusts and uses therein expressed and declared. In either case, the remainder is limited over to the children absolutely.

If I am right in supposing that these powers are special and must be strictly pursued, Charles Simons had no authority to create new trusts, or to vary in the least those created by this deed, and all acts done by the trustee in pursuance of other powers derived from him, are a nullity.

What are the powers conferred on the trustee, by Charles Simons's deed of the 29th Oct. 1836? The authority to sell is in conformity to the former deed. But new trusts are created, and other powers conferred. He is to pay out of the proceeds the debts of Charles Simons, and the funeral and other

expenses of Rachel Simons, and if it should become necessary, he is to expend the whole capital in the maintenance and education of the children. There are conditions annexed to the authority to sell, and if he fails in the performance of any of them, he violates the trusts created by this deed, and if he performs them, he violates the trusts created by the deed of the 8th October, 1829, which directs, in the event of the sale, the proceeds should be invested in other prop-

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erty, the corpus of which *was to go over in remainder to the children. All the powers of both Charles Simons and the defendant, Peter Redheimer, having been derived from this deed, and the sale having been made for purposes and trusts foreign to it, is void.

I have felt some difficulty in determining what order to make. If a money decree, according to the report of the Master, there is no one entitled to receive it for the minor complainants, and if a decree for the surrender of the negroes, there is no one to receive their portion. I have, therefore, concluded to retain the case until guardians shall be appointed for them; and it is ordered that one of the Masters shall inquire and report whether any, and what, suitable person will accept the appointment of guardian of the said minor complainants.

Defendants appealed from the decree of the Chancellor, on the following grounds:

1. That his Honor erred in decreeing that Peter Redheimer was not authorised to sell the negroes, under the deed of 29th of October, 1836; and in deciding that the said sale was not in pursuance of the power reserved in the deed of the 8th October, 1829.

2. That his Honor erred in decreeing that Peter Redheimer in any way transcended the power reposed in him, under the first deed, or that he or Charles Simons in any way transcended their powers under the two deeds.

3. That his Honor, in decreeing that Peter Redheimer had not a power to sell under the deed of 1836, has reversed the unanimous decision of the Law Court of Appeals made between the same parties.

4. That his Honor's decree was, in other respects, contrary to the law and facts of the case.

Curia, per HARPER, Ch. There is, perhaps, some difference between the present case and those in which the trustee is authorized to sell with the assent of the cestui que trust, or by the cestui que trust by the assent of the trustee. In such case the trustee and cestui que trust are intended as checks on each other to prevent an imprudent

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disposition, and it *may well be that a general previous assent by one to any sale which the other may make would be void, and an assent to the particular contract required. The trust in this case, is that the trustee will sell and dispose of the property at the joint request of the husband and wife, or at the request of the survivor of them. This cannot mean that the trustee shall carry into effect any particular contract of sale which the husband and wife shall indicate. This would be to remove the control which the general policy of the law and the particular provisions of this deed require the trustee to exercise. It would seem that it can only mean that upon the previous request of the husband and wife, or of the survivor, the trustee shall make such sale as shall seem to himself advisable.

But the Court of Law seems to have decided that the title of the purchasers of the slaves was good at law, both on the ground of the legal title of the trustee and of his power to sell, and I think we must respect that decision. If the trustee sold in pursuance of his power, the title of the purchasers cannot be affected or the slaves directed to be specifically given up, although he may have sold with the intention to dispose of the money in violation of his trust. The only question to affect them in that case seems to be, whether they were bound to see to the application of the purchase money. In general, our courts have held that purchasers are not so bound. 2 Des. 375. It might be a question, however, if the purchasers know that the trustee intends to misapply the money, and pay it to him with that knowledge, they might not, in the event of his insolvency, be compelled to make good any deficiency of the fund. But this it is not necessary to consider now. The defendant, Redheimer, is accountable for the fund in his hands, and his account is before the Master. There is no suggestion of his insolvency. The only material particulars in which the directions of the deed of 1836 are alleged to be in violation of the trusts of that of 1829, are those for paying the debts of the tenant for life, and the funeral expenses of his wife. Upon the coming in of the report, the question will arise, whether he is to be allowed for payments made by him on these accounts. At the same time,

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*complainants may make the question, if they desire it, whether, in case of his insolvency, the purchasers are bound to make good any deficiency of the funds.

JOHNSTON and DUNKIN, Chancellors, concurred.

JOHNSON, Ch., absent at the hearing of the appeal.

Rhett & Malone, for appellant, Redheimer. Kunhardt, for appellants, Blum and Mood.

Speers, Eq. 142

AARON GILLETT et al. v. J. S. POWELL, Adm'r of E. Gillett, and WILLIAM H. PEYTON, Adm'r of William S. Gillett.

(Columbia. May Term, 1843.)

[1. *Executors and Administrators* ⇐303.]

Partition may be effected amongst the distributees of an estate, if each should purchase to about the amount of his share, give bond for the amount, and then the bonds should be settled; each receiving or paying whatever amount his purchase might exceed or fall short of his share—the bonds then to be cancelled. But until such settlement and cancellation, there can be no distribution. Till then they would be liable on their bonds in case of any unexpected debt arising, or for any balance exceeding or falling short of their shares. In contemplation of law, it is not the property, (of which they are merely purchasers, as any other individuals would be,) but the money secured by the bonds, which is the subject of partition.

[Ed. Note.—Cited in Hill v. Hill, 1 Strob. Eq. 25; Turbeville v. Flowers, 27 S. C. 336, 3 S. E. 542.

For other cases, see Executors and Administrators, Cent. Dig. § 1229; Dec. Dig. ⇐303.]

[2, 3. *Husband and Wife* ⇐11.]

J. S. P. as administrator de bonis non of the estate of E. G. dec'd. under a decretal order of the Federal Circuit Court, directing said estate, both real and personal, to be sold, the former, by the marshall, and the latter, by the administrator, as well as the estate of W. S. G. dec'd. who had been the executor of E. G. proceeded to make a sale in January, 1832. There was an agreement between the surviving devisees of E. G. or rather between the husbands of his daughters, previously to the sale, that each should purchase to about the amount of the share of the estate to which his wife would be entitled; that bonds should be given for the amount of the purchases, which bonds, however, were not to be paid; but on a final settlement, after the decision of a suit then in

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the Federal Court, these *should be mutually given up or cancelled. Defendant J. S. P. was a party to this agreement, had married a daughter of E. G. who died in Nov. 1832, and had employed certain persons to make purchases for him. Their receipts, of dates anterior to the death of his wife, purported to have received, as administrators of E. G. for his wife, the price of slaves purchased by them. A. G. one of the devisees of E. G. was not a party to this agreement, but his receipt of Nov. 1834, was produced for certain bonds received on account of his share of the estate, and some correspondence to show that the parties contributed to make his share equal to the others.

But the parties not having purchased to the exact amount of their interests—that of defendant, J. S. P., exceeding the rest—*Held*, that all the purchasers were liable on their bonds to make up the share of A. G., which was not ascertained till after the death of defendant's wife, and that if defendant gave up the bonds of the purchasers, he would be liable as administrator, for so much money received. The estate of E. G., not being fully administered at the death of defendant's wife, his marital rights did not attach, in respect of his agreement and purchase.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 53; Dec. Dig. ⇐11.]

[4. *Husband and Wife* ⇐11.]

Where the funds of the wife, for which the husband is suing, are in a court of competent jurisdiction, an order to pay to the husband, is such an appropriation that the marital rights will attach, notwithstanding the subsequent death of his wife before the actual payment.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 39, 40, 47–57; Dec. Dig. ⇐11.]

[5. *Husband and Wife* ⇐11.]

Certain funds of the estate of E. G., being in the Federal Court, a decree of that court, directing defendant's proportionable share of it to be paid him in right of his wife, *held* sufficient for his marital rights to attach.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 39, 40, 47–57; Dec. Dig. ⇐11.]

[6. *Judgment* ⇐645, 829.]

The decree of the Federal Court directing the funds of the estate of E. G. in the hands of the Clerk, acting as Master, to be paid over in certain proportions to his distributees, *held*, not void for want of jurisdiction, because the relief claimed by the plaintiffs was refused, and the bill dismissed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1158, 1512; Dec. Dig. ⇐645, 829.]

[7. *Judgment* ⇐829.]

With respect to an inferior court of limited jurisdiction, the circumstances which give it jurisdiction must appear upon the face of its proceedings, and if they do not, the judgment will be void. But the judgment of a superior court of general jurisdiction, can never be void for want of jurisdiction. Nothing shall be intended to be out of its jurisdiction, which is not shown to be so in the course of the suit. However irregular and erroneous its judgment may be, it must be respected by every other tribunal, until arrested by the Court itself, or reversed for error on appeal.

[Ed. Note.—Cited in Yarborough v. Bank of Georgia, 4 Rich. Eq. 467, note.

For other cases, see Judgment, Cent. Dig. § 1512; Dec. Dig. ⇐829.]

[8. *Courts* ⇐32.]

According to the practice of the Courts of the United States, if the circumstances which give jurisdiction do not appear on the record, and the objection be taken in the course of the suit, they will refuse to entertain jurisdiction; or if the Circuit Courts should do so, the judgment may be reversed for error.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 134, 137, 139; Dec. Dig. ⇐32.]

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[9. *Judgment* ⇐829.]

*But it has never been held, that with respect to the judgments of other tribunals, the judgment would be void for such defect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1510–1515; Dec. Dig. ⇐829.]

[10. *Courts* ⇐118.]

If any question of civil right, may be directly or indirectly brought before the Court, this constitutes it a Superior Court of general jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 375; Dec. Dig. ⇐118.]

[11. *Judgment* ⇐829.]

The allegation of the circumstances which give jurisdiction may be traversed in the Courts of the United States.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1510–1515; Dec. Dig. ⇐829.]

[12. *Judgment* ⇐829.]

The jurisdiction of the Courts of the United States is not limited with respect to the matter of the civil action which shall be brought before

them, when the parties, plaintiff and defendant, are citizens of different States, but only as to persons.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1510–1515; Dec. Dig. ⟸829.]

[13. *Courts* ⟸159.]

A limitation in respect of locality, does not render a court inferior, if there be no other limitation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 404; Dec. Dig. ⟸159.]

[14. *Judgment* ⟸208.]

A decree may be made between co-defendants upon the proofs and pleadings in the cause, though the bill may be dismissed, with respect to the relief claimed by the plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 381; Dec. Dig. ⟸208.]

[15, 16. *Executors and Administrators*, ⟸513.]

E. G. had executed a note to J. H., on the 1st of January, 1818; the latter had also an account against the former, for which W. S. G. had given his note, signing himself "Executor of E. G."

In the account which was ordered to be taken in the Federal Court, between the Executor and legatees of E. G., these demands were brought forward. The Clerk reported in favor of the note, but against the account, on the ground that it was extinguished by taking the note; that it became the personal debt of W. S. G., and as his estate was insufficient to satisfy a judgment obtained by complainants, there were no assets out of which it could be paid. The Clerk also reported, that the note and account were admitted by the Executor, in February, 1825. J. H. excepted to the Report, on the ground that his account was not allowed; but the exception was overruled, and the Report, in this respect, confirmed. The Judge in his decree stated that the exception was very clearly not tenable, and "had been abandoned by the Solicitor." *Held*, by this Court, that it was not competent for the representative of J. H. to renew the demand.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2267–2291; Dec. Dig. ⟸513.]

[17. *Alteration of Instruments* ⟸20.]

J. H. purchased property at an Administrator's sale, gave his bond for the amount, and, on the same day, executed a mortgage, conditioned to be void on the payment of the sum stated in his bond. The mortgage made no reference to the bond, but on the production of the latter, it was found to have been altered, so as to be conditioned for double the amount actually intended to be secured. Although the alteration in the bond rendered it void, yet this did not affect the mortgage, which, it was held, must be taken as evidence of the debt.[1]

[Ed. Note.—Cited in Nichols v. Briggs, 18 S. C. 476, 483, 485; Plyler v. Elliott, 19 S. C. 257, 260, 264, 265; Smith v. Smith, 27 S. C. 169, 170, 3 S. E. 78, 13 Am. St. Rep. 633; Wallace v. Craig, 27 S. C. 523, 4 S. E. 74; Heath v. Blake, 28 S. C. 416, 5 S. E. 842.

For other cases, see Alteration of Instruments, Cent. Dig. § 160; Dec. Dig. ⟸20.]

[This case is also cited in Higgenbottom v. Peyton, 3 Rich. Eq. 401, as to facts, and in Clark v. Smith, 13 S. C. 596, on the question of marital rights of husband in proceeds of real property of wife.]

[1] See Gilbert on Evidence, 100; Peake, 111; Ford v. Grey, 1 Salk. 286; Price v. Copley, 1 Simmons & Stuart, 347; Hoddle v. Healy, 6 Mod. 181; Daly v. Kelly, 4 Dow. 435.

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*This case was heard by Harper, Chancellor, at Barnwell, May, 1841, on exceptions to the Commissioner's Report. The facts of the case are fully stated in the Circuit decree.

Harper, Ch. Elijah Gillett died in 1818, having made his will, by which, after some specific devises and bequests, he directed his whole estate, real and personal, to be equally divided between his six children, Wm. S. Gillett, Julia Gillett, Alexander H. Gillett, Lucy Gillett, Lavinia Gillett, and Aaron Gillett, and in the event of the death of either, under age and unmarried, the property given to such child by the will, to go to the survivors. He appointed several executors, of whom Wm. S. Gillett alone, proved the will and qualified. By the will, Wm. S. Gillett was also appointed the guardian of his brothers and sisters, who were infants. In 1819, Wm. S. Gillett, having selected specifically for himself, as is supposed, one-sixth part of the testator's estate, exposed the residue to sale at public auction, at which he himself was the principal purchaser. The proceeds of the sale were something more than $40,000. It is charged that Wm. S. Gillett, having authority under the will, sold other portions of the real and personal estate of the testator. On the first of June, 1819, Wm. S. Gillett confessed a judgment to James Higginbottom and Wm. Provost, in the sum of $30,000.00, upon a trust which was afterwards declared, to secure to his infant brothers and sisters and wards, any amount that might be found due by him to them, on account of their father's estate. Subsequently to this, the Bank of Georgia, being a large creditor of Wm. S. Gillett, obtained judgment against him in the Federal Circuit Court at Charleston, and having issued execution, proceeded to enforce it against the property in his possession. The claim of the judgment confessed to Higginbottom and Provost being interposed, the Bank, on the 4th of April, 1827, filed their bill on the chancery side of the Federal Circuit Court, to set aside the last mentioned judgment as fraudulent, or otherwise to give their judgment the preference, except in so far as Wm. S. Gillett was actually indebt-

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ed *to the cestui que trusts, at the time of his confession.

Several decretal orders were made in the cause; among others, one for the sale of the entire estate of Elijah Gillett, and Wm. S. Gillett; the real estate to be sold by the Marshal of the Court, and the personal estate, by the Administrator de bonis non of the estate of Elijah Gillett, his executor being then dead. In consequence, a sale was made on the 23d of January, 1832, for a small portion of cash; for the residue, bonds with mortgages and personal security were taken. The securities taken by the Marshall on the

sales of the real estate were returned by him into the Federal Court. The defendant J. S. Powell, states in his answer, that though true it is, he, as administrator of Elijah Gillett, did sell a large number of negroes of the said estate, nevertheless a considerable number of the said negroes had been previously sold by the Marshal of the Federal Court, and the bonds and other obligations for said sale are now in the custody of the said Court. I infer that the bonds and securities taken by himself remain in his hands, though this does not plainly appear, but the views I shall take may be applied according to the fact. A reference to the clerk, acting as master, was directed by the Federal Court, to ascertain and report the general statement of accounts between the executor and the estate of Elijah Gillett, also between the executor and the individual legatees, and for other purposes. A report was made, to which exceptions were taken. At the hearing, upon the report and the merits, a decree was made sustaining the judgment confessed to the trustees, Higginbottom and Provost, and referring back the report for further investigation. On the coming in of the second report, all the exceptions taken to it were overruled; all the relief claimed by the bank of Georgia was refused, and the Court decreed that the report and account be confirmed, and "that the funds in the hands of the clerk, as master, be paid over in the following manner; that is to say, to James Higginbottom, in right of his wife Julia, one fourth part; to George W. Collins, in right of his wife Lucy, one fourth part; to the Rev. J. S. Powell, in right of his wife Lavinia, one fourth part; and to Aaron Gillett, the remaining fourth part." The Circuit Court de-

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clares the purchase made by *the executor, William S. Gillett, at his own sale, to be absolutely void, but adds, "As the proceeds were in fact in our registry under a sale by our marshall, which no one was disposed to disturb, and it was thought to furnish the data for a fair distribution, the Court instituted the necessary inquiries to enable it to proceed to a final decree." The property was therefore sold as the estate of Elijah Gillett; but as all the parties in interest coincided in desiring to confirm the sale, and as the claim of the devisees of Elijah Gillett, as preferred creditors, will more than exhaust the estate of Wm. S. Gillett, this is not material, unless with a view to one of the exceptions hereinafter to be noticed.

On appeal to the Supreme Court of the United States the Court expressed the opinion with respect to Wm. S. Gillett's purchase at his own sale, "that the sale having been made by a trustee to himself, must have been set aside and annulled on application of the cestui que trust, but no such application being made, it cannot be regarded as a nullity, as it regards strangers to the transaction." The Court says in conclusion—"We think the application made of the money arising from the sale, by the decree of the Court below, was right, and it is affirmed," and directs the bill to be dismissed with costs.

Wm. S. Gillett died in 1829, and administration of his estate was granted to James Higginbottom, who had married Julia, one of the daughters of the testator, Elijah Gillett. Higginbottom's administration of the estate of Elijah Gillett was revoked, and administration of that estate committed to the defendant, J. S. Powell, who had married Lavinia, one of the daughters of the testator. James Higginbottom died in ———, and administration of the estate of Wm. S. Gillett left unadministered was committed to the Defendant Wm. H. Peyton, as also administration of the estate of James Higginbottom.

Alexander H. Gillett, one of the children of the testator, died under age and unmarried. Administration on his estate was committed to George W. Collins, and on his death to the complainant, Barnet M. Enicks.

After the death of James Higginbottom, his widow married ——— Kottman.

Lucy, one of the daughters of the testator,

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married *George W. Collins, before mentioned, and on his death, the complainant, Barnet M. Enicks.

Lavinia, the wife of the defendant, J. S. Powell, died in 1832, and her husband has taken out administration on her estate.

The Bill is filed generally for an account of the estate of Elijah Gillett, as supposed to remain unadministered in the hands of the administrator de bonis non, and also of the estate of Wm. S. Gillett. The Bill charges that the Court of the United States had no jurisdiction or authority to make distribution of the proceeds of the estate of Elijah Gillett, and that its judgment making such distribution is void. The defendant, J. S. Powell, relies by his answer on that judgment, and contends that by virtue of it, his marital rights attached on his wife's share of the proceeds of the estate of Elijah Gillett, which were in the registry of the Court. A reference has been ordered and an account taken of the estates in question, and the cause now comes up upon exceptions to the Commissioner's Report.

A Bill was also brought to the view of the Court, filed by John F. Peyton, administrator of George W. Collins, in which is brought in question the validity of a marriage settlement, alleged to have been made by the said Geo. W. Collins, previously to his marriage with Lucy Gillett; but it was stated at the hearing, that no question was made in relation to it, and I shall conclude nothing respecting it.

Exceptions to the Report have been filed by the defendant, J. S. Powell, and on behalf of the infant children of James Higginbottom.

I shall first consider the defendant's 5th and 6th exceptions, as being the most material in respect to principle, and the amount involved.

The questions made by them are, whether the marital rights of the defendant, J. S. Powell, attached on his deceased wife's share of her father's personal estate, and of the proceeds of the real estate. There can be no question respecting the conclusion arrived at by the Commissioner, and the authorities referred to very fully sustain him, that the marital rights of a husband, in possession of

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*a deceased wife's estate as administrator, will not attach, until the estate has been fully administered, and partition or distribution has been made.

But it was contended that partition and distribution was, in fact, made by the sale of the administrator de bonis non, of the 23d January, 1832. Evidence was offered to show an agreement between the surviving devisees of Dr. Gillett, or rather between the husbands of the females, previously to that sale, that each should purchase to about the amount of the share of the estate to which his wife would be entitled; that it was understood that bond should be given for the amount of the purchases, which bonds however were not to be paid; but on a final settlement, after the decision of the suit in the Federal Court, these should be mutually given up or cancelled. It appears that the defendant employed persons named Irwin, Colding and Bobo, to make purchases for him, (or having purchased, he took their purchases off their hands.) Their receipts are produced of the dates of Oct. 1st, 1832; August 4th, 1832, and Nov. 3d, 1832, (all previous to the death of his wife, who is stated to have died on the 12th of November, 1832,) specifying to have received of him, as administrator, for Mrs. Lavinia Gillett, the price of the slaves purchased by them. It is probable that at the same time he gave up their bonds taken for the purchase money. Aaron Gillett was no party to this agreement; but his receipt of the 18th Nov. 1834, is produced for certain bonds, received on account of his share of the estate, and some correspondence to show that the parties contributed to make his share equal to the others.

I have no doubt but that partition might be made in this way, if the distributees of an estate should purchase to about the amount of their shares; give their bonds for the amount, and then those bonds should be settled; each receiving or paying whatever amount his purchase might exceed or fall short of his share, (for it is hardly possible that each should purchase to the exact amount of his share,) and the bonds then cancelled. But until such settlement and cancellation, there could be no distribution. Until then they would be liable on their bonds in case of any unexpected debt arising, or for

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any balance exceeding *or falling short of their shares. In contemplation of law it is not the property, (of which they are merely purchasers, as any other individuals would be,) but the money secured by the bonds, which is the subject of partition.

In this case, there is no evidence of such final settlement, but the contrary. It plainly appears that the parties did not purchase to the exact amount of their interests. Defendant's purchase appears to have considerably exceeded the rest. All the purchasers were liable on their bonds to make up Aaron Gillett's share, which was unascertained till long after the death of defendant's wife, and if defendant gave up the bonds of the purchasers, he was liable as administrator for so much money received. The estate was not fully administered at the death of defendant's wife, and I do not think his marital rights would attach in respect of his agreement and purchase.

My opinion is different, however, with respect to the fund in the Federal Court. By the judgment of that Court, one fourth of the fund is directed to be paid to him in right of his wife. It is agreed, as explained in Edgerton v. Muse (Dudl. Eq. 179,) that if there are funds of the wife, for which the husband is suing in a Court of competent jurisdiction, an order to pay to the husband is such an appropriation that the marital rights will attach, notwithstanding the subsequent death of the wife before the actual payment.

But it is contended that the Federal Court was not a Court of competent jurisdiction; that its jurisdiction was founded solely on the circumstance that the plaintiffs in the action were citizens of another State; that when the relief claimed by the plaintiffs was refused, and the bill dismissed, there was an end of the jurisdiction, and the judgment as between the co-defendants was void. This must depend upon the character of that Court. It is the well known rule, with respect to an inferior Court, of limited jurisdiction, that the circumstances which give it jurisdiction must appear upon the face of its proceedings, and if they do not, the judgment will be void. It is an equally well known rule that the judgment of a superior Court of general jurisdiction, can never be void for want of jurisdiction. Nothing shall

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be intended to be out of its juris*diction which is not shown to be so in the course of the suit. However irregular and erroneous its judgment may be, it must be respected by every other tribunal until arrested by the Court itself, or reversed for error on appeal. I refer to the opinion and the authorities quoted in Miller v. Furse, (1 Bailey's Eq. 188.) It is certain that according to the practice of the Courts of the United States, if the circumstances which give jurisdiction do not appear on the record, and

the objection be taken in the course of the suit, they will refuse to entertain jurisdiction; or if the Circuit Courts should do so, the judgment may be reversed for error. But it has never been held, I believe, that with respect to other tribunals, the judgment would be void for such defect. It is observed by Chief Justice Marshall, in Kempe's Lessee v. Kennedy, 5 Cranch, 185 [3 L. Ed. 70], that all Courts from which an appeal lies, are inferior in one sense, but this is not the technical sense. "They apply to Courts of a special and limited jurisdiction, which are erected on such principles, that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The Courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments in such cases may certainly be reversed, but this Court is not prepared to say that they are absolute nullities, which may be totally disregarded."

My own opinion, founded on very mature reflection, and examination of authorities, is that if any question of civil right may be directly or indirectly brought before a Court, this constitutes it a superior Court, of general jurisdiction. The distinction is pointed out in Stanyan v. Davis, 6 Mod. 223: "Whatever is essentially necessary to maintain an action, if the action be brought in an inferior Court, that must be averred to be within the jurisdiction, or otherwise they have no jurisdiction."

"In Courts of general jurisdiction, as the Court of Exchequer or King's Bench, though universal as to the right, yet, because circumscribed or limited as to persons, such averment must be made; though where the jurisdiction is general, such allegation is not traversable, as it is in a circumscribed jurisdiction." The Court of King's bench was

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*supposed to have original jurisdiction only in criminal cases, and cases of tort, besides the superintendence of inferior jurisdictions; but it had jurisdiction of civil cases incidentally, when the defendant was in custody of the Marshall. The Court of Exchequer had jurisdiction only in case of revenue; but it had jurisdiction of all civil cases incidentally, when the plaintiff was the King's debtor. The allegation of these circumstances is not allowed to be traversed in those Courts, though it has never been surmised that their judgments would be void if omitted. The difference seems to be that the allegation of the circumstances which give jurisdiction may be traversed in the Courts of the United States.

The Courts of Common Pleas and Chancery have only jurisdiction of civil actions, yet they are Superior Courts of general jurisdiction. The latter Court, indeed, has jurisdiction only incidentally of any matter triable in a Court of law. So it is with respect to the Courts of the United States. Their jurisdiction is not limited with respect to the matter of the civil action which shall be brought before them, when the parties, plaintiff and defendant, are citizens of different States, but only as to persons.

It appears also that a limitation in respect of locality, does not render a Court inferior, if there be no other limitation. The Courts of the Counties Palatine in England, have jurisdiction of causes arising only within their territorial limits. Yet in Peacock v. Bell & Kendall, 1 Saund. 73, which was a case of error to the Court of King's Bench, from the Court of the County Palatine of Durham, on the ground that the proceedings in the Court below did not show the cause of action to have arisen within the jurisdiction, it was held that this was a Superior Court, and that it was not necessary that the ground of jurisdiction should appear. The Court said that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so. "And though the Court of the County Palatine is inferior to this Court of King's bench, yet that does not prove it to be an inferior Court, in the sense that it ought to certify every thing precisely for the Court of Common Bench is inferior to this Court," &c. The

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reason why these Courts *were regarded as superior, may be found in 1 Black. Com. 118—that within their respective counties, the Duke of Lancaster and the Bishop of Durham had jura Regalia, and consequently that their Courts had jurisdiction of all pleas whatsoever.

Nor do I think the judgment of the Federal Court can be regarded as void, because the bill was ordered to be dismissed. If partial relief should be given, and the bill ordered to be dismissed, construing the whole decree together, I must take it to mean, that it is dismissed, unless in so far as relief is given. There is no doubt, as stated by Lord Redesdale and Lord Eldon in Chamly v. Lord Dunsany and others, 2 Sch. and Lef. 709, 718, as the familiar practice, that a decree may be made between codefendants upon the proofs and pleadings in the cause. Nor do I perceive any reason why such decree may not be made, though the bill may be dismissed with respect to the relief claimed by the plaintiff. At all events, for reasons already given, however erroneous or irregular the judgment of the Court may be, (and I confess it appeared unusual and peculiar; the Court was not called upon to make distribution; and though no one is disposed to call in question the validity of the sale, it might have returned the fund arising from it to the Executor or Administrator, to be administered in due course,) yet I must respect it while it stands unreversed.

The defendant's first exception was abandoned.

The defendant's second exception makes the question, whether a certain note, executed by Elijah Gillett to James Higginbottom, and an account which Higginbottom had against Elijah Gillett's estate, are barred by the statute of limitations. The note was given for $1,637.22, on the first day of January, 1818. The account was for $1,116.47, for which Wm. S. Gillett gave his note, signing himself "Executor E. Gillett." In the account which was ordered to be taken in the Federal Court between the executor and legatees of Elijah Gillett, these demands were brought forward. The Clerk reported in favor of the notes, but against the account; on the ground that the account was extinguished by taking the note of the Executor, and it became his personal debt; and

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as the entire *estate of Wm. S. Gillett was not sufficient to satisfy the judgment of the complainants, there were no assets out of which it could be paid. The clerk reported, as was admitted in argument, that the notes and account were admitted by the Executor on the 17th February, 1825. Higginbottom excepted to the report, on the ground that his account was not allowed; but the exception was overruled, and the report, in this respect, confirmed.

I suppose that this cannot be regarded as a matter adjudicated. The bill in the Federal Court was finally dismissed, and the Circuit decree only affirmed as respects the distribution of the fund in Court. I certainly should not concur in the opinion of that Court, that the taking of the note of the Executor was an extinguishment of the demand against the estate of Elijah Gillett. The well known rule is, that the taking of a note is not the extinguishment of precedent demands; unless it turns out to be good and produces satisfaction; or unless it be expressly agreed to be taken in satisfaction, of which there is not the slightest evidence in the present instance. Then Higginbottom, being a creditor of the estate of Elijah Gillett, is entitled to be satisfied out of the assets of that estate, in preference to the devisees, who are merely volunteers, unless he is barred by the statute.

From the admission in 1825, till the filing of the Bill in the Federal Court, (4th April, 1827,) little more than two years had elapsed. Then, though there is something of novelty in the question which arises, I think the statute cannot be held to run during the pendency of that suit. There can be no question after defendant's appointment as Administrator de bonis non in 1829. If his demands were not barred then, they are considered as being paid upon his appointment, and he, or his representative, has a right to retain the amount in accounting for his administration. Then he was called into the Federal Court, and compelled to become the actor for the purpose of establishing his demands. He was under a disability. The court assumed jurisdiction, and no doubt, would have restrained him if he had attempted to sue at law. Indeed, at the time of his appointment in 1829, he had, so far as respects the note, a judgment in his favor which, according to

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the views I *have taken, was a valid one, and must have been respected by every other tribunal up to the final dismissal of the Bill in 1835; and with respect to the account, his exception was still pending. I cannot think that the statute can be held to apply under such circumstances. The exception is overruled.

The third exception of the defendant arises under the following circumstances:—At the sale made by the Administrator de bonis non, on the 23d January, 1832, James Higginbottom became the purchaser of slaves to the amount of $2,337.75. He gave his bond for the amount, and on the same day executed a mortgage of the slaves, conditioned to be void on the payment of $2,337.75. The mortgage makes no reference to the bond. On the production of the bond, it was found to have been altered, so as to be conditioned for double the amount that was actually intended to be secured. The Commissioner, deciding correctly that the bond was void for the alteration, refused to charge the representative of Higginbottom with the amount actually due.

But I am of opinion that the alteration of the bond does not affect the mortgage, and that it must be taken as evidence of the debt. If the mortgage alone had been taken, there can be no doubt but that it would have constituted a specialty debt. At law, it is regarded as a conveyance of the property, in equity, as evidence of the debt intended to be secured by it. I think it has been decided that in a suit on a bond, it is sufficient to produce a mortgage reciting it. The defendant is estopped by his deed to deny the existence of the bond. But here, as I have said, the mortgage has no reference to the bond, and I cannot consider that the party claiming under it, is in a worse situation than if the bond had never been taken. If he had taken a single bill, and a bond with a penalty, or a bond with, and one without, security, though there might have been an equity to restrain the enforcement of both. I do not see how the alteration of one could vitiate the other. The exception is sustained.

With respect to the fourth exception, if there is any error in the Commissioner's decision, the data have not been furnished me,

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by which to correct it; the exception *must, therefore, be overruled. The fifth and sixth exceptions have been disposed of.

The first exception on behalf of the infant children of James Higginbottom, has been disposed of in considering the defendant's fifth and sixth exceptions, so far as respects

the effect of the judgment in the Federal Court, and that of the sale of 1832. So far as respects their mother's claim under the alleged marriage settlement, nothing has been considered or concluded. If she has any rights under that, she is left to pursue them as she may be advised. The second exception was abandoned.

It is ordered that the report be referred back to the Commissioner, to be reformed according to the views herein expressed.

The defendant, J. S. Powell, appealed from so much of the Circuit decree in this cause as overruled the several exceptions filed by the said defendant, to the Commissioner's Report, and moved in the Court of Appeals to reform the same accordingly.

From the foregoing decree, the complainants also appealed, and now moved to reform the same, and for a confirmation of the Commissioner's Report, on the following grounds:

1st. Because the order of the United States Circuit Court in relation to the fund in its possession, has not the effect of vesting the portion of that fund to which Lavinia Powell was entitled, in her husband, J. S. Powell, by virtue of his marital rights, or otherwise.

2d. Because the order of the United States Circuit Court in relation to the fund in its possession, is no bar to the relief prayed for by the complainants in their bill in this case.

3d. Because Lavinia Powell in her lifetime was not bound by the order of the United States Circuit Court, in relation to the fund in its possession, and the same is now subject to distribution between her next of kin.

4th. Because the defendant, J. S. Powell, having by his own voluntary and fraudulent act rendered the bond of James Higginbottom

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void in law, the mortgage given to *secure that bond, cannot be set up in a Court of Equity, as evidence of the debt.

5th. Because the defendant, J. S. Powell, having voluntarily and fraudulently deprived himself of the primary and highest evidence of the debt, cannot now resort to collateral and secondary evidence to prove the same.

6th. Because the defendant, J. S. Powell, is not entitled to recover the debt secured by the bond of James Higginbottom, either at law or in equity.

Curia, per DUNKIN, Ch. This court concurs with the presiding Chancellor as to the jurisdiction of the Federal Court, and the binding efficacy of those proceedings on the parties to this litigation.

It is not doubted by the appellants, that the Federal Court had jurisdiction of the cause originally. The complainants were citizens of Georgia, the defendants of South Carolina. It was, substantially, a contest between the judgment creditors of William S. Gillett. The Bank of Georgia attempted to impeach the judgment in favor of the legatees of Dr. E. Gillett, to set it aside altogether, or, that failing, to ascertain the amount really due. In order to fix the sum due by Wm. S. Gillett, as executor of his father, Dr. Gillett, as well as to know the extent and sufficiency of his own estate, a sale became indispensable. The result of the proceedings was to establish the judgment of the legatees, and to shew also that the estate of Wm. S. Gillett was insufficient to satisfy the amount due to the legatees. The fund in the hands of the court was then ordered to be paid to the legatees in equal proportions. The court agrees with the Chancellor, and for the reasons given by him, that this judgment must be held conclusive.

But this court is also of opinion that the judgment of the Federal Court, on the claims of James Higginbottom, against the estate of Dr. Gillett, is equally conclusive. The indebtedness of Dr. Gillett's estate was brought in issue by the answer of the executor. The Clerk, acting as Master, reported against the demand of Higginbottom on the account of $1,116.47, for which he had taken the executor's note.

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*Higginbottom excepted to the report, on this ground. The Judge, in his decree, says, the exception was very clearly not tenable, "but that it had been abandoned by the solicitor." After this, we think it was not competent for Higginbottom's representative to renew the demand, and that the Commissioner should have so determined.

Then as to the defendant's third exception. The court has no disposition to call in question the decision in Mills v. Starr, 2d Bail. 359. If Powell had no demand at law, but on the bond, and he had lost that, by his own fault, or folly, in altering the condition, he would be entitled to no aid from the court. But we are not bound to go further. If, as is illustrated by the Chancellor, he had taken another bond, with a surety, instead of the mortgage, his alteration of the original bond would not prevent his recovery at law on that which had been taken as collateral security, and this court would not interfere but on payment of the amount really due. This paper is certainly a mortgage, or would be so regarded in this court, but it has no reference to, nor any necessary connexion with the bond, which has been mutilated. It is an absolute bill of sale of nine negroes, by name, with a proviso, or condition, that if the vendors should pay to the vendee the sum of $2,337.50, on or before the 23d January, 1834, the bill of sale should be void. The condition has never been complied with.

The negroes are now, and have always been, in possession of Higginbottom's representatives, and there is no obstacle to a recovery at law on this instrument. The defendant only asks that the condition should be performed, and to this, we think with the Chancellor, he is entitled.

The decree of the Circuit Court is reformed, in regard to the defendant's second exception. In all other respects it is affirmed, and the appeal dismissed.

JOHNSON and JOHNSTON, Chancellors, concurred.

Bellinger, for defendant, J. S. Powell. Patterson, for complainants.

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*JAMES H. PAGE v. THADDEUS STREET, and Others. THE CHARLESTON HOTEL COMPANY v. JAMES H. PAGE, and Others. CITY COUNCIL OF CHARLESTON v. JAMES H. PAGE.

(Columbia. May Term, 1843.)

1. Complainant P. entered into an agreement with the Charleston Hotel Company, 23d February, 1837, for the keeping of a Hotel then being erected, for the term of seven continuous years, to commence on the day that the building should be finished and furnished. Agreement recorded in the office of the Secretary of State, 29th May, 1838. On the completion and furnishing of the building, complainant entered into possession, but on the night succeeding the day of his doing so, the Hotel was destroyed by fire. The company resolved to re-build, and upon their suggestion the articles of agreement as originally entered into were modified by the parties, signed and sealed 7th July, 1838. Recorded in the office of the Secretary of State 30th March, 1839, and in that of the Register of Mesne Conveyance 12th May, 1840. In this agreement it was stipulated "that the said parties have agreed for the keeping of the Hotel, now in progress of construction, in Meeting street, by the said P., for the term of seven continuous years, to commence on the day the building shall be finished and furnished, which day shall be indorsed by the said parties on this memorandum, upon the following terms, to wit: That the said P., as landlord of the said Hotel, shall provide for the same, but shall contract no debt on account of the concern without first obtaining the sanction of the Board of Directors of the Company; that he shall procure and engage all waiters and servants, and the same discharge at will and pleasure; reside with his family in the Hotel, but free of all charge for board or rent; conduct the same in the manner contemplated by these presents, and have the sole and exclusive management thereof, bestowing upon it his entire attention; that the furniture shall be procured and purchased by the said Charleston Hotel Company, and shall be considered as part of the capital invested; but shall, at the expiration of the said term, be returned to them by the said P., or his personal representative, in the like order and condition in which they will be received by him, (ordinary wear and tear and unavoidable accidents excepted.) It is understood that the amount of forty-five thousand dollars shall be expended in the furniture of the house, and that of that amount, the sum of thirty thousand dollars shall have been purchased and placed in the Hotel, before the house shall be considered ready for occupation, and the balance shall be purchased within six months after commencement of operations, if required by the said P.

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*2. "That the said P. shall keep constantly in his employment a competent book-keeper, who shall keep the books of the said Hotel, according, as nearly as possible, to the most approved checks and usages adopted by well regulated mercantile establishments. Should the directors consider the said book-keeper incompetent, or otherwise disapprove him, he shall be discharged by the said P. on the aforesaid directors making known that wish to him; and P. may discharge him at any time, and procure another book-keeper, subject to the same disapproval by the parties. The books of the establishment shall always be open for the examination of any member of the Board of Directors, and shall be balanced on the first day of each and every month, so as clearly to exhibit the gross receipts of every month, the expenditure of the same, and the cash on hand." The agreement then provides that the nett profits remaining on hand at the expiration of every year, and after deducting the expenses of the Hotel, should be divided in certain proportions, varying according to the amount of the annual income, but finally provides that if the nett annual income should fall short of ten thousand dollars, the said P. should nevertheless and at all times be entitled to the sum of four thousand dollars, as an annual compensation for his services; and if the nett annual profits amount to any intermediate sum between those specified in the agreement, the sum should be divided between the parties pro rata, according to the scale established. It was further agreed that in ascertaining the nett profits, no account should be taken as charged against P., either for rent, or interest of capital invested in the building and furniture; that the company should keep the same under insurance, and in case of the destruction of the same by fire, during the continuance of the term, the same should be re-built and furnished, and again placed under the care of P., on the same terms and conditions as before mentioned, for the remainder of the term; the said P. to receive, during the re-building and furnishing thereof, the sum of four thousand dollars per annum.

3. It was provided, that should the company fail to receive the amount of their policies of insurance, to any material extent, it should not be obligatory on them to re-build and refurnish the Hotel—that the nett profits appearing on the books, might be drawn by the parties, on the first day of every month, in proportion to their respective interests, according to the scale established; and sums so drawn should be accounted for in the annual division of profits.

4. It was also agreed, that P's. contract should be "purely personal, not transferable to any one whatsoever by the said P., nor in any manner liable for his debts." It was provided, that if P. should die before the expiration of the second year, and before the commencement of the seventh year of the term, the personal representative of the said P. shall receive from the company the sum of five thousand dollars; and if the death of the said P.

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occur at any time during the seventh year of the term, the personal representative of the said P. shall receive from the company a sum of money to be named by three referees, of whom one shall be nominated by either party, and the third by the two so named. A system of strict accountability was to be maintained by P. from the servants or agents under him, such as found in the most approved managed Hotels in the United States. Complainant put in possession 24th October, 1839, the building being finished and furnished.

5. For the purpose of availing themselves of the benefit of the Acts of the Legislature, "for re-building the City of Charleston," the company applied to the Bank of the State of South Carolina for a loan, and on the 21st January, 1839, executed to the Bank a bond in the penalty of $150,000, conditioned for the

re-payment of all loans the Bank might make to the company, and a mortgage of the lot on which the Hotel was to be built. Mortgage recorded in the office of the Register of Mesne Conveyance 22nd January, 1839. A loan of $75,000 was effected, but before making it certificates were produced from the various public offices and submitted to the Attorney General, who certified his satisfaction with the title. There was no certificate, however, produced from the office of the Secretary of State.

6. To procure furniture for the Hotel, the company borrowed the promissory notes of forty individuals, for $1000 each, and to indemnify them, on the 23d May, 1839, executed a penal bond to certain persons, trustees, in trust for the lenders of the notes, and for the same purpose a mortgage of the house and furniture. Upon the execution of the mortgage, at a general meeting of the lenders of the notes, complainant, Page, requested that it might be made subject to his contract, and was told by the President of the Company that he would do nothing to impair his contract.

7. On the 27th June, 1840, the trustees of the lenders of the notes filed their bill against the Hotel Company to foreclose their mortgage on the house and furniture, and obtained a decree, which, on the filing of complainant's bill of July, 1840, was suspended until the further order of the Court.

8. Complainant's bill alleged a prior lien under his contract, and prayed process against the trustees, the President and directors of the Bank, the Hotel Company, and William Kelly, as also for an injunction against the President and Directors of the Bank, to restrain the enforcing of their mortgage, but this not being moved for, under the provisions of the Acts "for re-building the City of Charleston," they caused the Hotel to be advertised for sale, which, on the 2nd March, 1841, was purchased by the City Council, who, under the said Acts, had guarantied the loan. The trustees filed their separate answer 8th February, 1841, and the President and Directors of the Bank answered 15th February, 1841, in which all notice or information of complainant's contract is denied and protection claimed.

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*9. On the 26th April, 1841, complainant P. filed a supplemental bill to enjoin an execution in the nature of a fi. fa, sued out by the trustees, under their decree for foreclosure; also to enjoin an action of trover brought by the trustees for the furniture against complainant, and an action of trespass to try title brought by the City Council, to recover possession of the Hotel. The bill prayed process against the trustees and the City Council. The trustees answered on the 15th June, 1841, and on the same day the Hotel Company answered both the original and supplemental bills. The City Council answered the supplemental bill 15th June 1841, denying that complainant was entitled to any lien, either in law or in equity against them. W. Kelly never filed any answer. The Hotel Company filed a bill against complainant, P., for an account of his transactions in conducting the Hotel. The City Council also, for an account of the profits of the Hotel since they became the purchasers, and for possession of the same.

10. The object of complainant was to enjoin the actions brought against him, and to be quieted in the possession of the premises.

[11. *Landlord and Tenant* ⟸26; *Principal and Agent* ⟸3.]

This contract, as between complainant and the Hotel Company, held sufficient to constitute a lease, but not having been recorded, under the provisions of the Act of 1817, (6 Stat. at Large, 67,) he was not entitled to enforce its performance against the City Council.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 10, 77; Dec. Dig. ⟸26; Principal and Agent, Dec. Dig. ⟸3.]

[12. *Vendor and Purchaser* ⟸233.]

To supply the want of registration, notice must be full, explicit, and clearly proved.

[Ed. Note.—Cited in Phillips v. Rivers, 1 S. C. 450; London v. Youmans, 31 S. C. 150, 9 S. E. 775, 17 Am. St. Rep. 17; O'Cain v. O'Cain, 51 S. C. 357, 29 S. E. 68.

For other cases, see Vendor and Purchaser, Cent. Dig. § 563½; Dec. Dig. ⟸233.]

[13. *Vendor and Purchaser* ⟸229.]

Held, that the Bank and the City Council were not affected with sufficient notice of complainant's contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477–494; Dec. Dig. ⟸229.]

[14. *Lis Pendens* ⟸22.]

Lis pendens, which is notice to rebut an equity, will not supply the want of registration.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 36; Dec. Dig. ⟸22.]

[15. *Frauds, Statute of* ⟸119.]

The well known ground on which alone courts have thought themselves authorized to dispense with the words of a statute, as in the analogous case of the Statute of Frauds, is that the Legislature is not to be supposed to have intended that a statute made for the prevention of fraud, should itself be made the instrument of fraud.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 113, 266, 270; Dec. Dig. ⟸119.]

[16. *Frauds, Statute of* ⟸119.]

There being no ground of fraud in the present case, the purchaser, having only purchased the reversion with the subsequent accruing rents, there could be no ground to authorize a departure from the positive terms of the statute.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 113, 266, 270; Dec. Dig. ⟸119.]

[17. *Mortgages* ⟸156.]

Held, that the City Council came within the principle of a purchaser from a bona fide purchaser without notice.

[Ed. Note.—Cited in Yarborough v. Bank of Georgia, 4 Rich. Eq. 469, note.

For other cases, see Mortgages, Cent. Dig. § 365; Dec. Dig. ⟸156.]

[18. *Trover and Conversion* ⟸72.]

Held, that the mortgagees of the furniture were entitled to a delivery of it, but must pay their own costs.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. ⟸72.]

[20. *Mortgages* ⟸548.]

Delivery of possession of the Hotel decreed, and also an account for rents and profits.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1566; Dec. Dig. ⟸548.]

[21. *Trespass to Try Title* ⟸53.]

Where there is a decree for delivery of

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possession, an account of *mesne profits to the true owner follows as a matter of course; though the possession may have been that of a trespasser. Cruger v. Daniel, [Riley Eq. 102] May Term, 1843.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 85, 86; Dec. Dig. ⟸53.]

[22. *Mortgages* ⇐548.]
In accounting to the City Council after their title accrued, *held* that P. must account, not for the share of income and profits reserved by his contract with the Charleston Hotel Company, but on the principle of quantum valebat.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1566; Dec. Dig. ⇐548.]

[23. *Cancellation of Instruments* ⇐12; *Equity* ⇐41.]
P's. contract being void, as to the City Council, there was no ground on which they could sustain a bill for the delivery of possession, nor any necessity for it; nor could they sustain a bill for mesne profits alone. The City Council, therefore, to pay the costs of their bill, and P. the costs of their action at law.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 11; Dec. Dig. ⇐ 12; Equity, Cent. Dig. § 118; Dec. Dig. ⇐ 41.]

[24. *Chattel Mortgages* ⇐164.]
The mortgagees of the furniture not entitled to an account of hire, quantum valebat. Against the Hotel Company, entitled to interest on their debt.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 295; Dec. Dig. ⇐164.]

[25. *Mortgages* ⇐548.]
The mortgagees of the furniture, as against P., *held* entitled to such proportion of the profits as the Company would have been entitled to for the furniture, as distinguished from the Hotel.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1566; Dec. Dig. ⇐548.]

[26. *Costs* ⇐64.]
The Hotel Company to pay the costs of their bill; and as between complainant and the company, costs to depend on the account to be taken. The other costs of the bill to be paid by complainant, P.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 276; Dec. Dig. ⇐64.]

[27. *Account* ⇐19.]
[Where a bill is filed for a money balance, arising from a particular transaction, an account of that transaction may be taken without a bill by defendant for that purpose.]

[Ed. Note.—For other cases, see Account, Cent. Dig. § 107; Dec. Dig. ⇐19.]

[28. *Specific Performance* ⇐68.]
[Equity will enforce the performance of a contract in relation to personalty merely, as for the use of furniture, not incident to a contract in relation to realty.]

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 199; Dec. Dig. ⇐68.]

[This case is also cited in Carrigan v. Byrd, 23 S. C. 95, as to the doctrine of notice, and in Charles v. Byrd, 29 S. C. 552, 8 S. E. 1, and distinguished therefrom.]

Before Harper, Ch., at Charleston, July, 1841.

The original bill, in the first of the above mentioned cases, was filed on the 10th July, 1840, to enjoin the execution of a decree of sale, for foreclosure of a mortgage of the Charleston Hotel, and the furniture therein, which had been obtained by Thaddeus Street, M. T. Mendenhall, A. G. Magrath, J. E. Glover, and William Aiken, trustees, upon a bill filed by them against The Charleston Hotel Company; the complainant alleging a prior lien under certain contracts, entered into with him, by the said company, on the 23d February, 1837, and 7th July, 1838. The bill also prayed an injunction against the President and Directors of the Bank of the State of South Carolina, to restrain their enforcing a mortgage to them, of the Charleston Hotel, executed by the Charleston Hotel Company, on the 21st January, 1839, to secure re-payment of a loan, made under the provisions of the Act of June, 1838, "for rebuilding the City of Charleston," and the Act of December, 1838, to amend the former

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Act. The bill prayed *process of subpoena against Thaddeus Street, M. T. Mendenhall, A. G. Magrath, J. E. Glover, and William Aiken, trustees, The President and Directors of the Bank of the State of South Carolina, The Charleston Hotel Company, and William Kelly.

Upon this bill being filed, an order was made by Chancellor Johnson, in chambers, on the 13th July, 1840, suspending the execution of the order of sale for foreclosure of the mortgage to Thaddeus Street, and others, trustees. The injunction prayed against the President and Directors of the Bank of the State of South Carolina, was never moved for; and on the 2d March, 1841, in pursuance of the provisions of the Acts of June and December, 1838, they caused the Charleston Hotel to be sold, for satisfaction of the mortgage to them; and the City Council of Charleston, who, in conformity with the requisition of the Acts of June and December, 1838, had become the guarantors of the loan secured by the said mortgage, became the purchasers of the Hotel.

To this bill, Thaddeus Street, and the other trustees, filed their separate answer, on the 8th February, 1841. The Charleston Hotel Company answered the original and the supplemental bill hereinafter mentioned, together; and William Kelly does not appear to have filed any answer.

The President and Directors of the Bank of the State of South Carolina filed their answer on the 15th February, 1841, and therein explicitly denied all knowledge, notice, or information of the alleged contracts, under which the complainant claimed a lien on the Charleston Hotel, at the time of their loan to the company, and the date of the mortgage executed to secure the same, and until long after all the instalments of the said loan had been paid and advanced to the said company; and they averred, that if they had had, received, or heard, any knowledge, information, intimation, or surmise, of such lien, or any other incumbrance on the premises, they would not have made the said loan. They insisted, that as the contracts, under which the complainant claims, were not recorded, as required by law, such con-

tracts could not affect the prior lien of the mortgage to these defendants, which had

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been *duly registered in the proper office; and that, independently of their legal title, they had an equity superior to that of the complainant, who could not but have known of the intended loan to the Charleston Hotel Company, by these defendants, on the security of a mortgage of the premises, without which loan, as he well knew, the Hotel, which had been entirely destroyed by fire, could not have been rebuilt; and yet, he not only gave no notice to these defendants, of the lien now claimed by him, but also omitted to put the contracts, under which he claims, on record, as required by law, so that the defendants might have obtained notice of them; the first of the said contracts never having been recorded in the office of the Register of Mesne Conveyances, where alone it was requisite to record it; and the second contract, which was that on which the present claim was founded, never having been recorded, in any office, until all the instalments of the loan, by these defendants, had been advanced by them to the Hotel Company. And these defendants denied that the complainant had any equity against them; and they claimed the benefit of the complainant's want of equity against their legal title, in the same manner as if the same had been specially pleaded.

On the 26th April, 1841, the complainant, James H. Page, filed a supplemental bill, to enjoin a writ of execution, in the nature of a fieri facias, which had been sued out by Thaddeus Street, and others, trustees, under a decree in the foreclosure suit, already mentioned, and which, it was alleged, the said parties were about to enforce, by a levy on the furniture of the Charleston Hotel; and also to enjoin an action of trover, for the recovery of the said furniture, which had been brought against the said James H. Page, by the said Thaddeus Street, and others, trustees. The supplemental bill further prayed, that an action of trespass to try title, which had been brought by the City Council of Charleston, to recover possession of the Hotel, under their purchase from the Bank of the State of South Carolina, might be also enjoined. The bill prayed process of subpœna to answer against the said Thaddeus Street, and others, trustees, and the City Council of Charleston.

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*Upon this supplemental bill, James W. Gray, Esquire, one of the Masters of the Court, on the 26th April, 1841, granted the injunction prayed for against Thaddeus Street, and others, trustees; but refused a motion for the injunction prayed for against the City Council of Charleston.

On the 15th June, 1841, the defendants, Thaddeus Street, and others, trustees, filed their answer to the supplemental bill; and on the same day, the Charleston Hotel Company filed an answer to the original and supplemental bills.

The City Council of Charleston filed their answer to the supplemental bill on the 15th June, 1841, denying that the complainant was entitled to any lien, either in law or in equity, against them. And they reiterated the allegations contained in the answer of the President and Directors of the Bank of the State of South Carolina, from whom the defendants had purchased the mortgaged premises; which they were compelled to do, in order to protect themselves against a guaranty, covering this loan to the Hotel Company, which they had entered into, in conformity to the requisitions of the Acts of June and December, 1838, in order to secure the benefit of those Acts to the citizens of Charleston. These defendants further alleged in their answer, that the lot of land on which the Hotel was built, was originally part of a large square, which was purchased from these defendants, on the 26th April, 1836, by Ker Boyce, Le Roy M. Wiley, Henry W. Conner, and George H. Kelsey, who mortgaged the same to these defendants, to secure payment of the purchase money, amounting to two hundred and forty-six thousand five hundred dollars; and that afterwards, Ker Boyce, Le Roy M. Wiley, Henry W. Conner, and George H. Kelsey, having sold the lot of land on which the Hotel, (then recently destroyed by the fire of 27th and 28th April, 1838,) had been erected, to the Charleston Hotel Company, and the company being desirous of re-building the Hotel, but not being able to obtain a loan, under the Acts of June and December, 1838, to aid them in doing so, unless the title was wholly free from incumbrance, these defendants, on the 26th June, 1838, executed a release, discharging the said lot of land from the lien of the mortgage to them,

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to enable the company to ex*ecute the mortgage to the Bank, under which these defendants now claim. And they pray, that if the latter mortgage is now invalidated, the release of these defendants may also be vacated, and the original mortgage to them, again set up and enforced.

The bill, in the second of the foregoing cases, was filed by the Charleston Hotel Company, on the 20th April, 1841, for an account of the transactions of James H. Page, in the management of the Hotel. It prayed a sale of the furniture; that the said James H. Page might be enjoined from collecting debts due to the Hotel; that Le Roy M. Wiley, and James Harrall, and all other persons indebted to the Hotel, might be enjoined from paying such debts to the said James H. Page; and that a receiver might be appointed, and the affairs of the concern wound up. The bill prayed process of subpœna to answer, against James H. Page,

the City Council of Charleston, Thaddeus Street, M. T. Mendenhall, A. G. Magrath, J. E. Glover, and Wm. Aiken, trustees, and Le Roy M. Wiley and James Harrall.

On the 15th June, 1841, separate answers to this bill were filed by James H. Page; by the City Council of Charleston; by Le Roy M. Wiley; and by James Harrall; and a separate answer was also filed by Thaddeus Street and others, trustees, on the 23d June, 1841.

The bill in the third of the said cases was filed by the City Council of Charleston, on the 15th June, 1841, for an account of the rents and profits of the Hotel, and for the appointment of a receiver. The complainants set forth their title to the Hotel, under their purchase from the Bank of the State of South Carolina; and pray that their title may be quieted, and that they may be put in possession of the Hotel. The bill prayed process of subpœna against the said James H. Page, who, since the hearing before Chancellor Harper, to wit, on the 15th February, 1843, has filed an answer thereto.

After the bill of the Charleston Hotel Company in the second of the above mentioned causes had been filed, a motion for a receiver, injunction, &c., pursuant to the prayer of that bill, was made before Edward R. Laurens, Esquire, one of the Masters of this Court, who refused the same; and at the sitting of the court in July, 1841, the two

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first *causes came on for hearing before Harper, Chancellor, and at the same time, a motion was made for a receiver, pursuant to the prayer of the bill in the third cause. On the 13th May, 1842, his Honor filed a decree in the said causes, from which decree, and the foregoing abstract, and the grounds of appeal, and documents thereto appended, the questions arising out of the pleadings and evidence, and made at the hearing, and now submitted to the Court of Appeals, will probably be sufficiently understood.

Harper, Ch. In 1837, the Charleston Hotel Company, being engaged in the construction of a large building, to be used as an hotel, entered into a correspondence with the complainant in the first stated case, then residing in Baltimore, for the purpose of inducing him to take charge of it as landlord. Terms were settled, and on the 23rd of February, 1837, an agreement was entered into between the said complainant and the Hotel Company, for the keeping of the hotel for the term of seven continuous years, to commence on the day that the building should be finished and furnished. It was recorded on the 9th of May, 1838. The building was finished and furnished, and the complainant entered into possession; but on the night succeeding the day of his taking possession, it was consumed by fire. The Company resolved to rebuild the hotel; but upon their suggestion, it was resolved that there should be a modification of the articles of agreement, as originally entered into. Accordingly, on the 7th of July, 1838, an agreement was signed, entitled, "Articles of agreement, as originally entered into, between the President and Directors of the Charleston Hotel Company, for and on account of the Charleston Hotel Company, and James H. Page, on the 23rd day of February, 1837, and amended and modified by the said parties this 7th day of July, 1838." By these it was stipulated that "The said parties have agreed for the keeping of the hotel, now in progress of construction in Meeting-street, by the said James H. Page, for the term of seven continuous years, to commence on the day the building shall be finished and furnished, which day shall be indorsed by the said parties on this memorandum, upon the following terms, to wit. That the said James

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H. Page, as landlord *of the said hotel, shall provide for the same, but shall contract no debts on account of the concern, without first obtaining the sanction of the board of directors of the company. That he shall procure and engage all waiters and servants, and the same discharge at will and pleasure; reside with his family in the hotel, but free of all charge for board or rent; conduct the same in the manner contemplated by these presents, and have the sole and exclusive management thereof, bestowing upon it his entire attention; that the furniture shall be procured and purchased by the said Charleston Hotel Company, and shall be considered as part of the capital invested, but shall, at the expiration of the said term, be returned to them by the said James H. Page, or his personal representative, in the like order and condition in which they will be received by him, (ordinary wear and tear and unavoidable accidents excepted.) It is understood that the amount of forty-five thousand dollars shall be expended in the furniture of the house, and that of that amount, the sum of thirty thousand dollars shall have been purchased and placed in the hotel, before the house shall be considered ready for occupation, and the balance shall be purchased within six months after commencement of operations, if required by the said James H. Page.

"That the said James H. Page shall keep constantly in his employment a competent book-keeper, who shall keep the books of the said hotel, according, as nearly as possible, to the most approved checks and usages adopted by well regulated mercantile establishments. Should the directors consider the said book-keeper incompetent, or otherwise disapprove of him, he shall be discharged by the said James H. Page, on the aforesaid directors making known that wish to him; and James H. Page may discharge him at any time, and procure another book-keeper, subject to the same disapproval by the parties.

The books of the establishment shall always be open for the examination of any member of the board of directors, and shall be balanced on the first day of each and every month, so as clearly to exhibit the gross receipts of every month, the expenditure of the same, and the cash on hand. The nett profits remaining on hand at the expiration

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of every year, *and after deducting the expenses of the hotel, shall be disposed of in the following manner, viz: If the said annual profits shall amount to the sum of ten thousand dollars, the said James H. Page shall be entitled to five thousand dollars, and the said company to the other five thousand dollars. If the said annual profits amount to fourteen thousand dollars, the said James H. Page shall be entitled to six thousand dollars, and the said company to eight thousand dollars. If the sum shall amount to sixteen thousand dollars, the said James H. Page shall be entitled to seven thousand dollars, and the said company to nine thousand dollars. If the said annual profits amount to the sum of twenty thousand dollars, the said James H. Page shall be entitled to eight thousand dollars, and the said company to twelve thousand dollars. And if the said annual nett profits exceed the sum of twenty thousand dollars, of the excess over and above the said sum of twenty thousand dollars, the said James H. Page shall be entitled to two fifth parts, and the said company to three fifth parts. Should the nett annual profits fall short of ten thousand dollars, the said James H. Page, shall, nevertheless, and at all times, be entitled to the sum of four thousand dollars, as an annual compensation for his services; and if the nett annual profits amount to any intermediate sum between those specified in the above, the sum shall be divided between the parties pro rata, according to the said scale. It is further agreed between the said parties, that in ascertaining the said nett profits, no account shall be taken as charged against the said James H. Page, either for rent, or interest of the capital invested in the building and furniture; and also that the said company shall keep the house and furniture under insurance; and in case of the destruction of the same by fire, during the continuance of the said term of seven years, the same shall be rebuilt and furnished, and again placed under the care of the said James H. Page, on the same terms and conditions as herein mentioned, for the remainder of the said seven years; the said James H. Page to receive during the rebuilding and furnishing thereof, the sum of four thousand dollars per annum. Provided, that it shall not be obligatory on the said company to rebuild and refurnish the hotel, should they

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fail, in any *material extent, to receive the amount of their policies of insurance. It is further understood and agreed, that on the first day of every month, the nett profits appearing on the books may be drawn by the parties, in proportion to their respective interests, as established by the foregoing scale; and the sums so drawn, shall be accounted for and allowed in the annual division of the nett profits. It is also understood and agreed, that this contract, or agreement, and the right of the said James H. Page to keep the hotel, is purely personal, not transferable to any one whatsoever, by the said James H. Page, nor in any manner liable for his debts. But if the said James H. Page should die before the expiration of the second year, and before the commencement of the seventh year of the term, the personal representative of the said James H. Page shall receive from the company the sum of five thousand dollars; and if the death of the said James H. Page occur at any time during the seventh year of the term, the personal representative of the said James H. Page shall receive from the company a sum of money, to be named by three referees, of whom one shall be nominated by either party, and the third by the two so named. It is also understood and agreed, between the said parties, that the said James H. Page, in the management of the hotel, will establish and maintain a system of strict accountability from the servants or agents under him, to himself, as is to be found in the most approved managed hotel in the United States." Signed and sealed by the President of the company and James H. Page. This contract was recorded in the Secretary of State's office, on the 30th of March, 1839. On the 24th of October, 1839, the building being finished and furnished, in pursuance of the contract, the complainant in the first case was put into possession, and a memorandum made on the contract.

The Hotel Company being desirous to avail themselves of the benefits of the Act of the Legislature of June, 1838, "for rebuilding the City of Charleston," applied to the Bank of the State of South Carolina for a loan; and on the 21st of January, 1839, executed to the bank a bond, in the penalty of $150,000, conditioned for the repayment of all loans the bank might make to the company, to-

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gether *with a mortgage of the lot on which the hotel was to be built. This mortgage was recorded in the office of the Register of Mesne Conveyances, the day after its execution. On the said 21st of January, 1839, the Bank advanced to the company the sum of $25,000; on the 8th of February, 1839, the further sum of $25,000; and on the 12th of July, 1839, the further sum of $25,000; in all, $75,000. Before making the loan, certificates were produced from the offices of the Clerk of the Court of Common Pleas; of the Clerk of the City Court; of the Clerk of the Circuit and District Courts of the United States; of the Register in Equity; the

Register of Mesne Conveyances; and the Sheriff of Charleston District. These being submitted to the Attorney General, he certified his satisfaction with the title, and the loan was effected. No certificate was produced from the Secretary of State's office. It was stated by the Attorney General, that by the original draft of the regulations for carrying into effect the Fire Loan Act, prepared by himself, no certificate was required from the Secretary of State. It is required by the printed regulations, which were in existence.[1] This requisition was said to have been added by the Bank, on account of marriage settlements.

For the purpose of procuring the necessary furniture, the company was desirous of borrowing the promissory notes of a number of individuals, to the number of forty,

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for *$1000 each. These were lent accordingingly; and for the purpose of indemnifying the trustees, the company, by their President, executed their bond, dated the 23d day of May, 1839, in the penal sum of forty thousand dollars, to T. Street, M. T. Mendenhall, A. G. Magrath, J. E. Glover and Wm. Aiken, in trust for the lenders of the notes; and for the same purpose, a mortgage of the house and furniture. Schedules of the furniture, as it was afterwards purchased, were made and annexed to the mortgage. There is no doubt, from the evidence, but that the lenders of the notes had full notice of the complainant's contract. The evidence is, that upon the execution of the mortgage, at a general meeting of the lenders of the notes, the complainant requested that it might be made subject to his contract, and was told by the President of the company, that he would do nothing to impair his contract.

On the 27th of June, 1840, the trustees of the lenders of the notes filed their bill in this court against the Hotel Company, for the purpose of foreclosing their mortgage on the house and furniture. To this the company answered, admitting the charges of the bill, and a decree by consent was obtained, for the sale of the house and furniture. On the filing of the present bill, however, on application to Chancellor Johnson, an order was made, directing the execution of the decree to be suspended until the further order of the court. The trustees, however, issued an execution on their decree, which they "lodged to bind" in the office of the Sheriff of Charleston District. They have also brought an action of trover for the recovery of the furniture, against the complainant, Page, which has been enjoined by the Master.

The arrears of interest on several instalments of the bond of the Hotel company, to the Bank of the State of South Carolina, being unpaid, the Bank, by virtue of the authority given to it by the "Act for rebuilding the City of Charleston," advertised the Hotel for sale; and on the 2d of March, 1841, it was accordingly exposed to sale at public auction, and bid off by the defendants, the City Council of Charleston, at the price of $84,622.23. The said defendants having complied with the terms of sale, the Bank, on the same day, executed to them a conveyance

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of *the lot and hotel in fee simple. The City Council, by their answer, deny that at the time of making the loan, and taking the mortgage, the Bank had notice of complainant's contract, and claim to be protected as purchasers from a bona fide purchaser without notice. The City Council have commenced an action of trespass to try title against the complainant, Page, to recover possession of the Hotel, having given him notice to quit. The objects of this bill are, that this action at law may be enjoined, as also the action of trover for the recovery of the furniture; and generally, that the complainant may be quieted in his possession of the premises, according to the terms of his contract.

The second bill, that of the Hotel Company, is for an account of the transactions of the defendant, Page, in conducting the Hotel. They charge, that the said defendant, Page, is a partner with them, and jointly liable for the debts of the firm, to the payment of which they pray he may be compelled to contribute. They charge, that he is conducting the business of the firm in his own name, and suing for the debts of the firm in his own name; and more particularly, that he is prosecuting suits against L. M. Wiley and James Harrall, on accounts for boarding, &c., who are creditors of the firm, holding the notes of the Hotel Company. The said Wiley and Harrall, who are made defendants, claim to set off their demands against their debts for boarding, &c. The bill prays a sale of the furniture; that the defendant, Page, may be enjoined from collecting debts; and that a receiver may be appointed; and that the affairs of the firm may be wound up.

[1] This is a mistake. The printed regulations were not in existence, at the time of the loan to the Hotel Company, 21st January, 1839, nor until some time after that date. The original draft of the regulations, prepared by the Attorney General, did not require certificates from the Secretary of State, and these original regulations constituted the rule in the examination of titles, until his departure for the circuit, towards the close of March, 1839. The regulations were printed by the Bank, as he believes, during his absence; at least, he saw them, for the first time, after his return from the circuit, some time in April, when he learned that the requisition of certificates from the office of the Secretary of State had been inserted, under the impression that marriage settlements registered in that office, prior to the Act of 1824, might be entitled to priority of lien, even as to the lands included in them, under the marriage settlement Act of 1785, although not recorded in the office of the Register of Mesne Conveyances. See 4th ground of appeal by the Bank, post. H. B.

The third bill, that of the City Council, is likewise for an account of the profits of the Hotel, since they became the purchasers; and that the defendant, Page, may be compelled to give up the possession. They pray that defendant, Page, may be compelled to give security, for any amount that may be found due to them, or that a receiver may be appointed, and that Page may be enjoined from collecting debts. They charge, that the agreement for the keeping of the Hotel will be an impediment to the successful prosecution of their action of trespass to try title, and pray that he may be enjoined from setting it up.

The first question relates to the relief

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claimed by the *complainant, Page, by the first stated bill; whether the agreement for the keeping of the Hotel is such an one as this court would specifically enforce, or restrain one of the parties from violating; and it will disembarrass the case to consider it, in the first place, as if it were between the original parties to it, without respect to any claims of purchasers or creditors. That is to say, had there been no sales or mortgages, and supposing this to be merely an equitable agreement, if the Hotel Company had given Page notice to quit, and demanded the furniture, and then brought their actions at law, would they have been restrained by this court? I am of opinion that they would. I need not say, that there are many agreements which this court will execute, when there is no adequate remedy at law; and in general, I should say, that the court will execute any agreement which involves the disposition of land. The books are full of cases in which bills have been sustained, to enforce the specific performance of an agreement for a lease, or the warrant of a lease. So, no doubt, for the performance of an agreement for partition in a specified manner. In Penn v. Lord Baltimore, 1 Ves. 443, a bill was sustained in England, to enforce the performance of an agreement for settling the boundaries of Provinces in America. In Legard v. Hodges, 1 Ves. Jun. 477, it is laid down by Lord Thurlow, as a maxim of universal application, "that wherever persons agree concerning any particular subject, that, as against the party himself, and all claiming under him, voluntarily, or with notice, raises a trust." That was a case in which the defendant covenanted to set apart, and pay, one-third of the income of certain specified estates, to certain trustees. He afterwards sold and conveyed the same estates to other trustees, in trust, to raise £1,000 annually for himself, and to pay off the debts and incumbrances. It was contended that the covenant was a merely personal one, and the remedy at law; but it was held, that it constituted a lien on the estates. In Roundell et ux. v. Breary, 2 Vern. 482, there was a covenant to settle lands of the value of £150 per annum. The covenantor died without making any settlement, and it was held that the covenant was a lien on his lands in the hands

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of his heir. The authority of *this case was recognized by Lord Hardwicke, in Deacon v. Smith, 3 Atk. 327. "A covenant to settle or convey particular lands, will not, at law, create a lien upon the lands; but in equity, such a covenant, if for valuable consideration, will be deemed a specific lien on the lands, and decreed against all persons claiming under the covenantor, except purchasers for valuable consideration without notice." 1 Fonbl. Eq. 367, n. d. Many covenants to purchase and settle lands, have been specifically enforced. But as to the Hotel itself, and as against the Hotel Company itself, I think there can hardly be any question. Then as to the furniture, there is no doubt that there are many cases, in which this court will enforce an agreement relating merely to personalty, where there is not an adequate remedy at law. In Weymouth v. Boyer, 1 Ves. Jun. 11–16, there was an agreement for the sale of tobacco, but the property was not transferred. The tobacco was placed in the hands of a factor to be sold, and it was held by Buller, Justice, who heard the case, that although an action for money had and received might have been maintained, yet that, in its nature, it was an equitable action, and that a bill was properly brought to recover the proceeds. Similar in principle is the case of Plunkett v. Carew, 1 Hill Eq. 169. In the case of Buxton v. Lister, 3 Atk. 388, Lord Hardwicke, puts several instances of cases in which agreements relating to personalty will be enforced, though sounding in damages, where the party cannot otherwise have the full benefit of his contract. But none of the cases are so strong as the present. It is too plain to be argued, that the complainant's contract in relation to the Hotel, which he has a right to have enforced, would be defeated altogether, unless he could also have the furniture.

This is not, as suggested in argument, a bill to enforce the specific performance of an agreement for a partnership. Though it is said by Lord Hardwicke, in the same case of Buxton v. Lister, (supra) "Suppose two partners should enter into an agreement, by such a memorandum as is in the present case, to carry on a trade together, and that it should be specified in the memorandum, that articles should be drawn pursuant to it, and before they are drawn, one of the parties flies off. I should be of opinion, upon a bill

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*brought by the other in this court, for a specific performance, that notwithstanding it is in relation to a chattel interest, a specific performance ought to be decreed." Yet, supposing this to be a partnership, (and possibly there might be such a partnership, though I know of no precedent for such a partnership

as that between a corporation and an individual; and there would seem to be an inequality in it, inasmuch as the individual would be liable for partnership debts to the whole extent of his property, while the corporation would only be liable to the extent of the corporate funds.) it was already carried into effect, and in operation. If this be a partnership agreement, the covenant to furnish the house and furniture does not constitute it such. That is merely accessary to the partnership. The house and furniture are the individual property of one of the partners, who has stipulated to provide them for the partnership business. The carrying on of the hotel constitutes the partnership business, and the debts contracted for that purpose, for wines, provisions, servants, wages, &c. are the partnership debts. One is the dormant partner, and the other the active one, having the exclusive right of control and management. Suppose, in the case of a mercantile partnership, one of the partners to have stipulated to furnish the storehouse and fixtures; that he has done so accordingly; that the goods have been purchased; and the acting partner in possession of them and the house; and the business of the firm in full operation. Suppose the dormant partner then to give his copartner notice to quit, and bring his action at law for the house; if there could be no defence at law, would there not be the strongest and plainest equity for this court to restrain him? How could a jury estimate the damages to result, from being unable to find an equally advantageous situation for the business; from putting an end to the business: the profits that might be made, or the losses sustained, in the course of the business?

It is hardly necessary to say that the complainant, Page, cannot be regarded as a mere agent, and the corporation as the true landlord and keeper of the Hotel, exclusively liable to guests, if it should fail to provide properly for them, or if they should lose

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their property. That he was to re*ceive a part of the profits, would at least make Page a partner, and proportionably liable. But it would be a singular agency, in which the principal had no right to interfere with, or in any degree control, his own business. By the terms of the agreement, the members of the company had no right to enter the Hotel, in their character of corporators, unless for the purpose of inspecting the books; and the only control which the company could exercise, was that, upon signifying their disapprobation, Page was bound by the covenant to dismiss the book-keeper. He was "to have the sole and exclusive management," and every thing to be conducted absolutely at his discretion.

But I am of opinion, that this was a lease at law from the Hotel Company to the complainant, Page, and not merely an equitable agreement for one, or that he should have possession. What is a lease? It is said, (Co. Lit. 43 b.) that no particular form of words is necessary to constitute a lease. According to Blackstone's definition, (2 Com. 315,) "A lease is properly a conveyance of any lands or tenements, (usually in consideration of rent, or some other annual recompense,) made for life, for years, or at will; but always for a less time than the lessor hath in the premises, for if it be for the whole interest, it is more properly an assignment than a lease." The words demise, lease, and to farm-let, are the proper ones to constitute a lease; but any other words which shew the intention of the parties, that one shall divest himself of the possession, and the other come into it, for a certain time, whether they are in the form of a covenant, a license, or an agreement, are of themselves sufficient, and will, in construction of law, amount to a lease, as effectually as if the most proper words had been used for that purpose. 4 Cruise's Dig. 67. If there be a license to come upon land, and take the profits for a year, this is a lease for a year. Anon. 3 Salk. 223. In Roe v. Ashburner, 5 T. R. 163, by articles of agreement, one of the parties covenanted that the other "shall enjoy, and I engage to give him a lease," of certain premises, from a certain day. There was also a stipulation, that the first party should purchase some additional land to be added to the premises. It was said by Lord Kenyon, delivering the opinion of the court,

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that if there had been nothing more *than the stipulation that the party should enjoy the premises, this would have amounted to a lease; but the additional words, "I engage to give him a lease," shewed that the contract was executory; which was strengthened by the circumstance, that an additional piece of ground was to be purchased, without which there was to be no lease. And in Goodtitle v. Way, 1 T. R. 735, there was a similar stipulation for a future lease. There is some discrepancy in the cases, which are collected 4 Cruise's Dig. 68, et seq. but there is no case, in which it has been sufficiently expressed that the party shall have possession and enjoyment of the premises for a certain time, without any agreement for a future assurance, that has not been held to amount to a lease. It is said, that a lease must have a certain commencement, and a certain termination: but that is certain which can be rendered certain. As in the case of Barry v. Nugent, cited in Doe v. Ashburner, (supra,) where the party devised the premises from the time he should recover them, or where a lease was granted for twenty-one years, if the lessee should so long live. So it is said, that although a lease must have a certain beginning, and a certain termination, yet the continuance may be uncertain, for it may cease and revive again. Co. Lit. 46, a.

Now, taking the whole of this agreement together, can there be any question but that the Hotel Company do agree to divest themselves of the possession for the specified time, and that Page shall have the exclusive possession, receiving the entire issues and profits? He is to have the exclusive management and control. The agreement, too, uses technical words, appropriate to a lease. It provides for the re-building of the Hotel, if it should be burnt during the continuance of the term, and makes provision for the contingency of Page's dying during the continuance of the term. Lease and term for years, are often used as words convertible. That the matter was so understood, by the company itself, is unquestionable. In the first overture of their agent to Page, he is requested to become a candidate for the lease of the Hotel. On the minutes of the company, which were in evidence, the resolution of the 16th February, 1837, provides for

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letting out the Hotel, *and renting the stores. Again and again, the contract, on the minutes of the company, is spoken of as a lease, and Page as their tenant.

Nor does it make any difference, that instead of a fixed annual sum, the lessee was to pay a specified proportion of the issues and profits, as rent. As observed by Blackstone, (2 Com. 318,) originally the common mode of renting lands, was to reserve a portion of the produce; and this is still, at least in some portions of this country, no uncommon practice. The words, to farm-let, technically imply this sort of reservation of rent. Nor does the stipulation that if the profits shall not amount to $10,000, annually, the lessee shall still be entitled to the annual sum of $4,000, make a difference, any more than if, in the case of a farm, it were agreed that if the profits did not amount to a certain sum, the tenant should take them for his personal services. Nor do I think it would have made a difference, if it had been stipulated, that if the profits did not amount to $4,000 per annum, the company should pay, and make up to Page, that sum, though such are not the terms of the contract, the parties, probably, not contemplating the possibility of their falling below that sum. Nor that it is stipulated, that Page shall reside with his family in the Hotel, without being charged for rent, or the interest on capital. Taking the whole contract together, it means, that he shall pay no other rent than the specified share of profits. When rent is to be paid in kind, or by a share of the profits, there is always a contingency, that the landlord will receive nothing; for it may always happen, that the expenses will exceed the profits. Nor do I think it makes a difference, that the contract is declared to be strictly and purely personal to Page himself, and not transferable to any other person. This was a covenant on his part, (a very common one,) not to underlet. There is rather a curious analogy, in several particulars, between the case of Right v. Proctor, 4 Burr. 2208, and the present. Green, the owner of a brew-house, who had covenanted to sell an undivided portion of it, covenanted that the trade should be carried on between Green, Ekins and Proctor, and that £300, allotted for the yearly rent of the house, should be paid by Green, (the owner.) He

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covenants, also, that Proc*tor should reside and dwell in the house, free of all rent, except taxes, and should be allowed certain perquisites, and receive £6. 6s. weekly, for his trouble, &c.; and covenanted, that if he should die, his executor should renew the lease to Proctor. In an action of ejectment by Green, against Proctor, for the house, Lord Mansfield said, he could not recover against his own covenant. The house was to be appropriated to the use of the trade, and Proctor to have the use and occupation of it, and receive perquisites. It was said by Mr. Justice Yates, that even as a license to inhabit, it amounts to a lease. Justices Aston and Willis concurred. In the case of Harker v. Birkbeck, 3 Burr. 1556, which was cited in argument, the writing could not be given in evidence as a lease, for want of being stamped, as required by the English law; and it shewed that the alleged lessee was not entitled to the exclusive possession. It was a license to raise lead ore, and the alleged lessor was to keep up a smelting furnace on the premises, and to smelt the ore, and receive every sixth pig of metal. Lord Mansfield is made to say, that this is no lease, because nothing is reserved to the lessor. But if the lessees had been entitled to the exclusive possession, covenanting to pay one-sixth part of the lead they should raise on the premises, I do not know how it could be said that nothing was reserved.

I have thus far considered the case as if the Hotel Company were alone concerned. With respect to the mortgagees of the furniture, there is no doubt that they had full notice, and can stand in no better condition than the company itself.

There is more doubt with respect to the City Council. If there be a lease, good at law, I suppose it would prevail both against the Bank and the City Council, unless there were something to invalidate it. It is alleged that it is void, for want of being recorded within three months. If there be an Act of the Legislature requiring a lease to be recorded within three months, it has escaped me. The Act of 1785, requiring conveyances to be recorded within six months, does not relate to leases for years. It relates only to the conveyances of "any estate of inheritance, in fee simple or any estate

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for life or lives." If it is embraced *by any statute, it must be that of 1698, declaring that the first sale, mortgage, or conveyance

of lands, recorded in the office of the Register of Mesne Conveyances, and the first sale of chattels recorded in the Secretary of State's office, shall have priority. Now, in one sense, a lease for years is certainly a conveyance of lands. Yet it is not commonly so spoken of, and in construction of law, it is regarded as the sale of a chattel interest. The reason may be found Bac. Ab. Tit. Leases and Terms for years. Originally, the term itself was not recoverable, but only damages for breach of covenant. I cannot say that this lease was not properly recorded.

The contract of the 22d February, 1837, was recorded before the mortgage to the Bank. The modifications of it, by the agreement of the 7th July, 1838, are such as do not concern the Bank or creditors. It is no less substantially the same contract, than if the modifications only had been written down, leaving the former to stand as the subsisting contract. The term, by both, was the same, viz: seven continuous years from the time of taking possession. Regarding this as notice, according to the decision in Thayer v. Cramer, 1 MC. Ch. 395, and the view I have taken in Thayer v. Davidson, 1 Bail. Eq. 412, the Bank had sufficient notice.

But independently of this, I have some difficulty in saying that the lease to Page was an incumbrance, against which the Bank had a right to be protected, if the mortgage was taken without notice of it. In England, a lease by a mortgagor after the mortgage, is void against the mortgagee; because the mortgagee is the legal owner of the land. But this will hardly apply in this country, and the lease in question was made before the mortgage. Of course, the Bank knew that the Hotel was to be rented. It was involved in the very nature of the transaction. The corporation could not, in proper person, be the keeper and landlord of the Hotel, and it must have been known, that it was to be kept under some lease, or contract; and this added to the security of the Bank. Undoubtedly, the value of the property would have depreciated, if it had been left tenantless. By the terms of the loan, under the Act of Assembly, the first instalment was to be re-

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paid within *three years, and the last, after a lapse of thirteen years. Was the house to remain untenanted during all that time? According to the evidence of Major Black, the former President of the company, this particular contract with Page was regarded as an advantage, and as adding to the value of the property, on account of his qualifications as a landlord.

Then it was said in argument, that if there is a lease, this is a defence at law, and this court ought not to interfere. But the answer of the City Council takes no exception to the jurisdiction, on the ground of adequate remedy at law; and according to the decision in Miller v. Furse, 1 Bail. Eq. 187, this is necessary to be done, and the objection cannot be taken for the first time at the hearing. On the contrary, so far as in its power, it has given jurisdiction. It alleges that the agreement of the Hotel Company is an obstacle to a recovery at law, and claims the interposition of this court. And it alleges truly. At law, there is no plea of bona fide purchaser without notice, and whatever defence would be good against the Hotel Company, would be good against the City Council; and according to the decision of Lord Mansfield, in Right v. Proctor, and in Harker v. Birkbeck, supposing the agreement to be only a covenant for possession, this is a good defence at law. So in Weakley v. Bucknell, Doug. 473, he held an agreement for a lease to be a good defence at law.

But regarding it as merely an equitable agreement. It is said, that to supply the want of registration, full and explicit notice is necessary; to repel the plea of purchaser without notice, any thing that is enough to put the party on enquiry, will suffice. Now, in point of fact, I have not the slightest doubt, but that at the time the loan was made and the mortgage taken, every director and every officer of the Bank, knew that Page was to keep the Hotel, when finished; and of course, to keep it under some contract, entitling him to the possession. This, according to authorities, to which I shall advert hereafter, was enough to put them on enquiry. The Attorney General, who examined and approved the title, stated that he had heard it. This, I should have thought

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sufficient notice, but for *the principle laid down by Lord Hardwicke, in Warrick v. Warrick, 3 Atk. 294, that where the same person is agent for the mortgagor and mortgagee, notice to such agent will not affect the mortgagee. The Attorney General was at the same time agent of the Hotel Company, for the purpose of clearing up the title. Several members of the Hotel Company were Directors of the Bank. The witness, Major Black, stated that it was notorious that Page was to keep the Hotel. Mr. Logan said, he believed that every body in town knew that Page was to keep the hotel.

Then with respect to the City Council, even although the Bank might have resisted the performance of this agreement, I do not think it comes within the principle, that a purchaser from a bona fide purchaser without notice, though having notice himself, is to be protected. That they purchased pendente lite, is, of itself, enough to affect them with notice. But it is a general principle of equity, that a purchaser of land, knowing it to be in possession of another at the time of the purchase, is presumed to have notice of every equity which the tenant has, in relation to the land; as where there was a covenant for the renewal of a lease, or the ten-

ant had contracted for the purchase of the land. Taylor v. Stibbert, 2 Ves. Jun. 437; Hiern v. Mill, 13 Ves. 114; Daniels v. Davidson, 16 Ves. 249. It is not questioned, but that the City Council had full knowledge of Page's being in possession.

I feel more satisfaction in arriving at my conclusion, because it is evidently conformable to the right and justice of the case. As I have said, there can be no doubt but that the Bank, in making the loan, and the City Council in making the purchase, had substantial notice of Page's contract, and consequently, that it ought to be enforced against them, as well as against the Hotel Company itself. A sort of soreness seemed to be felt, on the part of those who were concerned in the constructing of the Hotel, that while it has been a source of loss to all others engaged in a public spirited enterprize, it has afforded large profits to the landlord, Page. But I think it will be found, upon calmer reflection, that these views and feelings are entirely misconceived. Either the hotel Company complain that they have made too liberal a contract, too favorable to Page,

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*and seek to get rid of it on that ground, which I am sure they would not be willing to do, or they complain that their enterprize, so far as he is concerned, has been too successful. If he has made large profits for himself, he has made larger for the company. It is true, no money has been paid over to them; but it appeared in evidence, that up to the 27th of May, 1840, in pursuance of a resolution to that effect, the entire profits were consumed in completing and furnishing the house. But this was no less to the advantage of the company, and its creditors, than if the money had been paid over. More so, indeed. By enlarging the power of affording accommodation, the profits were to be increased, and the furniture would remain for their benefit, at the expiration of the contract. If these profits were not properly applied, Page is accountable for them, as well as for any he has made since. For any thing that appeared in the cause, he has honestly, diligently, and skilfully performed his part of the contract. It would be obvious and gross injustice, when he has been induced to quit a similar employment, for the purpose of taking charge of this, now to turn him adrift, leaving him to his action for damages, against a Company which avers itself to be utterly insolvent.

The various questions made by the answers, and cross-bills, for the most part result from that confusion of ideas which is apt to be occasioned when the same parties stand in various relations. The Hotel Company, and the City Council, claim an account, and to this they are entitled. But the bill of the Hotel Company prays that Page may be declared a partner with them, and liable for the partnership debts. Supposing a partnership to have existed, undoubtedly he is liable for the partnership debts. But, as I have said, the partnership debts were those contracted for supplies to the hotel, servants's wages, &c. The firm consisted of the Hotel Company and Page. If, as alleged, he was a member of the Company, his individuality was merged in his character of copartner. The debt to the mortgagees of the furniture, to the Bank, &c., were the private debts of one of the partners. So with respect to the debts of Harrall and Wiley. At law, you cannot set off the debt

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of one part*ner, in an action by the firm. And in equity, the right of creditors of assignees, of one partner, is to the amount that may be found due to him, on the final winding up of the concern. But this is a question for the Court of Law. I know of no principle of equity by which Page should be restrained from collecting the partnership debts. When there is an acting and a dormant partner, it is common that suits should be brought in the name of the former. His name is the style of the firm. There would be something unusual in a suit by the Charleston Hotel Company, and James H. Page, hotel keepers, under that style and title. There was no evidence at all shewing the necessity of appointing a receiver. Whether this court would carry specifically into effect an agreement for a partnership, or not, when it is in the independent power of the acting partner to carry on the business, it will not interfere to dissolve it at the instance of the other partner, and contrary to his agreement.

It is ordered and decreed, that the complainant, in the first cause, account before the Master, for the income and profits of the hotel, since he has been in possession of it; the share of the profits reserved to the Hotel Company, to be paid to the parties entitled to them, according to their respective interests; and that the Master report how the said profits ought to be opportioned, between the mortgagees of the furniture and the owners of the hotel. And it is further ordered, that the City Council of Charleston be enjoined, until the further order of the Court, from prosecuting their action at law, to recover the possession of the said hotel; and the mortgagees of the furniture, from prosecuting their action of trover; and that they be also restrained from enforcing their execution, under the decree of this Court for foreclosure.

Grounds of Appeal by the Bank of the State of South Carolina.

The President and Directors of the Bank of the State of South Carolina, parties defendants to the original bill in this cause, and from whom the City Council of Charleston purchased the premises in dispute, at a sale made during the pendency of the suit,

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under the mortgage to these *defendants; the said City Council of Charleston being guarantors of the debt to these defendants, which the said mortgage was intended to secure; and no injunction against the said sale having been granted, or moved for, by the complainant, as prayed for in his bill, although due notice was given, and ample time allowed for making such motion, the said sale not having been made until nearly ten months after complainant's said bill was filed; respectfully appeal from so much of his Honor's decree as declares that the complainant is entitled, under his contract with the Charleston Hotel Company, to hold the premises in dispute against the mortgage to these defendants executed by the said company, and enjoins the said City Council of Charleston from prosecuting their action at law, against the complainant, to recover possession of the said premises, by virtue of their purchase aforesaid from these defendants. And in support of their said appeal, they rely upon the following grounds.

1. That the complainant's original contract with the Charleston Hotel Company, which bears date the 23d February, 1837, was not recorded in the office of the Secretary of State, until the 29th May, 1838, and was never recorded in the office of the Register of Mesne Conveyances at any time; that by the provisions of this contract, the complainant's term of seven years was to commence from the day of his being put in possession, and it appears by the decree, that he was put in possession, and that his term commenced, on the 26th April, 1838; but that his contract was modified, and, in fact, rescinded, by the second contract, of the 7th July, 1838, which substituted a new term of seven years, to commence from the complainant's being put in possession of the new building, which took place on the 24th October, 1839; and that this second contract, although bearing date the 7th July, 1838, was not recorded in the office of the Secretary of State until the 30th March, 1839, nor in the office of the Register of Mesne Conveyances, until the 12th May, 1840; both of these last mentioned dates being subsequent to that of the mortgage to these defendants, which was executed on the 21st January, 1839, and duly recorded in the office of Register of Mesne Conveyances on the 22d Jan-

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uary, 1839. *Wherefore it is respectfully submitted, that even if the original contract were not rescinded by the second, and if either, or both of them, could be regarded as more than a merely personal contract, for a breach of which his only remedy is a compensation in damages, and whether the same be a lease, or a contract of any sort, which equity would specifically enforce by a decree for possession, yet, in any and every character, they are wholly unavailing against the mortgage to these defendants; first, under the 1st section of the Act of 1698, 2 Statutes at Large, 137, which, according to the construction given to it by the unanimous judgment of the Constitutional Court in the case of Ex Parte Leland, 1 N. & M. 460, requires leases for years, as well as other conveyances of lands, to be recorded in the Register's office, and gives the preference to that which is first recorded there; and second, under the 1st section of the Act of 1817, which provides, "that all leases, or contracts in writing, hereafter to be made between landlord and tenant, for a longer term than twelve months, shall not be valid in law against the rights and claims of third persons, unless the same shall have been recorded in the office of Mesne Conveyances, at least within three months from the time of the execution thereof; nor shall any payment made in anticipation of rent for a longer period than twelve months, be considered a valid discount against the claims and rights of third persons." Vide 6 Statutes at Large, 67.

2. That the proposition intimated in the decree, to wit: "that the lease to complainant was not an incumbrance, against which the bank had a right to be protected, if the mortgage was taken without notice of it," cannot be sustained by principle or authority, and is equally inconsistent with the letter and the spirit of the registry Acts; it being respectfully submitted, that whatever confers upon a third party a right to the possession or to the enjoyment of any interest, which the mortgagor himself is precluded by his mortgage from setting up, exercising or enjoying, against the mortgagee, is an incumbrance, against which the mortgagee is protected by want of legal notice; and if the instrument by which such right or interest is created or granted, has not been recorded in the manner which

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*the registry Acts require, for the purpose of giving notice, then, by the express provisions of these Acts, such right or interest, as well at law as in equity, "shall not be valid against the rights and claims" of the mortgagee.

3. That although actual notice may supply the place of recording, yet in this case, there was not only no direct proof of notice to these defendants, nor proof of any facts from which notice could be reasonably inferred to them, or to any of them, or to any of their officers, but notice is most explicitly denied in their answer; and it was, moreover, distinctly proved, at the hearing, that the officer on whom, by law, devolved the duty of making the investigation in this case, had no notice whatever of the claims of complainant, at the time of the loan to the Charleston Hotel Company, on the security of the mortgage to these defendants, and that the loan would have been arrested, if there

had been the slightest information, intimation or surmise, that such claims existed.

4. That his Honor was mistaken in supposing that the printed regulations established by the Bank, among which was one requiring certificates from the office of the Secretary of State to be produced on applications for loans under the Act of 1838, for re-building the city of Charleston, were in existence at the time of the loan by these defendants to the Charleston Hotel Company; the evidence being distinct, that the regulation in question was not introduced. nor were any of the regulations printed, until some time after that loan had been made. And even if such regulation had existed, it could not avail against the positive proof, that the office of the Secretary of State was not in fact searched; nor, if it had been searched, is there any reasonable probability, that such search would have led to a discovery of the complainant's claims; the contract of 7th July, 1838, not having been recorded at that time, even in the office of the Secretary of State; and the contract of 23d February, 1837, not being in the corporate name of the Charleston Hotel Company, which was then incorporated, nor in the names of the persons in whom the legal title to the land was then vested, which were the only names the most careful examiner could have thought of searching for. Besides which, an actual

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in*spection of that contract would scarcely have suggested that it was regarded as a conveyance of, or a lien on, the land, being declared in the body of it to be "strictly and purely personal."

5. The proposition maintained in the decree, that the knowledge, by these defendants, of the general rumor that the complainant was to be keeper of the hotel, when finished, was sufficient to put these defendants upon inquiry, and, therefore, to fix them with notice of what is now declared to be a lease, if it be tenable at all, must be limited to fixing these defendants with notice of a parol lease, and such lease, by the third section of the Act of 1817, cannot avail to give a right to the possession for a longer period than the term of twelve months. Vide 6 Statutes at Large, 67.

6. That if general rumors, of an intended connexion in business between parties, are sufficient, in any case, to put the community upon enquiry, and to fix all persons, whom such rumors may reach, with notice of a secret lien or incumbrance, held by one of the parties, on the property of the other, the rule must be limited to cases where the want of notice is relied on as an equitable defence against an otherwise valid title to relief; but such notice can never, of itself, constitute a sufficient ground of relief against a title valid at law; and that to make it a ground of relief, against a legal title, cannot fail to produce vast injury and injustice, and is fraught with the most disastrous consequences to the rights of property, and to the best interests of society. It would unsettle every title in the State; and particularly, render the whole mass of securities taken by the Bank, for the large sums loaned out to individuals by the State, under the provisions of the Act of 1838, an easy prey to the machinations of the fraudulent and unprincipled, although every care and precaution which the law has prescribed, or common prudence could suggest, may have been taken, to ascertain that the property was free of incumbrances.

7. That whatever may have been the rule, independently of the registry Acts, it is respectfully submitted, that merely equitable notice, of every sort, is rendered wholly unavailing as to subsequent purchasers or

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incumbrancers, *without actual notice, by the provisions of those Acts; which were intended to relieve purchasers or incumbrancers from the necessity of making inquiry any where, but at the proper registry office, and expressly imposes upon every one who claims under a prior conveyance or incumbrance, the duty and obligation of giving implied notice to the world, by recording in the proper office, unless he is prepared to prove express notice of his claim to the junior purchaser or incumbrancer, under the penalty of losing his priority. Vide Acts of 1698, and 1817, (supra,) and Act of 1785, § 45, 7 Statutes at Large, 232, 233.

8. That a junior conveyance, or incumbrance, duly recorded, ought not, on principles of common equity, to be affected by a senior conveyance or incumbrance which has not been duly recorded, without proof of actual fraud, o. such explicit notice of the claim as amounts to presumptive proof of fraud, or of a wilful disregard of the rights of the senior incumbrancer, which cannot be distinguished from fraud; inasmuch, as a party who forbears to record the instrument which confers upon him the right to a lien or incumbrance, may, with great justice, be inferred to have withheld it from publication, for the express purpose of leaving his grantor unembarrassed, in dealing with other persons; of which the present case affords a pregnant instance.

9. That whatever rule the courts may be at liberty to adopt in other cases, a mortgage under the Act of 1838, is protected against all prior incumbrances not duly recorded, by the 2nd clause 4th section of that Act, which declares that a purchaser under such mortgage, "shall be deemed seized of a good and absolute and legal estate in fee simple of the premises purchased, as against all persons whomsoever, their heirs and assigns, not claiming by or under a paramount title;" which enactment was intended to protect the State against secret liens by equitable or implied notice, or notice of any

sort, to the agents of the State, and in effect excludes all liens and incumbrances not duly and regularly recorded, conformably to the strict requirements of law. Vide 7 Statutes at Large, 157.

10. That if the legal rights of these defendants could be affected by notice of any

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sort, it was necessary that such *notice should have been given to the officer to whom the examination of titles, on applications for loans, is by law committed, and at the time when the title of the Charleston Hotel Company was examined: it being respectfully submitted, that a corporation can in no case be affected by notice, unless the notice be given to the agent charged with the business to which it relates, and at the time when he is engaged in the transaction of that business.

11. That no fraud on the part of these defendants has been alleged, or pretended, or attempted to be proved; and if the decree, as it affects them, and the interests they represent, is to be sustained on this ground, they humbly hope that they may be allowed an opportunity of meeting the charge, and that an issue may be ordered for the purpose of trying it.

12. That if, in the absence of explicit notice, to these defendants, of the claims now set up by the complainant, general rumors, of complainant's connexion with the hotel, are to avail for the purpose of affecting their legal rights with an equity in favor of the complainant, they respectfully submit, that such an equity may be rebutted by a counter equity in the same way. That it was not more notorious, that the hotel was to be kept by the complainant, when it was rebuilt, than it was that the hotel was to be rebuilt with the aid of a loan from these defendants, under the Act of 1838: that this could not but have been known to the complainant; that he knew that the hotel could not be rebuilt without the aid of such a loan; that he could not but know the terms of such loan, as they were prescribed by law, and that by law it could not be made, if there existed any lien, or incumbrance, of any sort whatever, upon the land; and that he must have known, that if he had set up any claim under his contract, as prior in lien to the mortgage for that loan, the loan would have been arrested, and he would have been left to a barren contract, unless such claim of prior lien were distinctly waived: and yet he neither gave notice of his contract, or any intimation of such a claim as he has now set up, but actually withheld his contract from record in any office, and kept it, in effect, concealed, until the loan was effected; and even then did not record

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it in the proper of*fice, nor in any office until the entire loan of $75,000 had been advanced by these defendants. That although the reasons, or motives, for pursuing this course do not appear, yet, even if the omission to record the deed, or to give notice of the claim, originated in inadvertence merely, and not in a purpose to avoid a disclosure, which would have obstructed the loan from these defendants, and thus have defeated all the objects of complainant's contract, it has nevertheless produced precisely the same effects as if that had been the purpose: and it is submitted, that it is contrary to every notion of equity, to permit the complainant now to set up his contract, to defeat, impair, hinder, or delay, the mortgage executed to secure that loan; and to enjoy the premises built with the money of these defendants, without even paying the moderate annual interest due thereon, and which he was invited to pay, in order to exempt these defendants from the performance of the duty, enjoined on them by law, of foreclosing the mortgage, for default of such payment.

13. That at the date of the complainant's original contract with the Charleston Hotel Company, the land in dispute was under a prior mortgage to the City Council of Charleston, and the mortgage was duly recorded; and that satisfaction was entered on this mortgage, expressly for the purpose, as it was proved at the hearing of enabling the Company to mortgage an unincumbered title to these defendants; wherefore it is submitted, that these defendants are entitled to be subrogated to the rights of the City Council under the said mortgage, and to have the same set up against the contract of the complainant.

14. That the complainant has exhibited no ground of equity against these defendants, and the ground upon which his contract has been sustained by the decree, would have been as available at Law as in Equity; and as these defendants have by their answer claimed the benefit of the complainant's want of equity, in the same manner as if it had been specially pleaded, they have a right to insist upon the objection, either for themselves or their co-defendants, the City Council of Charleston, to whom these defendants may be answerable over.

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*15. That if the complainants have a legal title, and there were no objection to the jurisdiction, yet these defendants, being purchasers for valuable consideration, without notice, have at least an equal equity with the complainant, and are entitled to be protected, by the well settled rule of the court; and the rule is the same if the complainant's title be merely equitable, for where equities are equal, the Court will in no case interfere.

16. That, in fact, the complainant's title, if he have any, is merely equitable: for even if his contract be regarded as a lease, yet not having been duly recorded, it is void at law, as to these defendants, under the registry Acts; besides that the Charleston Hotel Company, under whom he claims, had at the

time but an equitable estate in the premises. But that in truth his contract cannot be regarded in law as a lease, and even if it be such a contract as equity would enforce by a decree for possession, yet it can give only an equitable title, which, as to all persons but the immediate parties to the contract, is a mere equity. And it is respectfully submitted, that however a mere equity may avail as defence in equity, yet without any allegation, pretence, or proof, of fraud, accident, mistake, trust, or other acknowledged foundation of equity jurisdiction, it cannot afford a ground for enjoining a legal title, without merging the whole law in, and rendering all titles dependent upon, the arbitrary discretion of a Chancellor.

Grounds of Appeal by the City Council of Charleston.

1. That the contract set forth in the complainant's bill, between him and the Charleston Hotel Company, is purely a personal contract, for a breach of which the complainant may be entitled to a compensation in damages; but that the same does not give him any legal lien on the lot, or buildings, constituting the Charleston Hotel, or any right to the possession thereof, otherwise than as the agent, or steward, of the Company: and that the said contract cannot be regarded in Law or Equity as a lease.

2. That the said contract is wholly void and unavailing as to the President and Directors of the Bank of the State, and the City Council, who derive their title from the Bank, inasmuch as the said contract was

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not recorded *in the office of the Register of Mesne Conveyances, for Charleston district, within three months from the execution thereof, as required by the Act of Assembly of 1817. And the President and Directors of the Bank of the State had no knowledge, notice, or information, of any lien, or claim of lien, or of any right, or claim of right, or title, to the said lot, and buildings, by, or in favor of, the complainant, either before, or at the time, when the bond and mortgage of the Charleston Hotel Company, to the President and Directors of the Bank of the State, were executed.

3. That the complainant well knew of the intention of the Company to apply to the Bank of the State, for the fire loan, and never placed his alleged contract on record, in the proper office, nor gave notice to the Bank, of any claim of lien, or right, or title, to the said lot, or buildings thereon, but stood by, and permitted the President and Directors of the Bank of the State to accept of the said bond and mortgage, and to pay and advance the several loans, or instalments, thereon, with which the said buildings were erected, without interposing any such claim as is now set up in his bill, whereby, as it is respectfully submitted, the complainant did, in effect, waive all claim, if any he had, which could have created a lien on the said lot and buildings.

4. That there was no evidence to shew that the President and Directors of the Bank of the State, prior to or at the time when the bond and mortgage were executed and the loans made, had any notice, whatever, of the claim now set up by the said James H. Page; and when the loans were made, the premises were vacant, the buildings not erected, and no one in possession, but the Charleston Hotel Company.

5. That the President and Directors of the Bank of the State, under their mortgage, were bona fide purchasers, for valuable consideration, without notice of such outstanding incumbrance as is now set up by the complainant; and that the City Council of Charleston are subrogated to all the rights, legal and equitable, of the Bank, and consequently, are also purchasers, for valuable consideration, without notice, and they should

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not have been post*poned, by the decree, to the contract of the complainant with the Company.

6. That there is no such rule, as that a mere general rumor in the community, of a connexion in business, between third parties, can be considered as notice of a special lien, on lands especially, existing from one to another, when the proper offices for incumbrances on lands are examined, and no such liens are found there recorded.

7. That a person who has purchased under the Bank of the State, is, by the Act of 1838, entitled to hold against all who have not paramount titles; which enactment was intended, by the Legislature, to exclude all implied or secret liens, in favor of the security of a fund from which a great public charity, or benefit, was to be extended to the whole community.

8. That the premises, mortgaged by the Charleston Hotel Company to the President and Directors of the Bank of the State, were regularly sold, according to the provisions of the Fire Loan Acts; and the premises, having been purchased by the City Council, who have received titles therefor, from the President and Directors of the Bank of the State, they are thereby seized of an absolute estate, in fee simple, as against the said James H. Page, and to the exclusion of his said contract.

9. That under all the circumstances, set forth and averred in the answers of the President and Directors of the Bank of the State, and the City Council, in relation to the proceedings to obtain the loan, the loan itself, and the sale made to the City Council, the defendants were entitled to the decree, and the Chancellor should have dismissed the bill of the complainant, so far as concerned the Bank and the City Council.

10. That the evidence did not make out a

case sufficient to put the Bank of the State upon inquiry, when the mortgage was accepted, as to the nature of the contract between the complainant and the Company, for the keeping of the Hotel; nor was there any testimony of any kind to shew that the President and Directors of the Bank, or the Attorney General, were aware of the conditions of that contract, when the loan was obtained by the Company.

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*11. That the City Council stand in the same position as the bank, and are within the principle of protection to a bona fide purchaser, for valuable consideration, without notice.

12. That the contract between the complainant and the company, is not such an agreement as should be specifically enforced against the Bank, or City Council.

13. That the Chancellor erred, in his decree, in supposing that there was no Act of the Legislature requiring leases to be recorded within three months; and also, in deciding, that the record of a lease, in the office of the Secretary of State, was legal, which is contrary to the decree of the Court, in Ex Parte Leland, 1 N. & M. 460.

14. That under all the circumstances, the Court of Equity had no jurisdiction, to restrain the City Council in the prosecution of their action of trespass to try title, and the question of jurisdiction was properly before the Court.

15. That James H. Page, not having complied with the registry Act, cannot claim the aid of this Court, against a subsequent purchaser, without fraud.

16. That when a purchaser has laid out money in improvements, the rule in equity is, to allow for those improvements; so that, at all events, the City Council, and the Bank, are entitled to relief, as their advances were expressly for improvements.

17. That the City Council stand not in relation merely as a purchaser, but as a guarantor of the original loan, by which the buildings were erected.

18. That the City Council, as the guarantors, and the Bank, as the lender, stand in the condition of benefactors, both to Page and the Hotel Company; and Page has the benefit of the money, laid out by the bank, in the building, without the least consideration moving from him to the bank; and the plain and obvious equity is, at the least, to require Page to keep down the interest, and to meet the instalments, or submit to a sale, and take his remedy against the Company.

19. That his Honor the Chancellor, in attempting to distinguish the case of the City Council from the Bank, has omitted to no-

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tice the equity and privity of the City *Council, as to the original loan, by being the guarantors; and has overlooked the numerous cases by which it is well settled, that a person with notice may safely purchase from one who purchased bona fide, and without notice.

20. That in order to constitute a notice, the Chancellor has been obliged to resort to the evidence of A. Black and G. W. Logan, as to rumors; whereas, reports from strangers, it is well settled, are not notice.

21. That a director of the bank, being a member of the company, what may be known to him as a member of the company, is not notice to the bank.

22. That the wide scope which the Chancellor has given to the effect of notice is contrary to the settled principles of the Court.

23. That James H. Page had notice, as an Act of the Legislature is notice to every one in the community.

24. That the contract between James H. Page and the Hotel Company, not having been recorded within three months from the time of the execution thereof, in the office of the register of mesne conveyances, could not give James H. Page a right of possession, in any view of that contract, for a longer time than twelve months from the time of his entering on the premises.

Grounds of appeal on behalf of the mortgagees of the furniture.

1. That the agreement of Mr. Page, with the Charleston Hotel Company, was merely a contract for his services, and binding on Mr. Page and the Hotel Company, but giving him no lien on the property of the Hotel Company.

2. That the furniture was purchased with the knowledge of Mr. Page of the mortgage that would bind it; and that the request of Mr. Page, that his agreement should be protected in the mortgage, and the refusal of the mortgagees to do so; with the knowledge of Mr. Page, that the money would not have been loaned if he had insisted on his agreement being so recognized; and the subsequent acquiescence of Mr. Page, in not insisting on his agreement, but receiving the furniture; amount to a fraud upon the mortgagees, if he insists on his agreement; and equity will not protect him.

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*3. That Mr. Page can have no higher right in the case than the Hotel Company, through whom he claims, and that company could not retain the furniture, upon the failure to pay the notes for which the furniture was pledged, without fraud.

4. That the mortgagees of the furniture are creditors of the Charleston Hotel Company, and the division of profits between that corporation and Mr. Page, make the said corporation and Mr. Page mutually responsible for the debts or contracts of the said corporation. And one co-partner cannot give a lien on co-partnership property, to his co-partner, in exclusion of co-partnership creditors.

5. That the company having failed to pay

the notes for which the mortgage was given, the estate of the company in the furniture has become forfeited, and the same is now the property of the mortgagees; and as the possession of Mr. Page is based upon the right of property in the company, whatever determines the one, will determine the other.

6. That a mortgage given to secure the purchase money, is a lien, paramount to all others, and one which will always be protected in a Court of Equity; and if Mr. Page could not establish his agreement, so as to prevent a sale of the furniture, for the payment of those from whom the furniture was originally purchased, he cannot establish it against those who have advanced the money, and are entitled to all the rights of the original vendors of the furniture.

7. That, it is respectfully submitted, as the decree is, in other respects, against equity.

Grounds of appeal of the Charleston Hotel Company.

1. That the company having become insolvent, and having been divested of all legal interest in the Hotel, by its sale to the City Council; and in the furniture of the Hotel, by reason of the forfeiture of the mortgage thereof, and the sale aforesaid; they were entitled to have the concern wound up, and to enjoin the said James H. Page, their agent, or partner, in the concern, from continuing to carry on the business for his private benefit, and from sueing debtors of the concern in his own name.

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*2 That the decree is in other respects contrary to equity.

Copy of the first contract between James H. Page and the Charleston Hotel Company, dated the 23d February, 1837. Recorded in the office of the Secretary of State, the 29th May, 1838.

City of Charleston,
In the State of South Carolina

Memorandum of an agreement, entered into, this twenty-third day of February, eighteen hundred and thirty-seven, between the President and Directors of the Charleston Hotel Company, and James H. Page, of the city of Baltimore. The said parties have agreed for the keeping of the hotel, contemplated by the company, and now in progress of construction, in Meeting-street, by the said James H. Page, for the term of seven continuous years, to commence on the day that the building shall be finished and furnished, which day shall be endorsed, by the said parties, on this memorandum, upon the following terms, to wit; That the said James H. Page, as landlord of the said hotel, shall provide for the same, procure and engage all waiters and servants, and the same discharge at will and pleasure, reside with his family in the hotel, (but free of all charge for board or rent,) conduct the same in the manner contemplated by these presents, and to have the sole and exclusive management thereof, bestowing upon it his entire attention. That the furniture shall be procured and purchased by the said President and Directors, and shall be considered as a part of the capital invested, but shall, at the expiration of the aforementioned term, be returned to them by the said James H. Page, or his personal representative, in the like manner and condition in which they will be received by him, ordinary wear and tear and unavoidable losses and accidents excepted. That the said James H. Page shall keep constantly in his employment a competent book-keeper, whose duty shall be to take charge of the books of the establishment, and enter thereon all the daily receipts and expenditures, which books shall

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*always be open for the examination of every member of the board of directors, and shall be balanced on the first day of each and every month, so as clearly to exhibit the gross receipts of every month, the expenditures of the same, and the cash on hand; the nett profits remaining on hand at the expiration of every year, and after deducting the contingent expenses of the hotel, shall be disposed of in the following manner, viz: If the said annual profits amount to the sum of ten thousand dollars, the said James H. Page shall be entitled to five thousand dollars, and the said President and Directors to the other five thousand dollars; if the said nett annual profits amount to fourteen thousand dollars, the said James H. Page shall be entitled to six thousand dollars, and the said President and Directors to eight thousand dollars; if the same shall amount to sixteen thousand dollars, the said James H. Page shall be entitled to seven thousand dollars, and the said President and Directors to nine thousand dollars; if the said annual nett profits amount to the sum of twenty thousand dollars, the said James H. Page shall be entitled to eight thousand dollars, and the said President and Directors to twelve thousand dollars; and if the said annual nett profits exceed the sum of twenty thousand dollars, of the excess over and above the said sum of twenty thousand dollars, the said James H. Page shall be entitled to two fifth parts, and the President and Directors to three fifth parts; should the nett annual profits fall short of the sum of ten thousand dollars, the said James H. Page shall, nevertheless, and at all events, be entitled to the sum of four thousand dollars, as an annual compensation for his services; and if the nett annual profits amount to any intermediate sum between those specified in the above scale, the same shall be divided between the said parties, pro rata, according to the said scale. It is further agreed between the said parties, that in ascertaining the said nett profits, no account shall be taken or charged against the said James H. Page either for rent or for the interest of the capital invested in the build-

ing and furniture; and also, that the said President and Directors shall keep the house and kitchen furniture under insurance; and

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in case of the destruction of the same *by fire, during the continuance of the said term of seven years, the same shall be rebuilt, and furnished, and again placed under the care of the said James H. Page, on the same terms and conditions as above mentioned, for the remainder of the said seven years the said James H. Page to receive, during the rebuilding and refurnishing thereof, the sum of four thousand dollars per annum; provided, that it shall not be obligatory upon the President and Directors, to rebuild and refurnish the hotel, should they fail to receive the amount of their policies of insurance. It is further understood and agreed, that on the first day of every month, the nett profits appearing upon the books may be drawn by the parties, in proportion to their respective interests established by the foregoing scale, and the sums so drawn shall be accounted for and allowed in the annual division of the nett profits. It is also understood, and distinctly agreed, that this contract or agreement, and the right of the said James H. Page to keep the hotel, is strictly and purely personal, not transferable to any one whomsoever, by the said James H. Page, and in no manner liable for his debts. But if the said James H. Page should die, after the expiration of the second year, and before the commencement of the seventh year of the term, the personal representatives of the said James H. Page shall receive from the said President and Directors the sum of five thousand dollars; and if the death of the said James H. Page should occur at any time during the seventh year of the term, the personal representatives of the said James H. Page shall receive from the President and Directors a sum of money, to be named and assessed by three referees, of whom one shall be nominated by either party, and the third by the two so nominated.

Witness the hands and seals of the said parties, on the date and year above mentioned. Alex. Black. [L. S.]
President Charleston Hotel Company.
James H. Page. [L. S.]
Signed and sealed
in the presence of
Thos. E. Deveaux,
Geo. Wm. Logan.

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*South-Carolina, Charleston District.

Personally appeared George Wm. Logan, and made oath that he saw Alex. Black and James H. Page sign, seal and execute the within instrument of writing, and that he, together with Thomas E. Deveaux, witnessed the same.

Sworn to, before me, this 29th May, 1838.
James Kingman, Not. Pub.

Recorded, 29th May, 1838.

Secretary of State's Office,
Charleston, So. Ca. May 26, 1842.

The foregoing Deed is a correct copy of the Record, in this office, in Miscellaneous Record Book, 5 U's, pages 208, 209 and 210. Examined and certified.

The words, (in which they will be received by him ordinary) interlined on first page, between eight and nine lines from the bottom. Thos. S. Jones, Dep. Sec. State.

The record of the foregoing deed is entered in the Index as follows:

Black, Alexander, P. C. H. C. to James H. Page, 208.

Page, James H., to Alexander Black, Pres. C. H. Co. 208.

And not in any other name or names.

Thos. S. Jones, Dep. Sec. State.

Copy of the second contract between James H. Page and the Charleston Hotel Company, dated 7th July, 1838. Recorded in the office of the Secretary of State, on the 30th March, 1839; and in the office of the Register of Mesne Conveyances, on the 12th May, 1840.

The State of South Carolina, City of Charleston.

Articles of Agreement, as originally entered into, between the President and Directors of the Charleston Hotel Company, for and on account of the Charleston Hotel Company, and James H. Page, on the twenty-third day of February, eighteen hundred and thirty-seven, and amended and modified by

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the said parties this seventh day of *July, in the year of our Lord one thousand eight hundred and thirty-eight. The said parties have agreed for the keeping of the Hotel, contemplated by the company, now in progress of construction in Meeting street, by the said James H. Page, for the term of seven continuous years, to commence on the day that the building shall be finished and furnished, which day shall be indorsed, by the said parties, on this memorandum, upon the following terms, to wit: That the said James H. Page, as the landlord of said Hotel, shall provide for the same, but shall contract no debts on account of the concern, without first obtaining the sanction of the board of directors of the company. That he shall procure and obtain all waiters and servants, and the same discharge at will and pleasure; reside with his family in the Hotel, (but free of all charge for board or rent;) conduct the same in the manner contemplated in these presents, and to have the whole and exclusive management thereof, bestowing upon it his entire attention. That the furniture shall be procured and purchased by the said Charleston Hotel Company, and shall be considered as a part of the capital invested, but shall, at the expiration of the aforementioned term, be returned to them, by the said James H.

Page, or his personal representative, in the like order and condition in which they will be received by him, ordinary wear and tear and unavoidable losses and accidents excepted. It is understood that the amount of forty-five thousand dollars shall be expended in the furniture of the house; and that, of that amount, the sum of thirty thousand dollars shall have been purchased, and placed in the Hotel, before the house shall be considered ready for occupation; and the balance shall be purchased within six months after the commencement of operations, if required by the said James H. Page. That the said James H. Page shall keep constantly in his employment a competent book-keeper, who shall keep the accounts of the hotel, according, as nearly as possible, to the most approved checks and usages adopted by well regulated mercantile establishments. Should the directors consider the said book-keeper incompetent, or otherwise disapprove of him, he shall be discharged by said James H. Page, on the aforesaid directors making

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known that wish to him; and *James H. Page may discharge him at any time, and procure another book-keeper, subject to the same disapproval by the parties. The books of the establishment shall always be open for the examination of any member of the board of directors, and shall be balanced on the first day of each and every month, so as to clearly exhibit the gross receipts of every month, the expenditures of the same, and the cash on hand. The nett profits remaining on hand, at the expiration of every year, and after deducting the expences of the Hotel, shall be disposed of in the following manner, viz: If the said annual profits amount to the sum of ten thousand dollars, the said James H. Page shall be entitled to five thousand dollars, and the said company to the other five thousand dollars. If the said nett annual profits amount to fourteen thousand dollars, the said James H. Page shall be entitled to six thousand dollars, and the said company to eight thousand dollars. If the same shall amount to sixteen thousand dollars, the said James H. Page shall be entitled to seven thousand dollars, and the said company to nine thousand dollars. If the said nett annual profits amount to the sum of twenty thousand dollars, the said James H. Page shall be entitled to eight thousand dollars, and the said company to twelve thousand dollars. And if the said annual nett profits exceed the sum of twenty thousand dollars, of the excess over and above the said sum of twenty thousand dollars, the said James H. Page shall be entitled to two-fifth parts, and the said company to three-fifth parts. Should the nett annual profits fall short of the sum of ten thousand dollars, the said James H. Page shall, nevertheless, and at all events, be entitled to the sum of four thousand dollars, as an annual compensation for his services; and if the nett annual profits amount to any intermediate sum between those specified in the above scale, the same shall be divided between the said parties, pro rata, according to the said scale. It is further agreed between the said parties, that in ascertaining the said nett profits, no account shall be taken or charged against the said James H. Page, either for rent, or for interest of the capital invested in the building and furniture; and also, that the said company shall keep the house and furniture under insurance; and in case of the destruction of the same by fire, during the

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continuance of *the said term of seven years, the same shall be re-built and furnished, and again placed under the care of the said James H. Page, on the same terms and conditions as herein mentioned, for the remainder of the said seven years. The said James H. Page to receive, during the re-building and re-furnishing thereof, the sum of four thousand dollars per annum. Provided, that it shall not be obligatory upon the said company to re-build and re-furnish the Hotel, should they fail, in any material extent, to receive the amount of their policies of insurance. It is further understood and agreed, that on the first day of every month, the nett profits appearing upon the books may be drawn by the parties, in proportion to their respective interests, as established by the foregoing scale; and the sums so drawn shall be accounted for and allowed in the annual division of the nett profits. It is also understood and distinctly agreed, that this contract or agreement, and the right of the said James H. Page to keep the Hotel, is strictly and purely personal, and not transferable to any one whomsoever, by the said James H. Page, nor in any manner liable for his debts; but if the said James H. Page should die, after the expiration of the second year, and before the commencement of the seventh year of the term, the personal representatives of the said James H. Page shall receive from the said company the sum of five thousand dollars; and if the death of the said James H. Page should occur at any time during the seventh year of the term, the personal representatives of the said James H. Page shall receive from the company a sum of money, to be named by three referees, of whom one shall be nominated by either party, and the third by the two so named.

It is also understood and agreed, between the said parties, that the said James H. Page, in the management of the Hotel, will establish and maintain a system of as strict accountability from the servants or agents under him, to himself, as is to be found in

the most approved managed Hotel in the United States.

Witness, the seal of the said company, and the hand and seal of the said James H. Page, on the day and year aforesaid.

Alexander Black. [L. S.]
President Charleston Hotel Company.
James H. Page. [L. S.]

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*Signed, sealed, and delivered, in the presence of, (the word "annual," being first interlined in the third page, fourth line,)

George Wm. Logan.

Charleston, October 24th, 1839.

This day, the Charleston Hotel was finished and furnished, agreeable to the within contract. James H. Page.

By order of the board.

Alexander Black, [L. S.]
President Charleston Hotel Company.
Attest, G. Wm. Logan,
Secretary and Treasurer Charleston Hotel Co.

South Carolina—Charleston District:

Personally appeared before me, George Wm. Logan, and made oath, that he was present and saw Alexander Black, President of the Charleston Hotel Company, and James H. Page, severally sign, seal, and deliver, the annexed instrument, between Alexander Black, as President Charleston Hotel Company, and James H. Page, and that he witnessed the same. Sworn to before me, this twelfth day of May, 1840.

Richard Irwing, J. P.
George W. Logan.

Recorded and examined, this 12th day of May, 1840. M. I. Keith, Register.

Register Mesne Conveyances Office,
Charleston District.

I herewith certify, that the foregoing is a correct copy from the record in this office, from Book E., No. 11, pages 156 to 160, the 21st May, 1840.

Richard Irwing, Deputy Register.

Secretary of State's Office,

Charleston, South-Carolina, 24th April, 1843.

I do hereby certify, that the amended and modified lease and agreement between the Charleston Hotel Company and James H. Page, of which the foregoing is certified to be a copy, is recorded in this office, in Miscellaneous Record Book, 5 U's., 378, 379, 380 and 381, on the 30th day of March, 1839.

Thomas S. Jones, Dep. Sec. State.

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*Copy of the release of the City Council of Charleston, to the Charleston Hotel Company, dated 26th June, 1838. Recorded in the office of the Register of Mesne Conveyances, 14th December, 1838.

State of South-Carolina.

To all to whom these presents shall come, or be made known, or whom the same may in any wise concern, the City Council of Charleston, in the State aforesaid, sends greeting: Whereas Ker Boyce, Leroy M. Wiley, Henry W. Connor and George H. Kelsey, in and by their deed, duly executed, and bearing date the first day of April, in the year of our Lord one thousand eight hundred and thirty-six, did grant, bargain, sell, and release, by way of mortgage, unto the said City Council of Charleston, all those several lots, pieces or parcels of land, situate, lying and being in the City of Charleston, in the State aforesaid, butting and bounding to the north on Pinckney street, to the east, on Anson street, to the south, on Market street, and to the west, on Meeting street, which said mortgage was made by the said Ker Boyce, Le Roy M. Wiley, Henry W. Connor and George H. Kelsey, to secure payment of their bond to the said City Council of Charleston, in the penal sum of four hundred and twenty-three thousand dollars, with condition for the payment of two hundred and fifty-six thousand five hundred dollars; all which, in and by the said mortgage, duly recorded in the office of the Register of Mesne Conveyances, for the district of Charleston, in the State aforesaid, in Book N., No. 10, page 191, reference being thereunto had, will more fully appear; and whereas, since the date of the said mortgage, the said Ker Boyce, Le Roy M. Wiley, Henry W. Connor and George H. Kelsey, have granted and sold, or otherwise disposed of, the two adjoining lots, pieces, or parcels of land, hereinafter mentioned and described, being part and parcel of the mortgaged premises aforesaid; which said lots were purchased by, or for the use of, the Charleston Hotel Company, and by proper conveyances have now become vested in the said Company, in fee simple, and the whole purchase money thereof, amounting to twenty-eight thousand, six hundred and six dollars, has been advanced by the said Charleston Hotel Company, and paid to the said

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Ker *Boyce, Le Roy M. Wiley, Henry W. Connor and George H. Kelsey, and by them expended in erecting valuable buildings on the other portions of the said mortgaged premises, whereby the value of the said premises has been enhanced and the security of the said mortgage increased; and whereas, also a costly hotel erected by the said Charleston Hotel Company, on the land so purchased by the said Company, as aforesaid, has been lately destroyed by fire, and the said company are unwilling to re-build the same, unless the said two lots, pieces, or parcels of land, are first discharged and released from the lien and operation of the said mortgage; and inasmuch as the re-building of the said Hotel would not only be greatly for the benefit and improvement of the said City of Charleston, but will also enhance the value of the residue of the mortgaged premises

aforesaid, and increase the security of the said mortgage, the said City Council of Charleston are willing to discharge and release the said two lots, pieces or parcels of land, from the lien and operation of the said mortgage. Now know ye, that the City Council of Charleston, aforesaid, in consideration of the premises, and also in consideration of the sum of five dollars, to them paid by the said Charleston Hotel Company, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released, discharged and forever quited claim, and by these presents do remise, release, discharge, and forever quit claim, to the said Charleston Hotel Company, their successors and assigns, all those two adjoining lots, pieces, or parcels of land, situate, lying, and being in the City of Charleston and State aforesaid, butting and bounding to the south, on Pearl street; to the west, on Meeting street; to the north, on Pinckney street; and to the east, on lands of the said Ker Boyce, Le Roy M. Wiley, Henry W. Connor and George H. Kelsey, and measuring and containing in front, on Meeting street, and also, on the east, or back line, one hundred and fifty feet; and in depth, from Meeting street, to the east, or back line, one hundred and ninety-five feet; together with all and singular, the rights, members, hereditaments and appurtenances to the said two lots, pieces, or parcels of land, belonging or in anywise incident or appertaining; and al-

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so, *all the estate, right, title, interest, property and claim of the said City Council of Charleston, of, in, or to, the same, or any part thereof, by virtue of the aforesaid mortgage of the same; and also, all action and actions, suit and suits, judgments, decrees, executions and claims or demands whatsoever, in law or in equity, which the said City Council of Charleston ever had, now have, or can or may have, against the said Charleston Hotel Company, for or on account of the said two lots, pieces, or parcels of land, and the said mortgage thereof, and the covenants and provisions therein contained.

In witness whereof, the said City Council of Charleston have caused their corporate seal to be hereunto affixed, and attested by the hand of the Honorable Henry L. Pinckney, Mayor of the said City, this twenty-sixth day of June, in the year of our Lord one thousand eight hundred and thirty-eight, and of American Independence the sixty-second.

Henry L. Pinckney, (Corporate Seal.)
Mayor of the City of Charleston.

By the Mayor.
William Roach, Clerk of Council.

We, Ker Boyce, Le Roy M. Wiley, Henry W. Connor, and George H. Kelsey, above named, do hereby assent to the foregoing release, and agree that the same shall not impair the lien of the City Council of Charleston on the residue of the mortgaged premises above mentioned, nor affect our liability for the debt which the said mortgage was intended to secure.

Witness our hands and seals, this 26th day of June, Anno Domini, 1838.

Ker Boyce, [L. S.]
Le Roy M. Wiley, [L. S.]
Henry W. Connor, [L. S.]
George H. Kelsey, [L. S.]

Witness, { H. Bailey, to Boyce and Wiley. / B. C. Pressley, to Boyce. / C. R. Brewster, to Wiley.

Witness, { To Henry W. Connor and Geo. H. Kelsey. / George Wm. Logan, / John H. Gayer.

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*South-Carolina—Charleston District.

Personally appeared, Henry Bailey, and made oath that he saw the within named Ker Boyce and Le Roy M. Wiley, sign, seal and deliver the within instrument of writing, and that he, with B. C. Presley and C. R. Brewster witnessed the same.

H. Bailey.

Sworn to before me, this 14th day of December, 1838.

James Kingman, Notary Public.

South-Carolina—Charleston District.

Personally appeared, George Wm. Logan, and made oath that he saw Henry W. Connor and George H. Kelsey, severally sign, seal and deliver this deed, for the purposes therein mentioned, and that he, with John H. Gayer, witnessed the execution of the same. George Wm. Logan.

Sworn to before me this 8th day of November, 1838.

James Kingman, Notary Public.

Recorded and examined, this 14th day of Dec. 1838.

Richard Irwing, Deputy Register.

Office of the Register of Mesne Conveyances,
Charleston District.

I hereby certify that the foregoing deed of release is correctly copied from the record in this office, from Book V's., No. 10, pages 461, 462 and 463 this 22d day of April, 1843. Examined and certified by

Richard Irwing, Deputy Register.

Curia, per HARPER, Ch. I am satisfied that the decree was erroneous, from the circumstance of my having overlooked the Act of Assembly of 1817, which provides, in very explicit terms, "that all leases or contracts in writing, hereafter to be made between landlord and tenant, for a longer term than twelve months, shall not be valid in law, against the rights and claims of third persons, unless the same shall have been re-

corded in the office of Mesne Conveyances, at least within three months from the time of the execution thereof." In the circuit decree, I have adverted to the distinction

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between the notice to supply the *defect of registration and to rebut an equity—a distinction which seems to be generally recognized.

It is not necessary to refer to the numerous authorities cited in argument, which fully establish what was contended for; that to supply the want of registration, the notice must be full, explicit, and clearly proved; nor did I intend to determine, by the decree, that the notice which I supposed to be proved in the present case was sufficient for this purpose. Lis pendens, which is notice to rebut an equity, will not supply the want of registration. Wyatt v. Barwell, 19 Ves. 439. In Anderson v. Harris, 1 Bail. 315, which was cited on behalf of the appellee, it is said that the notice must be express. In Price v. White, Bail. Eq. 266, Judge Colcock thinks the courts have gone too far in permitting any notice to avail against the express words of the statute. In Martin v. Sale, 1 Bail. Eq. 4, and in numerous other cases, it is put on the ground of fraud; the party ought not to derive a benefit from his own fraud. Indeed, the well known principle, on which alone courts have thought themselves authorized to dispense with the words of a statute, as in the analogous case of the statute of frauds, is that you are not to suppose the Legislature to have intended that a statute made for the prevention of frauds, should itself be made the instrument of fraud. Then, if according to the argument on behalf of the appellee, there can be no question of fraud in the present case, as the purchaser shall be intended to have purchased only the reversion with the subsequently accruing rents, there is no ground whatever on which the court would be authorized to depart from the positive terms of the statute. I think, too, that it was mistakenly said in the decree, that though the Bank itself might have resisted performance, on the ground of want of notice the City Council does not come within the principle that a purchaser from a bona fide purchaser without notice is to be protected.

Then, as to the mortgagees of the furniture; as performance of the principal contract, for the house itself, cannot be enforced, the only ground of equity on which the court would enforce the performance of a contract relating to personalty, that of being incidental to the former, and necessary to give it beneficial effect, fails, and the furniture

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*must be delivered them. They must, however, pay their own costs. I think, too, the court must decree the delivery of the possession of the Hotel. It is the well known rule of the court, that having jurisdiction and possession of the cause, it will do complete justice between the parties, and make an end of litigation. When the court restrains proceedings at law, for the recovery of money, it is the familiar practice of the court, if relief be refused at the hearing, to direct the payment of the money by its own decree. Here, the complainant, Page, has delayed the City Council from recovering at law, and the mortgagees of the furniture from seizing it under the decree for foreclosure as we have concluded they were entitled to do, and it would be inequitable that he should still further delay them until the suits at law can be terminated. And an account of rents and profits must also follow. In the case of Cruger v. Daniel, decided during the present sitting, it has been held that when there is a decree for the delivery of possession, an account of mesne profits to the true owner, follows of course; though the possession may have been that of a trespasser. But in accounting to the City Council after their title accrued, he must account not for the share of income and profits reserved by his contract with the Charleston Hotel Company, but on the principle of quantum valebat. But this is decreed on the bill of Page. This contract, whether lease or no, being void as to the City Council, there was no ground on which they could sustain a bill for the delivery of possession, nor any necessity for it; nor could they sustain a bill for mesne profits alone. They must therefore pay the costs of that bill. Page, however, must pay the costs of their action at law.

I do not suppose that the mortgagees of the furniture are entitled to an account of hire, quantum valebat. Against the Hotel Company, they would be entitled to interest on their debt. But having notice of Page's contract, and as I think, bound by it, they, as against him are entitled to such proportion of the profits as the company would have been entitled to for the furniture as distinguished from the Hotel. The account must be taken and the apportionment made as directed by the decree.

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*As to the bill of the Hotel Company, the only ground on which it could have been sustained was that it demanded an account. But for this purpose it was unnecessary, as the account could have been taken on the bill of Page. That bill demanded a money balance as due by them to him, which could only be established as the result of an account. It was in effect an offer to account, nor does it appear that he ever refused an account. The costs of that bill must, therefore, be awarded against the company.

On the bill of Page, the costs as between the complainant and the Hotel Company must depend on the account to be taken, and

follow the balance, as it may be found one way or the other. All the other costs of the bill must be paid by the complainant, Page.

It is ordered and decreed, that so much of the decree as establishes the right of the complainant, Page, to enforce performance of his contract, as against the City Council, be reversed; that possession of the Hotel and furniture be delivered as directed; and that the account be taken and the costs paid as before expressed and directed.

JOHNSON, DUNKIN and JOHNSTON, Chancellors, concurred.

Baily and Brewster, Solicitors for the Bank of the State of South Carolina.

Eckhard, City Attorney, for the City Council.

A. G. Magrath, for the mortgagees of the furniture.

Yeadon and McBeth, for the Hotel Company.

Hunt and Petigru, for Page.

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IN THE COURT OF ERRORS.

JUDGES AND CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
" WM. HARPER,
" JOB JOHNSTON,
" B. F. DUNKIN,
" J. S. RICHARDSON,
" JOHN BELTON O'NEALL,
" JOSIAH J. EVANS,
" A. P. BUTLER,
" D. L. WARDLAW.

*THOMAS NAPIER & ROBERT ANDERSON v. J. J. GIDIERE, Executor of Louis P. Descoudres.

(Columbia. May Term, 1843.)

[1. *Judgment* ⇐821, 822.]
The judgments of a sister State are not merely prima facie evidence of a debt liable to be opened and rebutted by proof, but are conclusive of the fact of indebtedness.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1492, 1496; Dec. Dig. ⇐821, 822.]

[2. *Judgment* ⇐822.]
All that was intended by the Act of Congress was to render such judgments conclusive of everything decided by them; that is, their effect in the Court in which they were obtained; and of necessity the fact of the judgment, can only be tested by the plea of nul tiel record—in all other respects the States are left to prescribe their own forms of pleading.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488–1490, 1496–1500; Dec. Dig. ⇐822.]

[3. *Judgment* ⇐818.]
It seems to be settled that under the plea of nul tiel record, the jurisdiction of the Court which pronounced the judgment may be inquired into.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1458–1481; Dec. Dig. ⇐818.]

[4. *Judgment* ⇐818.]
*If it appear from the record, as by plea to the jurisdiction, that the question was, whether one or another of the Courts of the State where the cause was tried had jurisdiction of the subject matter, the judgment on that point would be conclusive. But whether the party sued is or is not the same against whom the judgment was obtained, is a question which would necessarily be open in the Court where the judgment was obtained, and necessarily so every where else.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1458–1481; Dec. Dig. ⇐818.]

[5. *Judgment* ⇐812.]
So too where the proceeding is in rem, as a foreign attachment, the judgment can operate on the thing only, and not on the person.

[Ed. Note.—Cited in Stanley v. Stanley, 35 S. C. 99, 14 S. E. 675.

For other cases, see Judgment, Cent. Dig. §§ 1435–1442; Dec. Dig ⇐812.]

[6. *Judgment* ⇐934.]
The provisions of our Statute of Limitations do not apply, so as to bar actions founded on the judgments of a sister State.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1764; Dec. Dig. ⇐934.]

[7. *Judgment* ⇐815.]
Cameron v. Wurtz, 4 McCord, 278, which decides that in marshalling the assets of an insolvent estate, the judgment of a sister State only ranks a simple contract debt, *held* not to conflict with the decision in this case. The Act of 1789, (5 Stat. at Large, 111,) which gives a preference to mortgages and judgments when it becomes necessary to marshall assets, is in respect to the lien they have on the estate, which does not apply to the judgments of another State; and as they do not fall within the debts described in any of the other classes, they must fall in with the last, and rank as simple contract debts.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1445–1448; Dec. Dig. ⇐815.]

[For subsequent opinion, see 7 Rich. Eq. 254.]

L. P. Descoudres and Peter Crovat, Merchants in Charleston, being largely indebted to the plaintiffs, failed, and some years afterwards, plaintiffs arrested Descoudres in New York, where he happened to be found, and on the 14th May, 1822, recovered a judgment against him in the City Court of New York. Pending the action, Descoudres was admitted to the benefit of the New York Act for the relief of insolvent debtors, and according to the New York law, judgment was rendered against his property only. Napier, Anderson and Descoudres, all lived in Charleston. And in 1828, Descoudres set up

business there, under the name of L. P. Descoudres & Company, under which name the business was carried on until his death. The plaintiffs, on the 11th January, 1837, commenced an action against him on the judgment, to which he pleaded the Statute of Limitations. While this action was pending, Descoudres died on the 11th July, 1837, having made his will, and appointed Gidiere executor. Gidiere proved the will, and made an inventory, in which the stock-in-trade of L. P. Descoudres & Co. was returned as assets of his estate. Plaintiffs renewed the

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action against Gidiere *to which he pleaded payment and plene administravit. On the 26th June, 1838, this bill was filed, and a motion made for a receiver. Defendant filed an affidavit stating the assets that he had received, and the sums that he had paid away in discharge of the debts of L. P. Descoudres. Whereupon his Honor, Chancellor Dunkin, ordered him to pay into Court the balance in his hands, $1,568.36; and a further amount of $4,664.78, charged as retained for his own debt, making in all, $6,233.14; and to place in the hands of the commissioner, the notes, &c., belonging to the estate; and the commissioner was to proceed to collect them. The defendant not complying with the order, an attachment issued against him for a contempt. On the 29th January, 1839, he put in his answer; and averred that he was a partner of Descoudres; and claimed the right to apply the assets in his hands, being the proceeds of the stock-in-trade of L. P. Descoudres & Co., in payment of the debts of L. P. Descoudres & Co., as the surviving partner.

June, 1839, the cause came on to be heard, on the bill, answer and evidence. His Honor, Chancellor Dunkin, pronounced against the alleged partnership, and ordered an account of the estate of Descoudres. Mr. Gray, the master, to whom the case was referred, made a report, and supplemental report, and among the debts reported the sum of $10,063.99, with interest from 14th May, 1822, as due to the plaintiffs on the New York judgment. To which report, the defendant excepted, on the ground that the judgment was barred by the Statute of Limitations, and that the funds in respect of which the defendant was charged, were assets of L. P. Descoudres & Co. And being then in custody for disobedience of the order of June, 1838, presented a petition, praying that the attachment might be suspended till after the sitting of the Court of Appeals.

In May, 1840, the cause came before Chancellor Johnson, who overruled the exceptions, but granted the petition, upon defendant's giving security for his appearance, and gave him leave to amend his answer, by adding an allegation that the plaintiffs's demand was barred by the Statute of Limitations.

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*Defendant appealed from the decree of Chancellor Dunkin, on the ground, that the weight of evidence was in favor of a partnership; and that he was entitled to an issue for the trial of the question.

And appealed also from Chancellor Johnson's order confirming the report, on the ground, that the judgment of plaintiffs being recovered in New York, is a simple contract debt in South Carolina; and that after the lapse of fourteen years and upwards, without any acknowledgment of debt, or demand made, the same is barred by the statute of limitations.

In March, 1841, the cause was heard in the Court of Appeals, when their Honors, the Chancellors, were pleased to order that the cause be referred back to be heard in the Circuit Court, for the purpose of receiving evidence to rebut the plea of the statute of limitations.

At the sitting of the Court of Equity for Charleston, in January, 1842, the cause came on to be heard before his Honor, Chancellor Johnson, who made the following decree.

Johnson, Ch.—One of the questions involved is, whether the statute of limitations is a bar to an action founded on a judgment obtained in a sister State. The cause went up to the Court of Appeals from a decree of the Circuit Court at June Term, 1839, and it was, by order of that Court, referred back to this Court, to let the complainant into proof to take the case out of the statute, in the event the Court should be of opinion that the statute was a bar. No further evidence has been offered, and I am called upon to decide whether the statute is or is not, a bar.

The question has not been argued, and I wish it to be distinctly understood, that the decision which I shall give is merely pro forma, to enable the party to carry it up, that it may receive the solemn consideration of the highest tribunal, which is thought necessary on account of the importance and novelty of the question.

The Supreme Court of the United States is understood to have decided that the statute is a bar, and the Court of Appeals in this State have, in several cases, decided that it is not a bar. I shall, therefore, in con-

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formity with *the decisions of our Court, declare, and it is hereby declared, that the statute is not a bar to such judgment.

The defendant appealed from the order overruling the defence on the statute of limitations, and insisted that the plaintiffs's action was barred, and that the bill should be dismissed.

Wilson, for the Appellant.

B. F. Hunt, for the Appellees. The question presented to the Court, is to be solved by reference to the 1st sec. 4 art. of the constitution of the United States; and the Act of Congress, May 26, 1790, Sec. 1st, [U. S. Comp. St. 1913, § 1519;] and the Statute of

South Carolina, called the Limitation Act, 2d Vol. Stat. at Large, p. 583.

The defendant has pleaded the statute of limitations in bar of the complainant's claim, which is founded on a judgment rendered in the Courts of New York, against the defendant's intestate, L. P. Descoudres; and the question is made, whether under the Constitution and Act of Congress, and the Act of Limitation of this State, it is a valid plea. The complainants contend that the plea is not available, because their debt is a debt of record, and not a demand founded on a contract of lending, or without specialty.

The plea of nil debet was decided not to be a good plea. The counsel made the point, that the record was valid only as evidence; and that if a record, nul tiel record could not be pleaded—but a certified transcript is as valid in the same manner as in cases from our various circuits.

The answer is ready. It is record evidence, and can only be averred against, by matter subsequent or fraud—or perhaps want of jurisdiction in the Court, as will be insisted hereafter.

The constitution of the United States is the law which this Court is sworn to maintain, and no misconstruction of that law even by the supreme Court, can repeal the constitution. This Court, however, would consider the decision of the supreme Court as the most authentic construction of the constitution, and although the law gives jurisdiction to review State decisions by writ of error, yet each Court must follow its own deliberate construction—it is only where doubts exist that a decision concludes the doubt. Mills v. Duryee, 7 Cranch, 482.

"If in the State court, it has the faith and

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credit of evidence of *the highest nature, viz· record evidence, it must have the same faith and credit in every other court. Congress, therefore, have declared the effect of the record, by declaring what faith and credit shall be given to it." Story, Justice. "It remains only then to enquire in every case what is the effect of a judgment in the State where it is rendered." Id.

"It is beyond all doubt that the judgment of the Supreme court of New York was conclusive upon the parties in that State; it must, therefore, be conclusive here also." Id. All this proves that both the letter and object of the Statute of Limitations exclude judgments, where there is no danger of the loss of vouchers. The decision is conclusive at the time the judgment is entered, and then the presumption of payment must arise from lapse of time, or subsequent circumstances. It is not the case of a debt never proved judicially, and dependent on evidence to be passed on by a jury.

The case of Flournoy v. Durke, 2 Brev. 257, which ruled that nul tiel record was not a good plea, is not law. It was very crudely considered, if we may judge from the report, and this sentence of Judge Story is a death blow to it: "If it be a record conclusive between the parties, it cannot be denied but by plea of nul tiel record, and when Congress gave the effect of a record to the judgment, it gave all the collateral consequences. There is no difficulty in the proof. It may be proved in the manner prescribed by the Act, and such proof is of as high a nature as an inspection by the court of its own record, or as an exemplification would be in any other court of the same State." If this is law, the case of Flournoy v. Durke is not; and if the decisions of the Supreme Court are good in one instance they are so in all.

The objection that execution cannot issue, applies to every circuit court in the State. An execution only issues from the district where judgment is obtained; and yet, debt on judgment, no one questions, may be brought in any other district, else no writ could be served on a defendant out of the district, to revive the judgment.

The dissenting opinion of Judge Johnson itself admits the judgment, "as conclusive evidence of the debt," and it requires a keen casuist to distinguish between the difficulties suggested in the case supposed by him of "a judgment for $150,000 founded on an attachment of a cask of wine." Whether the judg-

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*ment is a record to be tested by nul tiel record, or conclusive evidence nil debit, if it be in fact conclusive, the form of pleading is, in either case, immaterial. The objection is to the article of the Constitution itself; and the apprehension that States will pass absurd laws, is no ground for abolishing regulations to render good ones effectual.

The case of Bissell v. Briggs, 9 Mass. 462, gives the history of the clause in the Constitution. Even before the revolution, although independent colonies, the constant intercourse rendered it important that judgments in each should be conclusive in all, and the stat. 14 Geo. 3d, c. 3, so enacted in relation to the "neighboring colonies," and it is not to be wondered at that the fraternity and increased intercourse produced by the common struggles of the revolution, the association of the confederation, and finally the union, which made us one people, should have resulted in adopting a universal rule applicable to the whole republic.

Judge Parsons, delivering the opinion of the Supreme Court of Massachusetts, expressly rules, p. 466, that the Constitution intended "to place judgments recovered in any of the courts of the United States, on better grounds than judgments rendered in any other State or country; and that judgments of this last description only, cannot be now considered as foreign judgments."

"They cannot be contradicted, or the truth of them denied." How then can a Statute of Limitations, explicitly applicable to actions

"of debt upon any lending or contract without specialty," apply to such a debt?

The only question open, is the jurisdiction of the court. Id. 467.

The opinion of Judge Sewall in this case is also an instance of great ingenuity and great bewilderment on this same subject. He is right in saying that "if any thing is adjudicated in the judgment of courts of general jurisdiction, it is that the case decided by them and the parties to the cause, are within their jurisdiction."

Yet his reasoning and that of all who have attempted to pare down the positive enactments of the Constitution, is wholly inconclusive. They admit that the Constitution and the Act of Congress do make the judgment of a sister State "conclusive evidence;" but they deny its effect as a judgment; and yet a judgment out of court is chiefly valuable

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as conclusive evidence *of the debt. But the true question is to be met on the very words of the Constitution and the Act of Congress. It will not do for this State to have recourse to the spirit, that is, the construction of the Constitution, to get at a meaning either opposed to or enlarging or diminishing its plain letter. A licencious construction may suit the interests of to-day, but it will recoil upon us in an evil hour, when our own example will be quoted against us. It is strange we do the framers of the Constitution such wrong as to suppose they did not mean just what they said when they used plain language. The constitution enacts first, that "full faith and credit shall be given in each State to the public Acts, records and judicial records of every other State." There cannot be any thing short; the word is "full," as evidence, except the jurisdiction. These are interpolations. The word is full faith, not partial faith and credit. The next clause is as unequivocal. It says, "Congress may, by general laws, prescribe the manner in which such Acts, records and proceedings shall be proved, and the effect thereof." It must be wilful perversion alone that can deny the power thus to fix the mode of proof and the effect of such public Acts, records and judicial proceedings; and if Congress has prescribed by such laws that they shall have the same faith and credit as they have "in the courts of the State from whence the said records are or shall be taken," is it not downright interpolation to say, except always "the jurisdiction of the court," or "except that such judgments may be pleaded to and resisted upon grounds not admissible in the courts of the State." "Such faith," does not mean other faith—less faith. "Nihil simile est idem." Whatever then may be the evils pointed out as actual or possible, the argument should be addressed to Congress, which has the power to declare the effect thereof, and may modify their general laws as they please. As long as the Act remains, if a judgment constitutes record evidence in the State whence it is taken from, such faith and credit also must it have in every other State. As long as the principle applies, "transit in rem judicatam," to a judgment in any State, and the parties are concluded, so long such faith and credit extends and accompanies the exemplifications in due form in every other State. The "effect" is the result of the faith and credit. If the faith and credit is not to be questioned, the effect is to conclude the parties. To deny that "nul tiel record" is a good plea, is to deny that it is

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a reply to *the demand; to say that this incontrovertible evidence of debt exists. It is impertinent for a defendant to offer proof where the case of the plaintiff is by law not to be controverted. Why then is not "nul tiel record" a proper plea? And what hinders the issue being established by a transcript made by law equivalent with the original? See 6 Pickering's Rep. p. 237.

A judgment of a sister State then, is no longer a foreign judgment; much less is it a debt "upon lending or contract without specialty." A judgment is higher than specialty, and therefore includes it. "Omne majus in se continet minus," and no one pretends that the Statute of Limitations can be pleaded to a specialty, therefore it cannot to debt on judgment from a sister State.

The case of Hall and others v. Williams and others, 6 Pickering's Mass. Rep., is worth an attentive perusal, for both its merits and its faults. After a most logical argument, leading directly to the opposite conclusion, the court decided that if by the record it does not appear that the defendant was served with process, "he may be allowed to avoid the effect of the judgment here, by showing that he was not within the jurisdiction of the court which rendered it, for it is manifestly against first principles that a man should be condemned either civilly or criminally without an opportunity to be heard in his defense." Now, every court owes it to comity, to presume that it has not violated first principles by so wanton an act as condemning a man unheard. The judgment necessarily presumes, whether it appear by the record or not, that the parties were properly before it, and if the record be indeed defective in that particular, the court where it is entered may be called on to vacate it.

But whatever may be the strict reasoning, it is very certain that even the opinion of the Supreme Court will be rejected, or construed away, when it establishes doctrines, however strictly true, which affect the rights and legislation of the States; and the remarks of the Chief Justice of Massachusetts, in 6th Pickering, p. 243 and 4, go the whole length to shew that even the decrees of the Supreme Court are imperative against State doctrine; and in fact the decision of Judge Parsons, in Bissell v. Briggs, has superseded

that of Judge Story in Mills v. Durea, and the jurisdiction of a State court, even a court of general jurisdiction, is a subject of en-

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quiry in a suit based on a judgment *of a sister State; but where the parties were before the court, the judgment is conclusive.

But all this shews that a State court may think for itself, even although the Supreme court have decided the question; and so the case of McElmoyle & Cohen, 13 Peters, may not be conclusive, except of that case. Let us then consider the case of McElmoyle v. Cohen, in 13 Peters, 312.

McElmoyle obtained a judgment against Levy Florence, in Charleston, on a promissory note. Florence moved to Georgia, died, and Cohen was his administrator. He was sued on the judgment in Georgia, and pleaded the Georgia statute of limitations and plene administravit, thus raising two questions; first, whether the action was barred by that statute; second, whether the judgment was to rank in the distribution of assets as a judgment, or a simple contract debt. Both questions are to be resolved by reference to the laws of Georgia. The statute of Limitations of Georgia is in these words: "That all actions of debt on judgments obtained in courts other than the courts of this State, must be brought within five years after the judgment obtained." But the statute of South Carolina, on that subject, is in these words: "All actions of debt, grounded upon any lending or contract without specialty." The whole case turns on this difference. The question whether a judgment of a sister State is a contract—a contract upon lending or without specialty, is thus presented. When it is considered that at common law there is no statute of Limitations; that the Act is in derogation of the common law, and so must be strictly construed, it is decisive of the point in issue. The case must be brought within the letter or spirit of the Act, or the statute does not apply. It is not within its letter, for judgments are not contracts or specialties, but debts of record. It is not within its spirit. The statute of Limitations is a statute of repose, to prevent men's estates being taken from them upon claims, when the evidence to rebut them may be lost by the casualties of time; when the counter proof is supposed to be lost. It is a wise and beneficent statute, and in proportion as the claim is stale, the defense is both legal and moral. A man who defers a suit for ten or twenty years, may recover more than is due, or what has been long since paid, and ought not to supercede intervening creditors, whose demands are recent. In almost every instance in which indebtedness is sought to be for the first time established, after a lapse of years,

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the defendant is jus*tified upon every principle of morals to resist its being reduced to judgment. If any thing is due at all, the plaintiff ought to rely upon the sense of justice of the defendant, and not on the coercive powers of the law. "Vigitantibus non dormientibus subveniunt leges." But this reasoning does not apply where the parties have had a full opportunity for trial on the merits, and after full defense the claim is established by the judgment of an impartial tribunal, and becomes matter of record. It is then res judicata.

The vouchers are not liable to loss; the amount and the indebtedness are fairly and fully established; and it is only by subsequent payment, or other cause discharging the judgment, that it can be annulled. It is true, that after twenty years, the common law presumes it paid, although that presumption may be rebutted; but until rebutted, the maxim applies, "stat presumptio donec probetur in contrarium."

Thus then a judgment does not come within the letter or the spirit of our statute of distributions. But it is said that a judgment of another State is not a record, but only a simple contract. There is much false reasoning on this subject. It is said it ranks only as a simple contract in the distribution of an estate. This can only be true where the original cause of action was a simple contract, for it will not be contended that a bond, because it is reduced to judgment in a sister State, will only rank as a simple contract. It cannot lose dignity by being carried into judgment. The true rule then must be, that judgments, in the Act regulating the distribution of estates, means judgments which have a binding efficacy, which constitute a lien within the State. The lien of a judgment only attaches to estates within the State where it is rendered. This reconciles the decision on that point with the provision of the constitution, and still leaves the judgments of the other States records—debts of record, fixed by record proof, and not "contracts without specialty." But in Georgia the lex fori has limited the recovery on foreign judgments to five years, and the only point decided in McElmoyle and Cohen, is that that law does not violate the provision of the constitution which gives full faith and credit to judgments of a sister State. Every nation may establish its own laws of her forum, which touch only the remedy and leave the right unaffected; and had Cohen been in South Carolina, where no such law of the tribunal exists, there could be no doubt of

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his liability. That this *law restricting the remedy does in practice render the right nugatory and fruitless, is evident, and may be carried to an extent to substantially impair the obligations of contracts, is too true. A right without a remedy, is a delusion, but a requisition that rights should be enforced in a reasonable time, is perfectly consistent with justice. If the law of Georgia had pro-

hibited altogether suits upon judgments in a sister State, a different question would arise, one to be resolved by reference to the prohibition to pass laws impairing the obligation of contracts, and giving to such judgments the same effect as they have in the State where they are rendered.

It is decided that the Statute of Limitations of the lex loci contractus is not applicable, but only that of the place where suit is brought, so it is no part of the contract, but a restriction of the remedy. The decision, therefore, in 13 Peters, goes no further than to maintain the constitutionality of this lex fori of Georgia, and is no authority in this case; and it cannot be disguised, that the case goes to the extremest verge of State rights, in thus cutting off or curtailing the remedy upon a record, protected by the constitution, and especially as the very words of the constitution confined to Congress the power to declare "the effect" of such judgments in the several States, and they have declared that they shall have such effect as they would have in the States where they are rendered. What State can say that effect shall last five years? Why not another fix the limit to one year or one month, so as practically to defeat the constitution? and that too in a suit brought in the United States court by a citizen of another State. The argument is all against the Georgia law. How far policy may have bent the court to submit to this partial abrogation of the constitution, I will not say, but surely this court will not be seduced from its allegiance, and go further, and pronounce a judgment, thus protected, a mere contract, a chose in action; evidence of debt, subject to question; in fact, a simple contract. A judgment is not a contract. See 3 Black, Com. 295, 399. It is a more solemn matter.

In our own courts there has been much contrariety of opinion. In Flournoy v. Durke, 2 Brev. Rep. 257, it was ruled that if nul tiel record be pleaded to debt on the judgment from another State, the transcript of the record, duly certified, is conclusive; and in Brown's administrators v. Winn, 2 Brev. Rep. 297, exemplifications from one district

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are as good as the original in the *district where the judgment is recorded; and in Hannahan v. Hathaway and Smith, 1st Brev. Rep. 111, nul tiel record was held bad on demurrer. But the conclusive decision is found in Morton & Co. v. Naylor, 1st Hill's Rep. 439. The decision is to the very point now submitted. That the Statute of Limitations of South Carolina does not in terms apply to a judgment from another State, and cannot be enlarged beyond its terms. The argument of the court is full and conclusive, and supports and recognizes the doctrine as maintained in Mills and Durea, Bissell and Brigs, 9 Mas. Rep. 462; Hall and Williams, 6 Pickering's Rep. 232, 1st Mass. Rep. 405; Sewall's opinion, and 7 Cranch, 485; 3d Wendall's N. Y. Rep. 267; and that nul tiel record is a good plea, is established by necessary implication, see 13 Peters, p. 325. All these authorities place such judgments on a higher footing than mere foreign judgments, which are received only as prima facie evidence, while State judgments are conclusive, especially if the record shows the parties to have been within the jurisdiction. I have thus proved that by the constitution and the Act of Congress, and by the concurring decisions of Story, Parsons, Parker, and our own court, a judgment in a sister State is a record; that it is conclusive evidence—record evidence, and that it is not included in the Statute of Limitations of this State, and so cannot be pleaded to the debt of Mr. Napier, and that the complainant is entitled to a decree dismissing the appeal, and such decretal order as may be necessary to enable the complainant to obtain payment of his debt as established by the circuit decree.

Curia, per JOHNSON, Ch. In May 1822, the complainants recovered against defendant's testator, in the City Court of New York, a judgment for $1093.99, and in January, 1837, they commenced an action on that judgment against him, in the Common Pleas, for Charleston district, in this State, to which he pleaded the Statute of Limitations. He died pending that action, and the complainants afterwards renewed it against the defendant, his executor. The cause has in the end found its way into this Court, and one of the questions was, whether the judgment in New York was or was not barred by the Statute of Limitations of this State. The Circuit Court decided for the complain-

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*ant, and whether that was error or not is the only question submitted by this appeal.

That decision was in conformity with the judgment of the Court in Hinton v. Townes, 1 Hill Rep. 439, when the question was directly made and solemnly decided, the whole Court concurring, and I suppose would not again have been revived, but for the supposition that it had been ruled otherwise by the supreme Court of the United States in McElmoyle v. Cohen, 13 Peter's Rep. 312 [10 L. Ed. 177], to which I shall hereafter more particularly refer, for the purpose of shewing that it does not involve the question to be decided here. But as it has been again revived and again argued on general principles, the Court have thought it expedient to use the occasion to put it to rest forever. Yet the whole ground has been so fully covered by the adjudications of our own Courts and those of the United States and our sister States, as to leave but scanty gleanings. The question has been heretofore treated as depending on the construction of the Act of Congress of 1790, passed in pur-

suance of the authority given to Congress, by the 1st section of the 4th article of the constitution of the United States. The constitution provides that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State: and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." And the Act, after providing for the mode in which they shall be authenticated, declares that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every Court within the United States, as they have by law or usage in the Courts of the State from whence the said records are or shall be taken." In the earlier cases in this State and in New York, and some of the other States, this Act was regarded as intended merely to prescribe the mode in which the judgments obtained in one of the States should be authenticated to make them evidence in the others, leaving the effect to be determined according to the rules of the common law. They were therefore put on the footing of judgments, strictly foreign, on which debt or assumpsit would lie as on

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simple contracts, *and that the record was only prima facie evidence of the debt; and it was held, that the plea of nul tiel record was inadmissible, because the usual replication of habetur tale recordum, was inapplicable, as the original record could not be inspected, but that under the plea of nil debet the defendant was at liberty to go into evidence to impugn the contract on which the judgment was founded, and consequently might plead any other plea applicable, under the general rules of pleading, to the cause or form of the action. Such was evidently the tendency of the judgment of the court, in Hammond and Hathaway v. Smith, 1 Brev. Rep. 110, and Flourenoy v. Durke, 2 Brev. Rep. 257, in which it was held that nil debet, and not nul tiel record, was the proper plea in an action on the judgment of a sister State, which would, of course, open the merits of the judgment for examination. Lambkin v. Nance, 2 Brev. Rep. 99, and Flourenoy v. Durke, were decided at the same term. That was assumpsit on a judgment obtained in Virginia, and it was held that the action was well brought, and that the plaintiff might have brought debt at his election. The New York cases went on the same principle. In Hitchcock v. Fitch, 1 Cain's Rep. 461, and Hubbell v. Cowdry, 5 Johns. Rep. 132, the judgments of other States are treated as foreign judgments—prima facie evidence only of a debt, and of course open to examination. The principle on which these cases proceeded would obviously have let in the plea of the Statute of Limitations, and it is a little remarkable that its application escaped the observation of the profession until it was made in the case of Hinton v. Townes, 1 Hill, 440. There seems indeed to have been an undefined and mysterious regard paid to the judgments of the sister States in this respect, altogether at variance with the severe scrutiny to which they were subjected in many others. The question has, however, been re-examined, and stands now on the true foundation. The judgments of a sister State are no longer regarded as merely prima facie evidence of a debt, liable to be opened and rebutted by proof, but as conclusive of the fact of indebtedness. It was so held in Mills v. Duryee, 7 Cranch, 481 [3 L. Ed. 411]. Mr. Justice Story, who delivered the judgment of the court, after referring to the constitution and the Act of Congress, says that the judg-

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*ment of a sister State may be proved in the manner prescribed by the Act, and such proof is of as high a nature as the inspection by the court of its own record, or as an exemplification would be in any other court of the same State, and the plea of nil debet was therefore inadmissible.

Precisely the same question arose in Massachusetts, and at the same time, (March 1813,) in the case of Bissell v. Briggs, 9 Mass. Rep. 462, in which Chief Justice Parsons remarks that "judgments rendered in any other States are not, when produced here, as the foundation of actions, to be considered as foreign judgments, the merits of which are to be enquired into, as well as the jurisdiction of the courts rendering them. Neither are they to be considered as domestic judgments rendered in our own courts of record, because, the jurisdiction of the courts rendering them is the subject of enquiry. But such judgments, so far as the court rendering them had jurisdiction, are to have, in our courts, full faith and credit." The effect of the judgments in one State in the courts of another, again came up in Hampton and McConnel, 3 Whea. 234 [4 L. Ed. 378], in which Chief Justice Marshall says that they should have the same credit, validity, and effect, in every other court of the United States, which they have in the State where they were pronounced, and therefore the plea of nil debet could not be pleaded to actions brought upon them.

Much diversity of opinion seems to have existed as to what might be pleaded to an action on a judgment in another State. In Hinton v. Townes, 1 Hill's Rep. 445, Judge O'Neall says that it is to be tested by the enquiry whether it would or would not be good in the State where the judgment was obtained; and Chief Justice Marshall, in Hampton v. McConnel, 3 Wheat. 234 [4 L. Ed. 378], holds the same doctrine. "And whatever pleas," says he, "would be good to a suit thereon in such State," (the State in which the judgment was obtained,) "and

none others, could be pleaded in any court in the United States." That, I think, is laying down the rule too broadly, and the whole force of it was not seen at the time, nor was the question in either case necessarily involved. All that was intended by the Act of Congress, was to render the judgment conclusive of every thing decided by it; that is,

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its effect in the court in which *it was obtained, and of necessity, the fact of the judgment, can only be tested by the plea of nul tiel record. In all other respects, the States are left to prescribe their own forms of pleading. On this principle it was held by the Supreme Court of the United States in McElmoyle v. Cohen, 13 Peters's Rep. 312 [10 L. Ed. 177], that the Statute of Limitations of Georgia, which declares that actions on the judgments of another State shall be barred unless brought within five years after judgment rendered, was properly pleaded to a judgment obtained in South Carolina. It seems too that it is now well settled that under the plea of nul tiel record, the jurisdiction of the court which pronounced the judgment may be enquired into. Such is the opinion expressed by Chief Justice Parsons in Bissell v. Briggs. See also Hall v. Williams, 6 Pick. 242. In all the cases the rule seems to have been laid down so broadly as to be liable to misinterpretation. If it appear from the record, as by the plea to jurisdiction, that the question was whether one or another of the courts of the State where the cause was tried, had jurisdiction of the subject matter, the judgment on that point would, according to the rule before laid down, be conclusive. But whether the party sued is or is not the same against whom the judgment was obtained, is a question which would necessarily be open in the court where the judgment was obtained, and necessarily so every where else. So too where the proceeding was in rem, as a foreign attachment, the judgment could operate on the thing only, and not upon the person.

I have gone something out of the way, and perhaps unnecessarily, for the purpose of explaining some doubts in relation to the points before noticed, for the whole court is of opinion, that the question here is concluded by the case of Hinton v. Townes, before cited. I have no question that the Legislature of this State might, as in Georgia, have passed an Act barring actions on the judgments of other States, without any violation of the constitution or Act of Congress; but the provisions of our statute do not extend to the case. The provisions of it applicable to this question are that "all actions of account and upon the case; all actions of debt grounded upon any writing or contract without specialty," shall

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be barred, &c. The original *cause of action here, was contract, but it is no longer so, it has passed into a judgment, and that is the foundation of the action, and therefore not embraced in our statute; that effect is precisely the same whatever may have been the original cause of action; it is merged in the judgment; as effectually so as if a bond or other specialty had been given for a simple contract debt. It has assumed a new form, and a name not found in our statute.

The case of Cameron v. Wurtz, 4 McCord, 278, is supposed to conflict with this view, but that too is the result of the construction of our own Act, providing for the order in which the debts of a person deceased shall be paid when it becomes necessary to marshal the assets. By the Act of 1789, 5 Stat. at Large, 11, the funeral and other expenses of the last sickness, and the charges of administration, are first to be paid, "next, debts due to the public; next, judgments, mortgages and executions, the oldest first; next, rent; then bonds or other obligations; and last, debts due on open accounts;" and it is provided that no "preference shall be given to creditors in equal degree, when there is a deficiency of assets, except in the cases of judgments and mortgages that shall be recorded, from the time of recording, and executions lodged in the sheriff's office, the oldest of which shall be first paid, or in those cases where a creditor has a lien on any particular part of the estate;" and it is evident that the preference here given to mortgages and judgments is in respect to the lien they have on the estate. That of course cannot apply to the judgments of another State; and as they do not fall within the debts described in any of the other classes, they must fall in with the last, and rank as a simple contract debt.

The motion to reverse the Circuit Court decree must therefore be dismissed, and it is so ordered.

HARPER, JOHNSTON and DUNKIN, Chancellors, and O'NEALL, EVANS, BUTLER and WARDLAW, Justices, concurred.

CHANCELLORS PRESENT.

HON DAVID JOHNSON,
" WM. HARPER,
" J. JOHNSTON,
" B. F. DUNKIN.

Speers, Eq. *233

*DR. JOHN S. FOWKE and JANE JOHNSON v. WM. WOODWARD et al., Administrators of Hugh Johnson.

(Columbia. Dec. Term, 1843.)

[1. *Husband and Wife* ⇐29.]

Unrecorded marriage settlements are not void, as between the parties, under the Act of 1823, (6 Statutes at Large, 213,) notice supplying the place of registration as to them, as well as all other persons affected by it.

[Ed. Note.—Cited in Kottman v. Ayer, 1 Strob. 575; Le Prince v. Guillemot, 1 Rich. Eq. 215; Wingo v. Parker, 19 S. C. 15, 16; Interstate Bldg. & Loan Ass'n v. McCartha, 43 S. C. 78, 20 S. E. 807.

For other cases, see Husband and Wife, Cent. Dig. § 167; Dec. Dig. ⇐29.]

[2. *Husband and Wife* ⇐29.]

Registration is not to be regarded as parcel of the mere execution of a marriage settlement; but as an event for setting it up, as against those to be affected by it, and for whose protection the notice implied in the recording was necessary.

[Ed. Note.—Cited in Gibbes v. Cobb, 7 Rich. Eq. 66.

For other cases, see Husband and Wife, Cent. Dig. § 47; Dec. Dig. ⇐29.]

[3. *Husband and Wife* ⇐29.]

As settlements may be confirmed, they are voidable only.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 47; Dec. Dig. ⇐29.]

[4. *Vendor and Purchaser* ⇐228.]

The true import of the Act of 1823, appears to be—that settlements shall not operate until recorded; that they may be recorded within three months; and if not recorded within that time, shall be void. They shall operate against third persons, only from the recording, or from the time they shall receive actual notice, which is equivalent to recording. They shall operate ab initio against the parties, because, as they must necessarily have had notice from the beginning, they are recorded as to them, at the very execution. If a creditor, or other third party, shall not re-

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*ceive actual notice, he may avoid the settlement; but as the parties must, of necessity, have had notice, neither of them can take advantage of the non-registration of the instrument.

[Ed. Note.—Cited in Gibbes v. Cobb, 7 Rich. Eq. 65, 67.

For other cases, see Vendor and Purchaser, Cent. Dig. § 498; Dec. Dig. ⇐228.]

6. The case of Austin v. Mullens, (not reported) examined and shewn not to conflict with the general doctrine, that explicit notice stands for registration.

Before Johnston, Ch., Barnwell, May Term, 1842.

From the decree, the facts of the case will be fully understood.

This case relates to the validity of an unregistered marriage settlement, as between the parties under the Act of 1823.

Johnston, Ch. On the 4th of October, 1837, in contemplation of a marriage, which shortly thereafter ensued, between the plaintiff, Mrs. Johnson, (then Miss Fowke,) and Hugh Johnson, now deceased, (the intestate of the defendants,) two separate instruments were executed, one by Miss Fowke, the other by Mr. Johnson; with the mutual knowledge of each other, as is admitted, in which, reciting their proposed union, they severally conveyed to the plaintiff, Dr. Fowke, certain property therein described, to be held by him as trustee for the wife after the marriage, and for her "relations by consanguinity," after her death. These instruments were not recorded, as required in the case of marriage articles and settlements.

Upon the death of Mr. Johnson, the defendants, in the administration of his estate, laid claim to the negroes mentioned in these instruments, and were proceeding to sell them as parcel of his estate, when the bill was filed. The bill is for an injunction to restrain the threatened sale, for a decree that the property be delivered up, and for an account of Mrs. Johnson's distributive share of her husband's estate. The defendants resist these claims, on the ground that the instruments aforesaid constitute a marriage settlement, and are void under the Statute of 1823, for want of proper registration; and they, on their part, in virtue of the marital rights of their intestate, lay claim to about $1500, now in the hands of the trustee, and which passed to him under the paper executed by Miss Fowke.

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*At the hearing, it was admitted that the only defence to the bill, was the non-registra-

tion of the papers mentioned. The whole case is, therefore, narrowed to the single, but difficult question, whether these papers, considered in the light of a marriage settlement or contract, are void as to Mr. Johnson, who had actual notice of them at the time of their execution, and who himself executed one of them.

I have long had a decided opinion on this subject; and although I have ground for supposing there may be a diversity of views upon it among my brethren, yet as I cannot officially know, but by an authoritative decision, that the law is otherwise than I suppose it to be, motives of personal and judicial integrity compel me to decide the point according to my own judgment.

The object of registration is too plain to be misconceived. It is avowed, some where or other, in all the statutes upon the subject, and if they were entirely silent upon that point, no person of the least experience or penetration can mistake it. It is to prevent the frauds which might be practised through concealment, and a false ostentation of property, by requiring notice to be extended to all who might be taken in.

Thus, in the Statute of 1785, (most accurately published in 4 Statutes at Large, 656,) it is said the enactment was intended to remedy "the practice prevailing in this State, of keeping marriage contracts and deeds in the hands of those interested therein," which it characterizes as "a deceitful practice," which "hath been oftentimes injurious to creditors and others, who have been induced to credit and trust such persons, under a presumption of their being possessed of an estate subject and liable to the payment of their just debts." Again, in the next succeeding Act of 1792, (5 Statutes at Large, 203,) which amends certain defects in the prior Act, the preamble avows the motive to be, that the former Act had failed "to remedy the mischief thereby necessary to be provided against," thus concurring in the statement of what that mischief was. To say nothing of the manifestation of intention, exhibited in the 1st and 2d sections of this Act of 1792, which brand all contracts, deeds and settlements, not registered in conformity with its directions, as

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"fraudu*lent," and declare them void as to those liable to be taken in by them, the discrimination made in the proviso of the second section, (to which I refer,) shews clearly, that notice, or want of notice, were the sole occasion of their being drawn.

The Act of 1823, (6 Statutes at Large, 213,) is inartificially, and, from its provisions, seems to have been hastily, drawn. That part of it which relates to marriage settlements, was evidently an amendment. But it had this connexion, and this only, with the bill to which it was tacked, in virtue of which alone it could, in parliamentary order, have been received; that the bill was one the provisions of which required notice to be given in the case of sole traders; which, as we learn by the preamble, was done to prevent "frauds on the community."

It is true, that in the clause thus added to the bill, it is simply declared that marriage settlements shall be recorded in a specified manner, and if not so recorded, shall be void; nothing being said about fraud on unnotified creditors or purchasers. But when we consider that the legislative mind had been constantly directed to recording, as a means of obviating fraud; that this very clause related to the same means, and was parcel of a bill which, in relation to its original subject, openly declared that the notice directed by it to be given, was intended for the purpose, so uniformly contemplated, of preventing frauds arising from concealment, can we fail to see what the intention was?

Then, I think, all the Acts are to be considered as having been passed with the same design. And if the notice, which is the object of them, instead of being given constructively by registration, has been given actually, those who have received it have not been defrauded; but have received all the benefits, and been saved from all the injuries, within the contemplation of the Legislature. Settlements must be known to the parties, and are admitted to have been actually known here. Settlements thus circumstanced, are what the Act of 1832, (6 Cooper, 482) calls "fair settlements."

Let us look a little into the clause of the Act of 1823, under which this defence is made.

"And be it further enacted, that no mar-

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riage settlement *shall be valid, until recorded in the office of the Secretary of State, and in the office of the Register of Mesne Conveyances of the district where the parties reside. Provided, that the parties shall have three months to record the same, and if not recorded within three months, the same shall be null and void."

Now, why this extent of publicity? Was it to inform the parties? Was it to protect them? Would they learn more from the Register's office, or the Secretary's office, than they already knew? What protection could the registration extend to them? To "the community" mentioned in the preamble, it might be very important, but to them, of no moment whatever; and is it not likely that the legislative attention was directed to the community, who needed their protection, and whom they could protect, rather than to the parties, who could and would take care of themselves? Would it be a rational construction to hold that it was intended by this Act, that the parties were to be made instruments to extend information to themselves, by registration of what they already knew? That is to say, that they who already

had actual notice, were to put the instruments on record, for the purpose of acquiring constructive notice of them; in order to be enlightened, it would seem, by an information inferior to that which they already possessed?

From the earliest decisions to the present time, actual and explicit notice, such as parties must always necessarily have, and are admitted to have had in this case, has been held, upon the plainest principles of justice, to be equivalent to recording. I think I collected most of the authorities, some years ago, in a decree pronounced by me in this court. For that reason, as well as because I presume this doctrine is indisputable, I shall abstain from an examination of these authorities here. I shall take this point for granted. As an example, however, of the decisions upon it, I mention the case of Givens v. Branford, (2 McC. R. 152 [13 Am. Dec. 702]) where the doctrine is extensively examined, both in authority, and in its application to analogous recording Acts, particularly to the Marriage Settlement Act of 1785, upon which the case arose. It was

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held there, that although the Act refer*red to, declared, in explicit terms, that for want of the registration therein required, the deed should be deemed fraudulent as to creditors, and the property covered by it as liable, to all intents and purposes, as if no such deed had ever been executed, yet that notice to a creditor made it as good as to him, as if it had been duly registered.

Now, the Act of 1823 does not more effectually avoid the instrument, generally, for want of registration, than does that of 1785, as to creditors; and why shall not notice stand here, as there, in lieu of recording? The principle is, that a statute intended to prevent fraud, shall not be so construed as to make it the instrument of fraud: and why not apply it to suppress the greatest of frauds: which it would be for a party to a contract to set it aside for the want of those requisites, solely intended to remove an ignorance which he never can experience? Suppose there had been issue born of this marriage, and had been provided for in the settlement; can any thing be more abhorrent to every feeling of justice, than that he who was not deceived, and could not be deceived, as to the provision made for them, should be allowed to wrest it from those, whom by reason of it, he was allowed to bring into existence, and who never would have had an existence, but for his most solemn pledge to provide for them? It would be hard enough that they should, through the necessary justice of the case, be stripped of it by a creditor, who had received no notice; but to allow such a thing to be done by a parent, and a party to the contract, would be far worse than any deceptive practice intended to be put down by registration, and could not have been intended by the legislature.

It is said the Act of 1823 declares the unrecorded instrument null and void; and that these terms are more emphatic than those employed in the Act of 1785. But if there is any difference, the greater opprobrium appears to be cast on the unregistered paper by the Act of 1785. It not only declares it to be, as if it had never existed, (which I take to be at least as good as null and void,) but calls it fraudulent besides; and yet notice shall make it neither the one nor the

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other. The truth is, that the ap*plication of the word "void," does not make the thing spoken of void. That depends on the nature of the thing itself. If it be in its nature voidable only, a word cannot make it otherwise. That which is susceptible of confirmation, is not, and cannot be, void. Settlements may be confirmed; and this shows that they are voidable only; and that the words used must, necessarily, be construed with reference to the subject matter about which they are employed.

It is said, however, and here I acknowledge is the real difficulty of the case, that marriage settlements, under the Act of 1823, have no legal existence until they are recorded; and that, therefore, they are, until recorded, not only void, in the sense of voidable, but absolutely and essentially, for incompleteness. Things will impress different minds variously, according to the construction of the minds themselves; and I can well perceive how there may be a difference of judgment here. But as the registration Acts have always (in my opinion, justly,) been construed with reference to their real design, in the light of remedial Acts, I think this canon of interpretation should not be forsaken here. Notice has been held to be recording, because it is its object. Let us apply this principle to this part of the discussion. Was registration contemplated by the Legislature, as parcel of the mere execution of the paper? or was it contemplated as an event for setting it up, as against those to be affected by it, and for whose protection the notice implied in the recording was necessary? If the latter view be taken, and I think it comprehends the true principles of the statute, the difficulties vanish. And I am disposed to adopt it, because registration, although a very appropriate means of extending notice, is neither a natural nor an appropriate means of executing an instrument. This is emphatically true in relation to the parties. For when they have signed and sealed it, and delivered it, what right or power have either of them of interposition afterwards to prevent its registration? And if they have mutually lost their control over it, at the delivery of it, how can it be said that it is not then complete as to them? How can the registration, over which they can exercise no influence by the strongest dissent, be

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attributed to them as their act? *or, if this

is a thing imaginable, can we persuade ourselves, in the face of other sensible designs exhibited by the Legislature, that by adopting this construction, we are promoting the real intention of their statute? I most conscientiously think not.

It has been supposed that the statute of 1832, 6 Coop. 482, betrays a legislative opinion that unrecorded settlements are, under the terms of the Act of 1823, not only void as to third persons, but void and incomplete as to the parties themselves. If this were so, the opinion would be entitled to great weight, although devoid of judicial authority. But I do not read the Act of 1832 in this light. Its preamble recites that by reason of the provisions of the Act of 1823 being generally unknown, many fair settlements have not been recorded according to its requisitions, and are therefore "liable to be avoided, to the injury of the wife, and parties interested therein." Now, it is manifest here, that the danger apprehended was not an avoiding of the instrument by the parties, but against them, and to their injury. When the settlements are called fair settlements, they are so characterized in reference to the parties, and so far from the instruments being regarded as incomplete for want of registration, and absolute nullities, they are said to be "liable to be avoided," that is, voidable only, even as to creditors and purchasers. Their completeness of execution is asserted in the enacting clause, even as to creditors and purchasers; and an operation is given them, even as against those persons, simply upon condition of future registration, which could not have been thought of, if it had been supposed that the instruments were still incomplete and without legal existence; for even the Legislature cannot perfect an imperfect and invalid deed, or other contract for parties, without their intervention or consent.

There is another view differing slightly from some I have advanced, and depending more on the mere letter of decisions, and which may be stated thus. As notice has been held to stand for recording, it may be affirmed that the instruments in question[1] in this case were recorded, as to the parties, from the time the parties had notice, to wit,

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*from their very date, and were, therefore, in the language of the Act, valid from that time.

The true import of the Act of 1823, appears to be this: that settlements shall not operate until recorded; that they may be recorded within three months; and if not recorded within that time shall be void. They

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shall operate *against third persons only from the recording, or from the time they

[1] South Carolina—Barnwell District.

This indenture, made the fourth day of October, in the year of our Lord eighteen hundred and thirty-seven, between Hugh Johnson, planter, of the district of Barnwell, and State aforesaid, of the one part, and John S. Fowke, physician, of the same district and State abovementioned, trustee nominated and appointed by him, the said Hugh Johnson, for the trusts and purposed intents hereinafter mentioned and declared. Whereas, a marriage is shortly to be made and solemnized between the aforesaid Hugh Johnson and Miss Jane Fowke, both of the same State and district: Now then, be it known, that in order that the said Jane Fowke may be secure in a decent maintenance, during the life and after the death of the said Hugh Johnson, should the said Jane prove the survivor, and so long as she shall live, the said Hugh makes over and assigns to the said John S. Fowke, in trust, all his right, title, interest, and estate in and over the following property, subject nevertheless at all times to the discretionary power vested in said trustee, after the death of the said Hugh Johnson, and during the life of the said Jane Fowke, to be managed and controled by the said John S. Fowke as shall best fulfill the design and intent of this instrument or deed; the said Hugh reserving to himself the right of disposing of the same by sale or otherwise after the death of the aforesaid Jane Fowke, viz: two negro boys named Peter and George; also, one third of the land whereon the said Hugh Johnson now lives, with all its profits, privileges and immunities; likewise, two milch cows, with their calves, ten head of good, well grown, stock hogs, one third of all the household and kitchen furniture; likewise, one third of the entire provision crop, and the same of all the plantation tools: Now, this indenture witnesseth, that the said Hugh Johnson, in consideration of the premises, and of ten shillings to him in hand paid by the said John S. Fowke, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, aliened, remised, released, conveyed, confirmed and assured unto the said John S. Fowke, and by virtue of a bargain and sale to him thereof made. In witness whereof I have hereunto set my hand and seal on the day and in the year above mentioned.

Hugh Johnson. [L. S.]

Signed, sealed and delivered in the presence of } Jno. Gallaway. James Woodward.

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*South Carolina—Barnwell District.

This indenture, made the fourth day of October, in the year of our Lord eighteen hundred and thirty-seven, between Jane Fowke, spinster, of the district of Barnwell and State aforesaid, of the one part, and John S. Fowke, physician, of the District and State above mentioned, of the other part, trustee nominated and appointed by her, the said Jane Fowke, for the trusts, intents and purposes hereinafter mentioned and declared. Whereas, a marriage is shortly to be made and solemnized between Hugh Johnson and the aforesaid Jane Fowke, both of the same district and State as aforementioned. Now, then, that the property of Jane Fowke may be well and truly secured to herself and heirs, by blood, she hereby makes over and assigns to the said John S. Fowke, in trust, all her right, title, interest and estate, to, and over, the following property, subject nevertheless at all times, agreeable to the discretionary power vested in said trustee, to the payment of all and every legal claim or demand against her, and to be controlled by her order, last will and testament, in the disposition thereof, viz: one negro man named Armstrong, now in the town of Columbia; two female negro slaves, Hetty, and Caroline, her mother, with the entire issue of their bodies; one white bodied cow, with black head; one white heifer, and their increase; household and kitchen furniture; wearing apparel; which may now or hereafter be lawfully claimed by the trustee or herself; also, the sum of fifteen hundred and

shall receive actual notice, which is equivalent to recording. They shall operate ab initio against the parties, because, as they must necessarily have had notice from the beginning, they are recorded as to them, at their very execution. If a creditor, or other

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third party, shall *not receive actual notice, he may avoid the settlement; but as the parties must, of necessity, have had notice, neither of them can take advantage of the non-registration of the instrument.

I shall rest this argument here. The deeds will be set up; and the account on the intestate's estate is a matter of course.

It is decreed that the defendants be enjoined from selling the property as to which the bill seeks an injunction; that they deliver said property up to the plaintiffs; and that they account before the commissioner for Mrs. Johnson's distributive share of her late husband's personal estate; but as the defendants were, from the doubtfulness of the question, bound to make it, let the costs be paid out of their intestate's estate, before distribution.

From the foregoing decree the defendants appeal, and now move to reverse the same, because the deeds mentioned in the pleadings, and on which the complainants rely, constitute a marriage settlement, and not having been recorded, as required by law, are null and void, as well between the parties and their representatives, as between said parties and creditors and subsequent purchasers.

Patterson, for the appellants. Bellinger, contra.

Curia, per JOHNSTON, Ch. When I delivered the circuit decree, I supposed, as I then suggested, that a majority of this Court probably entertained opinions directly opposed to my views. For, although the validity of unregistered marriage settlements, as between the parties, was expressly reserved in the case of Baskins v. Giles, (Rice Eq. R. 322–3,) yet an opinion was there intimated by one of the Chancellors, that the point had been decided in the case of Mullins v. Austin, contrary to my circuit decree in this case. The appeal decree in that case was not in our hands when Baskins v. Giles was decided; nor has it been found since, although the registry of this Court, and of the Circuit Court of Spartanburg, from which it was brought up, have both been searched, and an extensive enquiry made in all other quar-

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ters where it was likely to be *found. But from the pleadings and circuit decree, which have been found and examined, it appears that the question, whether unrecorded settlements are or are not valid between the parties, was not necessarily involved in the case. Mullins had made a post-nuptial settlement, in the year 1829, by which he conveyed to a trustee certain slaves and other personal property, to the use of his wife, &c. This deed was not registered, as required by the Act of 1823. Subsequently, he mortgaged the same property to Austin, to secure the price of certain property sold by Austin to him, and payable in instalments. Some of the instalments having become due, and being unpaid, Austin took possession of the slaves, and was about to sell them, when the bill was filed by Mullins. The bill prayed an injunction and a re-delivery of the slaves, upon four grounds, the first of which was abandoned. The second was, because, as it was alleged, Austin had drawn Mullins into the purchase and into the execution of the mortgage, by oppression and fraud. Third, because Austin had due notice of the settlement which conveyed the property to the trustee, and therefore could not avoid it for want of registration, and if valid, the title was, by virtue of it, out of Mullins, when he gave the mortgage, and belonged to the trustee for Mrs. Mullins, who was a party to the bill. Fourthly, that the seizure and threatened sale, under the mortgage, was premature, the whole debt being not yet due. Chancellor De-Saussure overruled the second ground, as unsupported by the evidence, and the fourth as unsustained by law. Upon the third he observed that Mullins was in debt and embarrassed when he executed the settlement, and swore out of jail soon afterwards, and that this would defeat the deed. "It was argued, however," he adds, "that though the deed was not properly recorded, the necessity for its being so was superseded by the fact that Austin knew of the existence of the deed before he took the mortgage, and, therefore, had the notice intended by the statutes. The statutes positively require the recording. They make no exception. The Equity Courts in England have made the exception above stated; and we have followed them with rather more guarded steps. We require the

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notice of the deed to be brought *home clearly and positively. Mere loose knowledge, alleged or believed by the witnesses, is not sufficient. In this case, Dr. Austin swears, in his answer, that he has no recollection of seeing the deed. Mr. Bomer, the register, how-

ten dollars, subject to such necessary drawbacks as may be required for her decent support and payment of her just debts. Now, this indenture witnesseth that the said Jane Fowke, in consideration of the premises and of ten shillings to her in hand paid by the said John S. Fowke, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, aliened and remised, released and confirmed, conveyed and assured unto the said John S. Fowke, and by virtue of a bargain and sale to him thereof made. In witness hereof, I have hereunto set my hand and seal, on the day and year above mentioned.

Jno. S. Fowke, [L. S.]
for
Jane Fowke.

Signed, sealed, and delivered in the presence of
John Gallaway.
James Woodward.

ever, testifies that Dr. Austin was in his office, and did see the deed; and thinks he read it, or the record of it, but he cannot say which. This discrepancy in the recollection of respectable men, of known veracity, shews the danger of substituting loose verbal testimony for the statutory rule, and the necessity of using great caution, and requiring very clear proof." He dismissed the bill. Now, it appears from this statement, that the only position taken by the plaintiff, which was sustained by the Chancellor, was the position, that notice is a substitute for recording, provided it be clear and explicit, and established by evidence clear of doubt; and that the Chancellor was restrained from applying it to the case, because the proof was not satisfactory to him. The appeal decree affirming the circuit decision may have expressed the opinion that the deed was void, solely for the want of registration, but such an opinion, if expressed, (of which we are uncertain,) was evidently beyond the necessity of the case.

A portion of this Court would have overruled this decision, if such a one existed as this of Mullins v. Austin was supposed to be; for it would have been clearly opposed to the whole current of authorities. But we preferred to keep this case under advisement, for the purpose of ascertaining, if we could, what was, in fact, decided in that case. Being now satisfied that there was no point necessarily adjudicated in it, contrary to the general doctrine, we are free to conform to that.

I might have said the universal, instead of the general doctrine. There is no case in which explicit notice has not stood for registration. Even in Baskins v. Giles, where the President of this Court questioned the applicability of the doctrine to the Act of 1823, an exception to the title (or letter) of the Act was recognized, and the decision made to turn on it; by which it was ruled, that marriage settlements are not void as to all persons, for want of recording, but that persons standing in particular circumstances, shall be bound by them. All that is asser-

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*ted in this case, is that it would be a fraud for parties, having notice of the execution and not defrauded by them, to take advantage of the mere letter of the Act, and avoid them. Baskins v. Giles ruled that the instrument should not be invalid, at the instance of a person who would have perpetrated a fraud by insisting on its want of registration. In what respect does this decision differ in principle from the general current of authorities, that a purchaser with notice of a settlement shall not be allowed to object to it? It would be a fraud in him to do so. And would it not be a fraud in a party, the husband, to receive and appropriate property known by him to have been secured by settlement?

The only difference between the Act of 1823 and the prior Acts of 1785 and 1792, is that they declare unregistered marriage deeds and contracts void as to particular persons, while the former declares them void generally. If notice supplied the place of recording, in regard to the particular persons as to whom the former Acts declared such unregistered instruments void, how is it possible, in conformity with the decisions to this effect, to hold otherwise than that it shall supply it as to all persons, the parties as well as others, under the Act of 1823?

The doctrine that notice supersedes the necessity of registration, is as old as the Court. It prevails in law as well as in equity. There is no exception to it.[2] I shall refer to only one or two cases, in addition to those

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particu*larly mentioned in the circuit decree. In Levinz v. Will, 1 Dallas, 430, [1 L. Ed. 209,] the argument was upon a special verdict finding that Levinz had executed a mortgage which was not recorded within the time prescribed by law. The defendant, as sheriff, sold the mortgaged premises, and after certain deductions, paid over the balance to the mortgagee, and afterwards Levinz assigned all his property for the benefit of his creditors generally. The action was brought by the assignees in the name of Levinz, the assignor, to recover the money paid over to the mortgagee. The Act of Assembly, relied on by plaintiff, declared that "no deed, or mortgage, (or defeasible deed, in the nature of mortgages,) hereafter to be made, shall be good or sufficient to convey or pass any freehold," &c. "or to grant any estate therein, for life or years, unless such deed be acknowledged or proved, and recorded within six months after the date thereof, where such lands lie, as herein before directed for other deeds." The opinion of the court was delivered by McKean, Ch. J.; that the mortgage was good as between Levinz and the mortgagee, and judgment was given for the defendant. The argument of counsel and the opinion of the court are very instructive; but for the sake of brevity must be omitted here.

[2] ☞Note by the Chancellor. The following authorities, among others, may be consulted with advantage upon the subject of notice generally; what notice is required as a substitute of registration; what is sufficient as to an outstanding equity; under what circumstances it shall or shall not affect the party to whom it is directed, viz: Martin v. Sale, 1 Bailey Eq. 4; Price v. White, Bailey Eq. 266; Miller v. Kershaw, Bailey Eq. 480 [23 Am. Dec. 183]; [McCartney & Gordon v. Ferguson] 2 Hill Eq. Rep. 180; Cabiness v. Mahon, 2 McCord Rep. 274; Givens v. Branford, 2 McCord, 152, [13 Am. Dec. 702;] Anderson v. Harris, 1 Bailey, 315; Jackson v. Ellis, 12 Johnson Rep; Jackson v. Sharpe, 9 Id. 168; Same v. Bext, 8 Id. 108; Same v. Givens, 2 Johnson Ch. Rep. 603; Id. 190; 19 Ves. 439; 3 Id. 484; 2 Atk. 275; [Ramsay v. Deas] 2 Dess. 238; 6 Munford, 42; Newland on Contracts, 510, et seq. Id. chap. 36; 2 Sugden on Vend. 223, (late edition,) Id. 276; 1 Story Eq. 359, 387, 393, 394.

It is sufficient to say that it was held that the object of recording was notice to persons liable to be affected, and that this was subserved by actual and explicit notice, such as Levinz, as a party to the mortgage, had. The Chief Justice observes that "the Legislature did not mean, nor did they in fact enact, that express personal notice, when given, shall have no effect; nor could they entertain an idea of defeating fair and honest bargains." He confirms his decision by the analogous principles of the cases on church leases, Bac. Ab. 390; Cowper, 141; on undocketed judgments, 2 Eq. Ab. 684; on leases in Ireland, Id. 282, case 19; and on surrenders of copy holds, by way of mortgage, 2 Chan. Ca. 170; 2 Vern. 564.

Now, the Act of Pennsylvania, above recited, corresponds in so many particulars with the Act of 1823, affecting the marriage settlement in this case, as to render the case in Dallas of great moment here. It draws no distinction between the parties and creditors

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or purchasers, but directs *its enactment generally against the instrument if not recorded. So does the Act of 1823. It declares that the deeds embraced by it shall not be good or sufficient to pass an interest, (that is, shall not operate or be valid) unless recorded within a given time. The Act of 1823 provides that marriage settlements shall not be valid until recorded, which shall be done within a fixed period. The only seeming difference is that the latter Act declares that for want of the prescribed registration, the settlement shall be null and void. But what difference can this make? The Pennsylvania Act declares that, unless registered, the deed shall not be good or efficacious; and if so, is it not inoperative and void? The words unless in the one Act, and until in the other, will be noticed hereafter. It appears to me, therefore, that the decision in Levinz v. Will amounts to a decision in conformity to the circuit decree upon the Act of 1823.

The case of Stroud v. Lockart, 4 Dallas R. 153, [1 L. Ed. 779,] was a scire facias on a mortgage. The mortgage had not been duly recorded; and Lockart had purchased the premises. But on the trial it was proved that he knew of the mortgage when he purchased. The court said the case was too plain for controversy, and the plaintiff must have a verdict.

Our own case of Anderson v. Harris, reported 1 Bailey R. 315, the particulars of which are more fully set forth in MSS. records of law decisions, Columbia, vol. 4, page 476, (case No. 381,) seems in principle to decide the present case. The action was trespass to try titles to lands. The plaintiff purchased from one Jenkins, who had previously leased a portion of the land to the defendant for fifteen years. The lease was not recorded; and it was insisted by the plaintiff, that it was void under the Act of 1817, 6 Cooper, 67, which provides, "that all leases, or contracts in writing, hereafter to be made, between landlord and tenant, for a longer time than twelve months, shall not be valid in law, unless the same shall have been recorded in the office of mesne conveyances, at least within three months from the time of their execution." But the plaintiff was fully notified of its execution at the time of his purchase. Mr. Justice O'Neall, who presided

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at the trial, *instructed the jury, upon the authority of Tart v. Crawford, 1 McCord R. 265, which was adjudicated upon the general recording law, 1 Brev. Digest, 171, and upon the authority of McFall v. Sherrard, Harper's L. Rep. 295, that the notice was a substitute for recording, and obviated the objection raised. They gave a verdict accordingly; and upon appeal the whole court, (Nott, Colcock, and Johnson, JJ.) affirmed the instructions.

Now, there is no other difference between the Act of 1817 and that of 1823, than the words unless and until; except the difference between the latter and the Pennsylvania mortgage Act, respecting the omission in the Pennsylvania Act, of the words null and void, which has been already observed upon. The Act of 1817 declares that leases shall not be valid, unless recorded within a given time; that of 1823, that settlements shall not be valid, until recorded; the time for which is limited. The one imposes a condition, the other a prerequisite; but the one is equal to the other.

But when the history of the registry Acts is examined, it will appear that this word, until, employed in the Act of 1823, is hardly entitled to the weight allowed to it by the appellant's counsel. Before that Act was passed, marriage settlements were required to be recorded in the office of the Secretary of State only. The Legislature desired to give more general publicity, and required, by the Act of 1823, that they should also be registered in the district where the parties resided. The true solution of the Legislature's intention, as gathered from the previous legislation, is, not that the deeds should be imperative until recorded, but that the registration should not be considered complete until made in both offices. And this interpretation fortifies the conclusion that notice was the sole object of this, as well as all the previous Acts.

I have thus shown what the general doctrine is. That the case of Mullins v. Austin is not opposed to it; and that not a single case, therefore, has ever been decided among ourselves or elsewhere contrary to the circuit decree.

It is the unanimous opinion of this court, that marriage settlements are not void as be-

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tween the parties, under the *Act of 1823; notice supplying the place of registration as

to them, as well as all other persons affected by it; and it is ordered, that the circuit decree be affirmed, and that the appeal be dismissed.

JOHNSON, HARPER and DUNKIN, Chancellors, concurred.

Speers, Eq. 250

MARY BIRD et al. v. LITTLETON HOUZE.

(Columbia. Dec. Term, 1843.)

[1. *Descent and Distribution* ⇐130.]

Where the widow and only child of an intestate had been in the exclusive possession of his lands, and had exercised acts of ownership, as his heirs at law, their inheritance is not liable to levy and sale under an execution against his personal representative. And the principle applies though no regular partition may have been made.

[Ed. Note.—Cited in Van Lew v. Parr, 2 Rich. Eq. 346; Rogers v. Huggins, 6 S. C. 362; Huggins v. Oliver, 21 S. C. 158; Hendrix v. Holden, 58 S. C. 529, 530, 36 S. E. 1010.

For other cases, see Descent and Distribution, Cent. Dig. § 480; Dec. Dig. ⇐130.]

[2. *Executors and Administrators* ⇐325.]

Where it appeared that the personal estate of the intestate would have been sufficient for the payment of its debts, and that a creditor had obtained a judgment by default against the administrator on a note barred by the Statute of Limitations nearly two years before the suit was instituted against him, on which judgment no further proceedings were had for nearly ten years, nor until the heir had been about twelve years in undisturbed possession of the estate, it was held, after such laches, too late to resort to the heir.

[Ed. Note.—Cited in Campbell v. Sloan & Seignious, 21 S. C. 307; Brock v. Kirkpatrick, 60 S. C. 342, 346, 38 S. E. 779, 85 Am. St. Rep. 847; Brock v. Kirkpatrick, 72 S. C. 503, 504, 52 S. E. 592.

For other cases, see Executors and Administrators, Cent. Dig. § 1340; Dec. Dig. ⇐325.]

[3. *Executors and Administrators* ⇐213.]

It was the duty of the administrator to have interposed the plea of the statute.

[Ed. Note.—Cited in Bolt v. Dawkins, 16 S. C. 213; Brock v. Kirkpatrick, 60 S. C. 346, 38 S. E. 779, 85 Am. St. Rep. 847.

For other cases, see Executors and Administrators, Cent. Dig. §§ 749–753; Dec. Dig. ⇐213.]

[4. *Executors and Administrators* ⇐117.]

Payment by him of a demand thus barred, would be a devastavit. It could constitute no claim against the heir, either on the part of the administrator, or of the holder of the note.

[Ed. Note.—Cited in Cleveland v. Mills, 9 S. C. 437; Brantley v. Bittle, 72 S. C. 189, 51 S. E. 561.

For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 469–471; Dec. Dig. ⇐117.]

[5. *Executors and Administrators* ⇐325.]

Although, by the statute of George 2d, lands in the possession of the heir are liable for the payment of the simple contract debts of the ancestor, yet in that case the cause of action must be established against the heir, and he is not bound by a judgment against the executor or administrator to which he was neither party nor privy. Vernon v. Valk, 2 Hill's Ch. Rep. 261.

[Ed. Note.—Cited in Gilliland v. Caldwell, 1 S. C. 198; Mobley v. Cureton, 6 S. C. 66; Richardson v. Chappell, 6 S. C. 156; Lanier v. Griffin, 11 S. C. 587; Small v. Small, 16 S. C. 71; Huggins v. Oliver, 21 S. C. 159; Wheeler v. Floyd, 24 S. C. 419; Ariail v. Ariail, 29 S. C. 94, 95, 7 S. E. 35; Brock v. Kirkpatrick, 60 S. C. 339, 341, 348, 38 S. E. 779, 85 Am. St. Rep. 847.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1339–1341; Dec. Dig. ⇐325.]

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*Before Dunkin, Ch., at Lancaster, July Term, 1842, who made the following decree:

Dunkin, Ch. The defendant and Thomas Bird, deceased, were joint owners of fifteen acres of land, comprising nine small Islands in or adjoining the Catawba river, and known as the Hill Island Fishery. Thos. Bird died in 1828, intestate, leaving the complainants, his widow and daughter, his heirs at law. D. M. Tillman administered on the estate of Thomas Bird; he leased out his intestate's moiety of the Hill Island Fishery for two years and received the rent. In 1830, the complainants took possession, and have held the same, sometimes occupying it during the proper season, and at other times renting it out, from that time, until the winter or spring of 1842. In January, 1842, the complainant, Mrs. Bird, applied to the Ordinary, to have partition made of the Hill Island Fishery. On the 25th January the parties met at the Ordinary's office, at his suggestion; the defendant then claimed the whole, on the alleged ground that, by the terms of the contract between Bird and himself, Bird was to furnish a landing and timber for the traps, &c. That the complainants could not do this, and therefore he, the defendant, claimed the whole. It appears that on the 1st January, 1826, Bird gave the defendant a note for twenty dollars, payable one day after date. On the 31st December, 1830, Tillman gave the defendant a receipt for the note, promising to account for the same, "provided the Ordinary should receive the same, and there should be funds sufficient to pay the debts of Bird's estate." The note is endorsed, "This note was filed 31st December, 1830."

On the 18th October, 1832, the Ordinary declined to receive the note, as it was out of date when the administrator took it up. On the 26th October, 1832, the defendant issued a summary process against the administrator on this note, and wished him to confess a judgment, which he declined. But at that time he endorsed on the receipt the following words, viz: "The date of this receipt ought to be 1829. It was a mistake in the date; I have examined and found it so. D. M. T." On Tillman's examination before the court, he said this memorandum was

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made by *him; that when the defendant,

(Houze) and his attorney came to him, he did not recollect about it, he was much embarrassed, and did not care much what he did." Judgment was entered against him on the process by default, and fi. fa. lodged 17th December, 1832.

At fall term, 1841, this judgment was revived by scire facias against the administrator; execution was lodged, and on the 9th March, 1842, the deputy sheriff, by direction of the plaintiff's attorney, endorsed on the execution, that he had levied on all the interest of Thomas Bird, (deceased,) in the Hill Island Fishery, &c. (Taking a description from the deed.) On the sale day in April, the land was knocked off to the defendant for five dollars, and on the 25th April, 1842, he received the sheriff's deed. This bill was then filed for the partition, which is resisted by the defendant, on the ground that the sale under the execution against the administrator divested the complainants's title, and gave him an absolute estate in the entire premises.

The decisions in Durphey v. Nelson [4 McCord, 129, note] and Martin v. Latta, 4 McC. R. 128, have never been satisfactory to the bench or the bar. While the court has in several instances expressed the opinion, that it was necessary for the repose of the country not to disturb what might now be regarded as a settled law of property, they have lost no opportunity of declaring that they would not go one step farther than those decisions have already gone. See Drayton v. Marshall, Rice Eq. 388 [33 Am. Dec. 84.] In Jones v. Wightman, 2 Hill's Rep. 579, the court had occasion to review and explain these decisions. The Statute Geo. 2d, makes lands liable as personal assets in the hands of the personal representative of the debtor. "The cases of Durphey v. Nelson and Martin v. Latta, do not go further than to declare the lands of a deceased person to be assets in the hands of his personal representative, liable to be taken on execution on fi. fa. issued under a judgment recovered against the executor or administrator."

In the former of these cases the ancestor left but a single heir; in the latter case the lands descended to several. But, say the court, in Jones v. Wightman, "there does not seem to have been any act done by the de-

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fendant (the *heir) in the first case, asserting his right of possession, as heir at law, before the suit was brought against the administrators, and a recovery had. In the other case, there had been no partition." In a subsequent part of the same case, the court declared what is the true notion of the constructive lien of a creditor on the lands of the deceased. So long as they remain in the hands of the heir, they are liable to be seized in execution under a judgment recovered against the heir, for the debt of the ancestor, and if the lands "are not in the exclusive, actual possession of the heir entitled to them, they would also be liable to execution on a judgment recovered against the executor or administrator." In the case then under consideration of the court, no partition had been made among the several heirs; but this seems to confer no new right, but is only conclusive evidence of "asserting their right of possession as heirs at law."

Partition can give no right to several heirs which a single heir would not have without partition—an only child, living on his father's plantation for ten years, or renting it out, and receiving the rents for ten or more years, without any claim on the part of the personal representative, or of an executor, would, in the language of Jones v. Wightman, have been deemed to assert his right of possession as heir; "the land would be in the actual exclusive possession of the heir entitled to it." And although the creditors might have a lien on the land, which they might enforce under a judgment against the heir, the land would not be liable to execution under a judgment against the personal representative. If the same acts of open, exclusive, actual, possession have been exercised, for a series of years, by the widow and only child of the intestate, the principle is equally applicable, although no regular partition may have been made. The rule in Durphey v. Nelson, is held by the court, in Jones v. Wightman, to apply only to cases where the heir has done no act, as heir, asserting his right of possession, before suit brought against the administrator, and a recovery had. Recognizing the authority of these cases, the court is of opinion that the exclusive possession of the complainants, and the acts of ownership exercised by them as heirs of the intestate, protected their in-

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heritance from *levy and sale under an execution against his personal representative.

But in another view the complainants seem entitled to the aid of the court. In Goodhue v. Barnwell, Rice Eq. 240, it is said, "certainly the personal estate is the primary fund for the payment of debts, and if a creditor stands by and suffers the personal estate to be squandered, he will not be afterwards permitted to look to the heir for payment of his demands."

The administrator, Tillman, testified "that Bird's personal estate, if rightly managed, would have more than paid the debts, but that his own affairs became deranged so that he attended very little to Bird's estate, after the first two years." No suit was instituted against the administrator until the 26th October, 1832. The judgment by default was suffered to remain, and no further proceedings had for nearly ten years, nor until the heir had been about twelve years in undisturbed possession of his estate. After such laches it is too late, in the judgment of the court, to resort to the heir. If he could not

be rendered responsible by a direct proceeding against himself, the right of the creditor can hardly be improved by a mere nominal proceeding against a bankrupt administrator. It is ordered and decreed that the sale by the sheriff be set aside, and that a writ of partition do issue according to the prayer of the bill, and that defendant account for the rents since 1st January—costs on the bill to be paid by the complainants; those on the writ of partition, and on the execution thereof, to be paid in equal moieties by the complainants and defendant—all other costs to be paid by the defendant.

Notes of evidence for defendant.

Execution December 17, 1832; sci. fa. March 20, 1841; execution November 9, 1841; (Record of Robert Dobbin v. Thomas Bird,) judgment, November 11, 1828, $91.65; assigned to Houze, January 7, 1832; sci. fa. issued October 29, 1832; acknowledgement by administrator, that he had no cause to show; sheriff's deed, 25th April, 1842.

Grounds of Appeal—to revise or modify decree.

Because, it is submitted, the sale by the *255 sheriff, under the *execution against the administrator, transferred a good title to the land of intestate to the defendant, and should have been sustained, and complainants's bill dismissed.

Because, even conceding that a valid sale could not be made by virtue of the execution against the administrator, yet as there was a good subsisting judgment against the intestate (in the case of Dobbin v. Bird,) it is respectfully submitted the sale should be referred to the judgment, and sustained.

Because the defendant's having set up a title to the land, was a bar to the claim of complainants for partition in this court.

Because, at all events, decree should be modified, by requiring complainants to account for the indebtedness of intestate to defendant, and especially for the amount of the Dobbin case.

Because, if it is considered by the court that the decree should be sustained on account of the adequacy of the personal estate for the payment of the debts, the evidence on this point was wholly insufficient, and a reference thereon should be ordered.

Wright and McMullan, for the appellant, cited the following authorities: Ashe v. Executors Ashe, 1 Bay, 304; 1 McCord Ch. 148; 4 McCord Rep. 128; 2 Hill Rep. 579; Rice Eq. 308; 1 Equ. Rep. 427; 1 McCord Ch. 191; 7 Johnson Ch. 140; Gist v. McJunkin, McMullan Rep.; 1 Hill Rep. 49.

Clinton, contra cited 2 Bay, 339; 1 Hill Rep. 399; Rice Eq. 240; 1 Bailey, 168; 2 McCord Ch. 302.

Curia, per DUNKIN, Ch. This court concur in the judgment of the Chancellor, and are of opinion that the appeal should be dismissed.

It may not be improper to add that the $20 note, on which the judgment against the administrator was obtained, and the land sold, had been barred by the Statute of Limitations nearly two years before the suit against the administrator was instituted. It was the duty of the administrator to have interposed the plea of the statute. Payment by him of a demand thus barred, would be a devastavit. It can constitute no claim against the heir, *256 ei*ther on the part of the administrator, or of the holder of the note. Although by the statute of George 2d, lands in the possession of the heir are liable for the payment of the simple contract debts of the ancestor, yet in that case the cause of action must be established against the heir, and he is not bound by a judgment against the executor or administrator, to which he was neither party nor privy; and so it was decided in Vernon v. Valk, 2 Hill Eq. 261.

The decree of the Circuit Court is affirmed, and the appeal dismissed.

HARPER and JOHNSON, Chancellors, concurred.

Speers, Eq. 256

JESSE KINARD WELCH v. JOHN M. KINARD. THE SAME v. SAMUEL KINARD. THE SAME v. HENRY DOMINICK.

(Columbia. Dec. Term, 1843.)

[1, 2, *Wills* ⇐87, 88.]

J. P. K. made a paper writing as follows: "Know all men by these presents, that I, J. P. K. for the love and affection which I do bear to J. K. W., son of Catharine Wedeman, formerly Catharine Welch, after my death, to him and his bodily heirs, four negroes, with their future increase," (naming them,) "but in case he should die without bodily heirs, the whole of the said negroes, with their increase, to return to my estate. Given under my hand and seal," &c.

It was *held*, that if the words "I give" be supplied "after my death," in this instrument, it could only operate as a testamentary paper; and not being legally executed for this purpose, was void.

[Ed. Note.—Cited in Crawford v. McElvy, 2 Speers, 230; Chancellor v. Windham, 1 Rich. 161, 168, 169, 42 Am. Dec. 411; Jaggers v. Estes, 2 Strob. Eq. 372, 376, 49 Am. Dec. 674.

For other cases, see Wills, Cent. Dig. §§ 206, 208; Dec. Dig. ⇐87, 88.]

Before Johnson, Ch., at Newberry, June Term, 1842, from whose circuit decree the facts of the case will be fully understood.

Johnson, Ch. The late John Peter Kinard, on the 6th June, 1826, made a paper writing, of which the following is a copy, viz: "Know all men by these presents, that *257 I, John *Peter Kinard, for the love and af-

fection which I do bear towards Jesse K. Welch," (the complainant,) "son of Catharine Wedeman, formerly Catharine Welch, after my death, to him and his bodily heirs, four negroes, with their future increase, namely, Fan and her daughter Martha, Rachel and Minty; but in case he should die without bodily heirs, the whole of the said negroes, with their increase, to return to my estate. Given under my hand and seal," &c.

John Peter Kinard died intestate in 1828, and administration of his estate was committed to the defendant, John M. Kinard, who states in his answer, that on the advice of counsel, that the deed was void, he sold the negroes as part of his estate. At the sale, defendant, Samuel Kinard, purchased Martha—Sally Bundrick purchased Fann, who sold to defendant, Henry Dominick; and the defendant, John M. Kinard, purchased Minty and Rachel; and it is stated in the bill, and admitted in the answer, that Martha, Minty and Rachel have all had increase of several children. The prayer of the bill is, that these defendants may be decreed to deliver up the negroes mentioned in the bill, with their issue and increase, and account for their hire.

The complainant's father died when he was a mere infant, and his mother, on the solicitation of the intestate, consented that he should take him, on his promise that he would raise him as his own and make him his heir, he having no children of his own, and he remained with the intestate until his death.

The paper writing referred to, it will be observed, does not contain any direct gift or grant of the negroes to the complainant; and a preliminary question, and that first to be disposed of, is, whether words necessary to confer a gift or grant, can be supplied.

The rule, as I understand it, is that when the intention of the parties to any written muniment can be clearly ascertained from the writing itself, though some of the necessary terms are wanting, the court will supply them to effectuate the intention. But in no case when the intention is in the least doubtful, or where different words might be interpolated and equally carry into effect the supposed intention.

On examining the deed, no one will doubt

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that the in*testate intended to give these negroes to the complainant, nor that he intended that the gift should not take effect until after his death; and if we interpolate the words "I give to Jesse Kinard Welch" between the name of his mother and the words "after my death," we have a perfect deed, which operated presenti to take effect in futuro, which, as I shall have occasion hereafter to show, is a valid deed, and carries the property with it.

Is it possible to supply any other words, consistently with the context, which would operate differently? None has occurred to me. It has, however, been urged, on the argument, that the court might, with the same propriety and consistency, supply words which would give it the effect of a bequest by will, as "I give and bequeath to the said Jesse Kinard Welch," &c., thus rendering it doubtful which was intended, and, therefore, neither, according to the rule, is admissible.

The paper commences in the usual form of a deed: "Know all men," &c., never used when a disposition, by will, was intended. It expresses a consideration, unusual and unnecessary in a will. It provides that it is to take effect after the death of the intestate—a provision wholly unnecessary, if a will was intended, for that could not operate until after his death. It does not profess to be a will, nor has it the conclusion or any of the ordinary forms of a will, but those of a deed. It has only two witnesses, one less than is required by law, and cannot, therefore, operate as a will. I conclude, therefore, that the testator could only have intended that it should operate as a deed in presenti, without any intendment to the contrary.

The claim of complainant is resisted on other grounds: 1st. That at the time of the execution of the deed, the intestate was incompetent to dispose of his property, by reason of his imbecility of mind. 2d. That the deed is void, as it is not to take effect until after the death of the donor, and could only take effect as a will.

The evidence in relation to the first of these grounds of the defendant was, that the intestate indulged to excess in the use of intoxicating liquors, and occasionally to great excess, and that in consequence, his mind was in some degree impaired; but

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when free from its immediate and ex*cessive influence, he understood perfectly what he was about; and the persons who witnessed the execution of the deed (William Rutherford and Micajah Suber,) both state that he had perfect command of his faculties at the time. The proof of a settled intention to provide for complainant is very satisfactory, as was also his recollection of the fact of having made the deed and acknowledging its validity. One of the witnesses, (Silas Tygart,) who lived with him as an overseer, says that he had heard him frequently say, both drunk and sober, that he had deeded these negroes to the complainant. This defence cannot, therefore, prevail.

In relation to the second ground of defence, it may be proper to state, though I regard it as important, that there was a formal delivery of the deed at the time of its execution, but no actual formal delivery of the negroes, though they were called into the house, and were present at the time. The delivery of the deed, or of the negroes, could not have been intended to operate otherwise than as provided for in the deed. The question then is, whether this paper writing can operate as a deed, and take effect accordingly.

The case of Ragsdale v. Booker, [2 Strob. Eq. 348 note,] referred to in Pitts v. Mangum, 2 Bailey, 588, is, in principle, this case. There the father, by deed, in consideration of love and affection, gave to his children certain slaves, to be equally divided between them, concluding, "I only reserve my life in the said negroes." The negroes were sold by the sheriff, to pay the donor's debts, and the court held that the deed could not operate as such, but was testamentary, and revoked by the sale. That case was decided in Columbia, in 1837, on the principle, that an estate in a chattel could not be created to commence in future by a deed. The same question again came up in the Executors of Duke v. Dyches, [2 Strob. Eq. 353 note,] decided in Columbia, December, 1829, but not reported, on a deed to the same effect, differing something in phraseology. The consideration expressed was, love and affection for the donor's illegitimate daughter, Esther Benson, and the following is the grant and reservation expressed. "I have given and granted, and by these presents do give and grant unto the said Esther Benson, her heirs, executors and administrators," certain slaves, naming

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them, *"to be and remain her proper right and property after the death of the said Moses Duke," (the donor.)

Judge Nott, who delivered the opinion of the court, reviews, with his usual clearness and ability, both our own and the English cases, on the question of power to grant an interest or estate in a chattel to commence in future, by deed, and concludes, principally from the tendency of our own decisions, and the current of professional opinions, that such an interest may be created, especially in slaves, the property in which he regards as bearing a stronger resemblance to property in real estate, than other chattels. The judgment was, that the donee was entitled to the slaves under that deed, in an action brought by the executor of the donor, and that must govern this case, being subsequent to the decision in Ragsdale v. Booker.

The case of Pitts v. Mangum, which followed in 1832, does not conflict with this. That was a parol gift, and the principle on which it was decided is, that a parol gift, to take effect in future, is only a promise to give, and being voluntary, does not bind.

It is, therefore, ordered and decreed, that the defendants in the several cases stated do, upon demand, deliver to the complainant the slaves mentioned in the deed, and their issue and increase, since they have severally had them in possession, each delivering the slaves and their issue and increase, admitted in the pleadings to be in their possession, and any they may have had since the filing of the bill, and that they do severally account before the commissioner, for the hire of the slaves from the time they have had them in possession.

The defendants appealed, and moved the Court of Appeals in Equity to reverse the decree, on the following grounds:

1st. Because the paper writing, under which the complainant claims the slaves mentioned in the bills of complainant, conveys no estate to him, and is inoperative and void.

2d. Because the Chancellor erred in decreeing that the words "I give to Jesse Kinard Welch," can be interpolated between the words "Catharine Welch," and "after my death," in order to give effect to the writing, as a deed, under which the complainant claimed the slaves.

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*3d. Because no interpolation of words necessary to give effect to a paper as a deed, ought to be permitted in favor of one claiming as a volunteer.

4th. Because, if the words suggested in the decree be supplied in the writing, it cannot be considered as a deed, but only as a testamentary paper, as it is to take effect after the death of the donor.

Fair, for the Appellants. This bill is simply for the recovery of the negroes, and is in effect a substitute for trover at law, and must be governed by the rules of law. Cited 2 Ves. 205, 215, 225, 230.

A conveyance to take effect in futuro, can only operate as a testament. 2 Brev. Rep. 414.

A remainder in chattels can not be limited over but by will or deed of trust. The deed here gives no right until after the death of the donor.

In Duke v. Dyches, Rice Digest, 154, there is a gift in presenti, to take effect in futuro. Not so here. It is simply a gift in futuro. Cited 1 Bailey Rep. 100; 2 Hill, 543; 4 McCord, 198; Rice Eq. 248, 261.

Pope, contra. The paper may be regarded as an attempt to carry into effect the agreement with complainant's mother to raise him and make him his heir, and will be enforced. Cited 2 Co. Litt. 482, book 2, ch. 38, note H. An interest to commence in futuro, may be created in a chattel real. 2 Saun. 307; 3 Co. Lit. 323, note D; 1 Cruise, title 8, ch. 1, sec. 18, 19; Id. ch. 2, sec. 23; 4 Id. ch. 2, 3; Harris v. Saunders, M. S. Dec. 1833; Cheves Eq. 148.

The court will construe a writing as a will when it can not operate as a deed, to carry the intention into effect; but there is no case in which it will be construed as a will to defeat the intention. Bacon Ab. grant 3, D.

It is not necessary to the validity of a deed, that it should take effect on delivery. 4 Kent, 260.

Parol evidence is admissible to show whether a paper was intended as a deed or a will. 2 Nott and McCord, 531; 1 McCord, 130; Id. 517; 1 Wilson Rep. 682.

A deed for negroes to take effect after the

death of the donor, is good. 2 Yerger, (Tennessee Rep.) 582. Cited also, 3 Lev. 307; 1 Ves. sen. 238; 2 Id. 198; 4 Cruise, 422, title

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32, ch. *19, sec. 42; Saund. 330; 1 Henry Blackstone, 535; Shepherd Touchstone, 85, 86.

As to the construction of deeds, cited 4 Cruise, title 32, ch. 19, sec. 14, 17, 18, 19, 20; 2 Saund. 96, 97, n. 1; 10 Mod. 45, 46; 15 Eng. Com. L. Rep. 99; 1 Id. 241.

J. J. Caldwell, in reply. Cited Powell on Dev. 91; 1 Burrows, 548; 1 McCord, 409; 4 Id. 12; Riley's Law Cases, 290; decided on the principle of Mangum v. Pitts. Prec. in Ch. 209; there must be actual delivery. Cited also, 2 Ves. sen. 440, 441; Rice Rep. 310; 1 P. Wm's. 235; 2 Id. 151; 2 Ves. sen. 195; 2 Vent. 365.

If a voluntary conveyance is defective, the court will not relieve, 2 Johns. Ch. 630; McMullan, Eq. 491; 1 Story Eq. 188.

Curia, per HARPER, Ch. The case of Ragsdale v. Booker cited by the Chancellor, appears to us, as it did to him, to be in point.

It is supposed, however, to be overruled by that of Duke v. Dyches, apart from the consideration, that the words in that case import the passing of a present interest or estate; "I have given and granted, and by these presents do give and grant;" and in the present case purport to give nothing till the testator's death.

"I give." If these words are supplied, "after my death," the question now before us seems not to have been considered or made. The only question examined is, whether a remainder in a slave may be limited by deed, when there is no trust, after the creation of a life estate, a point which I suppose we may now consider settled. No suggestion appears to have been made of the testamentary character of the paper. The case of Harris v. Saunders [2 Strob. Eq. 370 note] seems to have turned on proof of the delivery. The cases of Pitts v. Mangum, and McGinney v. Wallace, Riley's Rep. 290, seem also to be in point. It is true that in those cases the gift was made by parol, but I am not aware that any disposition of personal property, which may be effected by deed, may not be made by parol accompanied with delivery. It is not necessary to make the enquiry, which was principally urged, whether an interest or estate may be created in chattels to take effect in futuro. If it be limited to arise on any other event than the death of the grantor, the instrument, cannot, of course, be of

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a testamen*tary character, or even on that event, if it be founded on a valuable consideration, as in the instance of a term limited to arise on the death of the grantor, with a reservation of rent. In general, a testamentary disposition implies a voluntary disposition, or one grounded only on natural love and affection. But, in contemplation of law, even that consideration does not exist to support the instrument in the present case. The question is, what is a will? It would be very difficult to give any definition which would not include the paper in question. The legal declaration of a party's intentions, which he directs to be performed after his death. (Rice Digest, title Will, 13,) referring to MS, Dec. 1822. "Where the paper is in the form of a deed, letter or memorandum, or in any other form, containing an actual disposition of his estate, to take effect after his death." McGee v. McCants, 1 McC. 517. In Ously v. Carrol, cited in Ward v. Turner, 2 Ves. 440, the terms were, "I have given and granted, and give and grant to my five sisters and the children of the sixth, in case they survive me," as explained by Butler, J. 2 Ves. jun. 230. The question is not whether the maker supposed it to be a deed or a will. If the only effect is to dispose of property after the maker's death, it must operate as a will or not at all. It was argued that such papers have been construed wills, in order to give them effect, and not to defeat them, and something of the sort is said in Habersham v. Vincent, the case last referred to. In Ragsdale v. Booker however, the effect of the decision was to defeat the paper. It must be recollected, that the policy of the law requires three witnesses to a disposition of a man's estate, to take effect after his death; and we are bound to annul and defeat whatever contravenes that policy. But if an instrument like the present can have operation and effect, it is plain that a man may make a disposition of his entire estate, with two witnesses, or one witness, by simply changing the usual introductory words of a will into "know all men by these presents."

It is therefore ordered and decreed, that the decree be reversed, and the bills dismissed.

DUNKIN, Ch., concurred. JOHNSTON, Ch., absent from indisposition.

Speers, Eq. *264

*GEORGE R. ALLEN and Wife and Others v. JAMES BARKLEY, ROBERT BELK and J. W. BELK.

(Columbia. Dec. Term, 1843.)

[1. *Ejectment* ⇐132.]

Complainants were the grand-children of R. B., and through their mother C. B. claimed four twenty-sevenths of a tract of land on which was situated a gold mine, the defendants being in possession. They had purchased the land from J. B. who acted under an authority from the heirs of R. B. The mother of complainants was feme covert and never conveyed her title. The claim of complainants was sustained, and they were declared entitled to an account of the rents and profits.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 452; Dec. Dig. ⇐132.]

[2. *Mines and Minerals* ⇐50.]

In raising the account the commissioner adopted the principle of allowing to the proprietor, in mining operations, one fourth of the gold found, clear of all charge of expenses in conducting the same, which was sustained by the Court.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 136; Dec. Dig. ⇐50.]

[3. *Mines and Minerals* ⇐50.]

Held, that the defendants could not be regarded as the trustees of the complainants; and that they were entitled to the rents and profits which, as proprietors of the land, they would have received from any other person.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 136; Dec. Dig. ⇐50.]

[4. *Ejectment* ⇐132.]

The defendants, while in the possession of the premises, incurred expenses in defending their title at law against a person claiming by title paramount. *Held*, that the complainants were not bound to contribute in defraying the expenses of the suit.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 452; Dec. Dig. ⇐132.]

Before Dunkin, Ch., at Lancaster, July Term, 1842.

The complainants, Mrs. Allen and Robert and Sarah Beard, were the grand-children of Robert Barkley, who claimed a share of a tract of land, through their mother, Mrs. Catharine Beard. They were minors at the time the bill was filed. The defendants had purchased from James Barkley, who conveyed to them during the life of Mrs. Beard; she was a feme covert, and never conveyed her title. The title of the complainants was fully sustained by the decree of the Court, and a writ of partition and an account of rents and profits ordered between them and the defendants, the defendants being in possession. The principal question, as to rents and profits, related to the profits of a gold mine which was situated on the land. By the bill, the defendants were required to set out the proceeds of the mine, and the expenses of working it. By the exhibit filed with their answer, it appeared that the production of the mine, in gold and silver,

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amounted, as *stated in the report of the Commissioner, to $5,771.44, and that the expenses, including some costs of a suit at law which had been brought against them for the land, amounted to $1,936, leaving a balance of $3665.44, as the profits to be divided, as the complainants contended, between themselves and the defendants, as tenants in common; and if the defendants are not to be allowed their expenses in defending their title in the suit brought, the profits would be somewhat more—those expenses, as set out in the exhibit of the defendants, being $148.

The case came up upon exceptions to the commissioner's report, who, in making up the accounts, did not take the exhibits as evidence, and make them the basis of his calculations, but heard testimony of an usage to allow one-fourth of the proceeds of the gold mines to the proprietors, and allow three-fourths to the operatives for their work and labor. By the operation of that rule in this case, the parties being tenants in common, and the defendants the operatives, they get three-fourths for their labor, leaving one-fourth to be divided between themselves and the complainants. According to the calculations of the report, the one-fourth to be divided would amount to $1,442.86, making a difference against the complainants of $2222.58, if the expenses of the suit at law be allowed the defendants, and a difference of $2,370.58, if the said expenses be not allowed.

As the whole work was done in a few months, chiefly by the defendants themselves, in the interval of making their crop, the complainants thought the allowance enormous; and as their title was in no way involved, or their interests put in jeopardy, by the suit at law brought against the defendants by some third person, considered it inequitable that those expenses should be charged to them.

They therefore filed the following exceptions to the Commissioner's report.

1. That the commissioner should not have adopted the usage (as it is called) of allowing one-fourth to the owner of the mine, as the measure of rents and profits in this case, but should have made an estimate of the actual value of the profits of the mine, and should have taken testimony as to the expenses, and have struck the balance.

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*2. That the complainants being minors, are not bound by the usage, if any such usage exist.

3. That the commissioner should not have allowed the expense of the defendants, Belks, in defending their title at law, and in opposing the injunction, as a charge against the complainants.

Upon hearing argument, the Chancellor pronounced the following decree:

Dunkin, Ch. The Court can add nothing advantageously to the reasoning of the commissioner, in reference to the subject matter of the complainants's first and second exceptions. It is only to place the same thing in a different light, to say that the owner of a mine is obliged to pay one-fourth of the product, for the labor and risk of working it, and the requisitions of the complainants's argument are met. It is believed that the custom is not, in principle, peculiar to gold mines—Fisheries and Oyster Banks yield a profit to the proprietors in the same way. As to the third exception, the case of Mr. Hall, in Deas and Manigault, 1 Bail. Eq. 283, seems conclusive. The exceptions are overruled and the report confirmed.

The complainants appealed from the said decree, and relied in this Court upon the

grounds made in the above stated exceptions, and upon the following additional ground.

That from the language of the decree, it appears to have been made under the misapprehension, that one-fourth of the products were allowed to the operatives, instead of three-fourths—to the allowance of which the complainants would not have objected, as it does not exceed the actual expenses.

McCall, for the appellants, cited Jacobs Rep. 297; 1 Eq. Rep. 191; 2 Story's Eq. 325.

Clinton, contra, cited 6 Ves. 93; 7 Id. 540.

Curia, per DUNKIN, Ch. The complainants were the grand-children of Robert Barkley. As the heirs at law of their mother, Mrs. Catherine Beard, they claimed four twenty-sevenths of a tract of land, on the

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Catawba, on *which was a gold mine. The defendants, Robert and J. W. Belk, had purchased the land from James Barkley, who acted under an authority from the heirs of Robert Barkley, the person last seized. The power of attorney was executed by the mother of the complainants, while she was a feme covert; and under a decree heretofore pronounced, the claim of the complainants was sustained, and they were declared entitled among other things, to an account of the rents and profits.

In taking the account, the commissioner received the testimony of several witnesses, who proved that, in mining operations, the uniform usage was to allow to the proprietor one-fourth of the gold found, clear of all charge of expenses in conducting the operations.

One of the witnesses, a practical miner of experience, testified that this was the highest rent he had ever known allowed. There was no diversity in the testimony, and the Commissioner adopted this rule in raising the account, which was confirmed by the Court.

The complainants excepted to the report, and now appeal from the decision of the Chancellor, on the ground that "the Commissioner should have made an estimate of the actual value of the profits of the mine, and should have taken testimony as to the expenses, and struck the balance, and especially as the complainants were minors."

This court is satisfied with the judgment of the Commissioner, approved by the Chancellor. The defendants, (the Belks,) can in no manner be regarded as the trustees of the complainants; on the contrary, they claimed adversely to them; and the complainants are only entitled to the rents and profits, which, as proprietors of the land, they would have received from any other person. The witnesses proved what was the rent usually allowed. The mode of ascertaining it, is not peculiar to mining operations. Fisheries and Oyster Banks yield a profit to proprietors on a similar principle.

While the defendants were in possession of the premises, a suit was instituted against them by Matilda Briggs, claiming by title paramount. In the successful defence of this claim, the defendants incurred an expense of one hundred and twenty-five dollars, or

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thereabout, and insisted *that the complainants should contribute their proportion, being about nineteen dollars; which claim was allowed by the Commissioner, and confirmed by the Chancellor.

We have just held, that the defendants could not be regarded as trustees for the complainants. It was not an expense incurred in the protection of a common fund, as in Manigault & Deas, cited in the Circuit decree: and although the amount is small, the court can perceive no principle on which it should be allowed. In this particular, the Commissioner must correct his account, which is, in all other respects, confirmed, and the appeal dismissed.

HARPER and JOHNSON, Chancellors, concurred.

Speers, Eq. 268

ABRAM HODGE, Administrator, and WILLIAM LEWIS, Ordinary, v. JOSEPH MONTGOMERY, ZIMMERMAN SCARBOROUGH and THOMAS CLERRY.

(Columbia. Dec. Term, 1843.)

1. By deed of gift of 5th March, 1821, G. D., in consideration of love, good will and affection, conveyed to his six children, certain slaves, with their future increase, to them, their heirs and assigns, with clause of warranty, &c. Recorded the day of its execution. Three of the donor's children having died, the survivors, in 1838, instituted against G. D. an action of trover for the negroes named in the deed, with their increase, he having remained in possession till that time; and obtained the following verdict. "We find for the plaintiffs, four thousand two hundred and seventy-five dollars, being one half the value of the negroes and hire." Under this verdict judgment was awarded, and a fi. fa. issued, by virtue of which the negroes were sold by the sheriff, in April, 1840, and purchased by the defendants. A. H., one of the complainants, who had administered on the estate of one of the deceased children, and the Ordinary, who represented the others, there being no administration, claimed a moiety of the negroes sold under the deed of gift.

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[2. *Judgment* ⇐686.]

*As to the effect of the verdict in trover on the rights of complainants's intestates, the court were of opinion, that if they could be regarded as parties to that proceeding, or represented in it, they would be bound by it. Their right in the negroes would have vested in the defendant, and passed to the present defendants under a judicial sale.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1209; Dec. Dig. ⇐686.]

[3. *Judgment* ⟸707.]

But if no privity existed between the complainants and the plaintiffs at law, it was res inter alios acta, and from it they could derive neither prejudice nor benefit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ⟸707.]

[4. *Appeal and Error* ⟸1009.]

The negroes having been levied on and sold as the property of G. D., and purchased as such, by the defendants,—and the Chancellor who heard the cause having reported, that both from the testimony and the conduct of the parties subsequent to the deed, it had all the "leading characteristics of fraud," the court refused to interfere, and dismissed the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3970; Dec. Dig. ⟸1009.]

[5. *Fraudulent Conveyances* ⟸196.]

In this view, the deed could have no more effect against the rights of a purchaser for valuable consideration, than against creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 611, 614, 615; Dec. Dig. ⟸196.]

Before Johnson, Ch., Sumter, May Term, 1842.

This was a bill for the partition of slaves, and states that on the 5th of March, 1821, Gilbert Dinkins executed the following instrument of writing:

State of South-Carolina, }
Sumter District. }

To all to whom these presents shall come, greeting: Know ye, that I, Gilbert Dinkins, of the State and district aforesaid, greeting: that for the love, good will and affection which I have towards my children, to wit: William G. Dinkins, Harriet B. Dinkins, Emily E. Dinkins, Sarah M. Dinkins, Mary Dinkins, and James E. Dinkins, I freely give and grant, and by these presents do give and grant, unto the said William, Harriet, Emily, Sarah, Mary, and James Dinkins, their heirs and assigns, the following property: one negro man named Ned, and his wife Fatimore, and her children, namely, Sam, George and Mariah; one negro woman named Molly and child Kendil; one negro girl named Hannah; one negro woman named Sarah, and her daughter Nancy; together with their future increase; to have and to hold the said negroes, unto the said William, Harriet, Emily, Sarah, Mary and James Dinkins, their heirs and assigns, forever. I also give unto my daughters, Harriet, Emily, Sarah and Mary Dinkins, one feather bed and furniture, each; and to my son, James E. Dinkins, one filly or mare, known by the name of the

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*Janel filly, and her increase; the right and title of said property, I warrant and forever defend unto the said William, Harriet, Emily, Sarah, Mary and James Dinkins, against myself and all other claimants whatsoever. In witness whereof, I have hereunto set my hand and seal, this fifth day of March, one thousand, eight hundred and twenty-one.

his
Gilbert X Dinkins.
mark

Signed, sealed and delivered in presence of }
Fr's. C. Edwards, Henry Hudnal. }

State of South Carolina, }
Sumter District. }

Personally appeared before me, Henry Hudnal and Fr's. C. Edwards, who being duly sworn, saith, on oath, that they were present, and saith the within mentioned Gilbert Dinkins assigned, sealed and delivered the within instrument of writing as his deed, for the uses and purposes within mentioned. Sworn to before me, this 5th day of March, 1821.

Sam'l R. Gibson, J. P. Fr's. C. Edwards.
Henry Hudnal.

Recorded 5th March, 1821.

That the deed was recorded in the Register's office for Sumter, the day of its execution. That the increase of the negroes are Lavinia, Linda, Louisa, Cressy, June, Rachel, Diana and her child, July, and some not known. That the children of Gilbert, mentioned in the deed, were minors at the execution of the deed, and living with their father. That William G. Dinkins died in 1835, and Abram Hodge has administered upon his estate; James E. died in 1835, and Sarah M. in 1837; and no administration has been taken upon their estates. That Harriet B. married Benjamin B. Hodge, Emily E. Married Benjamin D. Hodge, and Mary married John M. Hodge. That Gilbert Dinkins, in 1838, being in possession of the negroes, converted them to his use, and the three Hodges, with their wives, being the survivors of William. Sarah and James E. Dinkins, on the 31st January, 1838, brought trover at law against Gilbert Dinkins, for Hannah, Diana

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*and her child, July; Molly and three children, Lavinia, Sinda, and Louisa; Darcas and child, Sinbad; Cressy, June, Kendal, Sam, George, Fatima, Rachel, and Maria, being the negroes mentioned in the deed, and their increase. That the jury found the following verdict: "We find for the plaintiffs, four thousand two hundred and seventy-five dollars, being one half of the value of the negroes, and interest as hire;" and judgment was awarded for the plaintiffs, on 9th March, 1840, and a fi. fa. issued the same day, and lodged in the sheriff's office, under which the negroes were sold on the 6th April, 1840. That Joseph Montgomery purchased Cressy, June, Kendal, Sam, George, Fatima, Rachel, and Maria; Zimmerman Scarborough purchased Hannah, Diana, and July; and Thomas Clerry purchased Molly, Lavinia, Sinda, and Louisa. That the defendants became tenants in common with your orators, by their purchase of Gilbert Dinkins's interest

in said slaves. That Abram Hodge is entitled to one-sixth part upon partition; and William Lewis, Ordinary, by virtue of his office, representing James and Sarah Dinkins, who died intestate, is entitled to two-sixths thereof.

The answer of Joseph Montgomery states, that he believes Gilbert Dinkins did execute such a deed as stated in the bill, but denies that it can operate against him as it was executed with fraudulent intent to defraud the creditors of Gilbert Dinkins, and without the intention of operation between the parties themselves. That James and William Dinkins, in 1834, admitted to defendant, that they set up no claim under the deed at a time when defendant purchased these negroes of Gilbert Dinkins, at sheriff's sale, Sarah, Nancy and Patsey, the two first included in the deed, and the last, a child of Nancy. That under their assurance, and that of the Hodges, who married the three sisters, that they set up no claim under the deed, he purchased, and has been in possession ever since, having paid to Gilbert Dinkins, with the knowledge of his children and their husbands, the difference between the bid at sheriff's sale, and the amount agreed upon with Gilbert Dinkins upon private contract. Denies that all the children were minors at the

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execution of the deed; that Wil*liam and Harriet were over age. Believes William died at the time stated, and that Abram Hodge has administered upon his estate; that James and Sarah died as stated, and that Harriet, Emily and Mary, married as stated. Admits the suit in trover, as stated in the bill, for all the negroes except July and Sinbad; that the jury found the verdict as stated; and that he purchased the negroes as stated; but denies that he became tenant with complainants, or that they are entitled to partition, or to any portion or share, and prays the benefit of the statute of limitations. That the recovery in trover is a bar to any further claim by complainants. That plaintiffs in trover represented not only themselves, but William, James and Sarah, of whom, as survivors they sued and recovered. That Abram Hodge was present at the sale, and gave no notice of claim. That he paid a full price, without notice of any claim. That defendant, believing that the deed was never intended to operate between the parties, but was a mere pretence, purchased from Gilbert, on the 3d February, 1838, for $2,775, the negroes Fatima, Sam, George, Diana, June, Rachel, Mariah and Hannah; and on 22d July, 1839, purchased from Gilbert Dinkins, for $2,055, Molly, Kendal, Darkey, Cressy, Viney, Sinda and Louisa; of which amount, except about $1,400, he has been loser.[1] That if partition be ordered, he claims Gilbert Dinkins's interest in estate of James and Sarah Dinkins. Prayer, &c.

The answer of Thomas Clerry states, that he has no knowledge of the deed, except from report. That previous to the sheriff's sale, at which he purchased Molly, Lavinia, Sinda, and Louisa, under execution at the suit of the Hodges and wives, he had heard that the plaintiffs in the action claimed under a deed from Gilbert Dinkins to his children, or some of them; but he had no knowledge of such deed, except from report. Does not admit it and requires proof. The rest of the answer is substantially the same as that of Joseph Montgomery.

The answer of Zimmerman Scarborough denies notice in any way, and the rest is substantially the same as the others.

JOHNSON, Ch. The late Gilbert Dinkins,

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by deed bear*ing date the 5th March, 1821, in consideration of natural love and affection, gave to his six children, William B., Harriet B., Emily E., Sarah M., Mary, and James E., and to their heirs and assigns forever, ten slaves, by name, some of the females of which have since had issue and increase. William B., one of the children, died in 1835, intestate, and administration of his estate was granted to complainant, Hodge. James E., another of the children, died in 1835, and Mary M., in 1837, both intestate, and no administration of their estates having been granted, the complainant, Lewis, the Ordinary, represents their interests in this suit. The three remaining children intermarried, Harriet B. with Benjamin B. Hodge, Emily E. with Benjamin D. Hodge, and Mary with John M. Hodge.

Gilbert Dinkins, the donor, notwithstanding the deed, remained in possession of the negroes until 1838, when the three children last named, and their husbands, as survivors of the three deceased children, brought an action of trover against the said Gilbert Dinkins, for the wrongful conversion of the negroes mentioned in the deed, and their issue and increase. On the trial of that cause, the following verdict was rendered by the jury, to wit:—"We find for the plaintiff, four thousand and two hundred and seventy-five dollars, being one half the value of the negroes, and interest as hire." On this verdict, judgment was entered up on the 9th March, 1840, and execution thereon was issued and lodged in the sheriff's office on the same day. This execution was levied on the negroes mentioned in the deed, and their issue and increase; and at the sale by the sheriff, on the 6th of April, 1840, the defendant, Montgomery, purchased eight, defendant Scarborough, three, and defendant Clerry, four of their number.

Such are the facts stated in the bill; and the complainants insist that they are entitled, in right of the deceased children whom they represent, to a share of the negroes, as tenants in common with the defendant; and they claim for each one-sixth, under the

deed; and complainant, Lewis, further claims for those whom he represents, one other sixth part, and the distributive share of the interest they took in the estates of those that had previously died; and they pray partition of the negroes accordingly.

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*Several grounds of defence are relied on, and, amongst others, that of the statute of limitations, which I shall first notice.

This defence rests altogether on the possession of Gilbert Dinkins, as the possession of the defendants did not commence until they purchased the negroes in 1840, and the bill was filed in 1841. But, as before stated, Gilbert Dinkins had possession of them at the time of the execution of the deed in 1821, and they remained in his possession, and under his control, from that time up to the sale in 1840, a period of about nineteen years. If that possession was adverse, it may be assumed, and the facts will warrant the conclusion, that the children represented by the complainants, were all barred during their lives. But the proof is abundant, that from about the time, or shortly after the execution of the deed, up to the time of the death of the children, Gilbert Dinkins disclaimed all interest in the negroes, and declared they belonged to his children. Having been arrested on a ca. sa. in 1827, he rendered a schedule, purporting to be of all his effects, with a view to take the benefit of the insolvent debtor's Act, which although sworn to, contained no negroes. The necessary conclusion, therefore, is, that his possession was consentive, and not adverse. Two circumstances would seem to oppose this conclusion. James, one of the deceased sons, had entered into a treaty to exchange one of the negroes for a tract of land, which Gilbert Dinkins refused to sanction, and the treaty was broken off. William, another deceased son, hired two of the negroes from Gilbert Dinkins. But these circumstances may be reconciled to the foregoing conclusions, by supposing that, although the deed was absolute, there had been some agreement between the parties, that Gilbert was to have the use of the negroes. They will, perhaps, be better explained by matters hereafter to be stated.

I conclude, therefore, that their possession was not adverse, and that the defendants are not protected by the statute of limitations.

Another ground of defence, and one much relied on, is, that the recovery in the action of trover, is a bar to the complainants's claim.

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*That, it will be recollected, was an action by the surviving children, as survivors of the deceased children; and it is insisted, in the defence, that the plaintiffs, as survivors, were entitled to recover the entire value of all the negroes, and were accountable to the representatives of their co-tenants for their interest in them, and therefore the recovery was a bar.

It is a familiar and well understood rule, that if several are jointly interested in a chattel, and one or more of them die, the survivors only can maintain an action at law, and that the executors or administrators of the deceased party can neither be joined with them nor sue separately. Chit. Pl. 55. It follows, that in an action by the survivors, they are entitled to recover the full value of the property.

It would seem from the verdict, that the jury undertook to apportion the damages, and to allow the plaintiffs in that cause only the value of the interest which they had in the negroes, reserving the right of the deceased parties. But it may well be questioned, whether that verdict is examinable even as between the parties themselves. It was a matter of which the law court had jurisdiction, and had the power to afford complete and adequate relief; and if there was error in the verdict, a mode of relief in the law courts was open to the plaintiffs. Here, however, strangers to that proceeding had become interested. A recovery in trover vests the property in the defendants, and all that the purchasers at the sale were concerned to know was, that there had been such a recovery, and that the plaintiffs were, at law, entitled to recover the full value of the property. Nor would the declaration in the verdict, that the sum found was only half the value of the negroes, be sufficient to put them on their guard that there were still other interests in them. At most, that is but surplusage. There is no necessity that a jury should give their reasons for finding a verdict. If it were, we should often find them very incongruous, and at war with the conclusion. It is the conclusion which decides the rights of the parties, and that alone can operate. Let any stranger look into this verdict, and what is there to indicate that it was not predicated on the assent of the plaintiffs to accept half the

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value, or on a *release from the deceased children of their interests in the negroes?

The case of Henry v. Means, 2 Hill, 334, has been referred to as establishing that in trover at law, the damages may be apportioned according to the interest of the parties. In that case, two or three joint owners of negroes were barred by the statute of limitations, on account of the possession of defendant, and it was held, that the third might, notwithstanding, recover against the defendant, to the extent of his interest, and that the damages might be so apportioned. But it will be perceived that the defendant there had, by his possession, acquired a title to two-thirds of the property, and thus became joint owner with a party not barred; and if, as I suppose, one of several joint owners might maintain trover against another, for the wrongful conversion of the

whole, the amount of the recovery could only be measured by the value of the undivided interest of the party sueing.

Now, if I am right in supposing that the plaintiffs in the action of trover referred to in these pleadings, had the right to recover the entire value of these negroes, the case of Henry v. Means has no application at all.

A third ground of defence is, that this deed was intended to defraud the creditors of Gilbert Dinkins, and is therefore void.

The proof is, that the negroes named in the deed were all that were owned by Gilbert Dinkins, and constituted the bulk of his property. He was considerably indebted at the time, and within ten days after the execution of the deed, confessed a judgment to General Sumter, for $637, for a debt contracted before, which was finally paid out of the proceeds of the sales of these negroes, in 1840. His pecuniary embarrassments continued, until, in the end, all the property of value which he possessed was sold under execution. Both William G. and James E., the two deceased sons, again and again disavowed any interest in the property, and declared that the deed was only intended to protect the property against the creditors of Gilbert Dinkins; and, as before stated, William G. hired two of the negroes from him, and he refused to suffer James E. to dispose of one of them; circumstances utterly

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inconsistent *with their right of property. There is no evidence of any direct disavowal on the part of Mary, the deceased daughter; but she was present on one occasion when one of the witness was in treaty with Gilbert Dinkins for the purchase of some of them, and interposed no objection. She lived apart from her father for several years, without asserting her rights under the deed, although, as I infer from the circumstances of the family, she was not otherwise provided for. And when it is recollected that Gilbert Dinkins retained possession of the negroes for nineteen years, and until they were forced from him by the process of law, and that the deed was merely voluntary, we have all the leading characteristics of a fraud.

It is therefore ordered, that complainant's bill be dismissed, with costs.[1]

The complainants appealed from the decree, upon the following grounds:

1. Because the recovery in the action of trover, by Benjamin B. Hodge and wife, Benjamin D. Hodge and wife, and John M. Hodge and wife, v. Gilbert Dinkins, is not a bar to complainant's demand, inasmuch as it appears upon the face of the verdict, that the damages were apportioned, and the recovery was only for their interest in the said negroes, and that the jury had a right to make such apportionment.

2. Because the complainants were neither parties or privies to the action of trover for the said negroes, and were not represented, and they ought not to be precluded by the verdict in that case.

3. Because the verdict and judgment rendered at law, in the action of trover, was only for the interest of the said Benjamin B. Hodge and wife, Benjamin D. Hodge and wife, and John M. Hodge and wife, and vested only their interest in the said negroes

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in the defendant Gilbert Din*kins, under whom the defendants now claim, and that only such interest could be sold under said judgment.

4. That is was notorious and well known to the defendants, and especially to Joseph Montgomery, who was in effect a defendant in said action of trover, and to Thomas Clerry, that the plaintiffs only recovered, and that the verdict of the jury was only rendered for, the interest and share of the said plaintiffs in said action.

5. Because, in an action of trover at law, by one of several joint owners, the interest of the parties may be apportioned, and the damages rendered accordingly.

6. Because the interests of the complainants could not, by any act of theirs, have been represented and enquired into at law, and they should not be precluded by the act of others.

7. Because, if the deed made by Gilbert Dinkins was intended to defraud his creditors, these defendants, purchasers under him, who purchased only the interest he took by the verdict and judgment in the action of trover, cannot have the benefit of such defence or objection to the deed.

8. Because only the creditors of Gilbert Dinkins could set up the defence of fraud to said deed.

9. Because any disavowals, on the part of William G. and James E. Dinkins, are entirely reconcileable with the nature and circumstances of the transaction, and the subsequent possession of Gilbert Dinkins, and as between these defendants, should not operate as a bar to their claim.

10. That Mary Dinkins never disavowed her right or title in said negroes, and the mere negative conclusion of the Chancellor ought not to deprive her of such right.

11. Because the decree is, in other respects, contrary to law and the testimony.

12. Because the complainants ought not to be charged with costs, they having a right to investigate their claim only in this court, and were not represented elsewhere by others.

13. The complainant, William Lewis, further appealed, upon the question of costs, because, he says, as a public officer, (to wit,

[1] There was a good deal of evidence taken before the Commissioner on a reference, and also before the Chancellor on the trial, but as the facts deducible from it, going to establish the fraudulent character of the deed, are substantially stated in the circuit decree, it is deemed unnecessary to publish it.

ordinary,) he is bound by law, and it is
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*made his duty, to take charge of and collect all derelict estates, and that he ought not to be held responsible for costs.

DeSaussure and Garden, for the Appellants. In actions ex delicto, if all the parties will not join, defendant may plead in abatement, or the damages may be apportioned. Cited 6 T. R. 766; 7 Id. 279; 1 Saund. 291, (I;) 4 East, 407.

In actions for injury to the freehold, tenants in common must join; but if in ejectment, they must sever. Cited 1 Chitty Pl. 54, (N. Y. Ed. 1809.)

The action of trover subjects the chattel to the payment of the judgment, and is in effect an action to recover the corpus. 2 Hill Ch. 488.

Moses, contra. The statute saves the abatement of the suit, if one of the joint tenants, &c. die pendente lite. 7 Stat. at Large, 193.

Surviving joint tenants, &c. may sue for injuries done to the joint property. Bacon Ab. (Joint Tenat, K;) Com. Dig. (Abatement E.) 9, 10, 11.

A recovery binds all the parties and their privies. A verdict is a conclusive bar to the second action. 2 Johns. Rep. 210.

Curia, per DUNKIN, Ch. It is not intended by the court, to express any definitive opinion as to the effect of the verdict in trover, in relation to the rights of the complainants's intestates. If they could be regarded as parties to that proceeding, or represented in it, they are bound by it. Their right in the negroes vested, by the verdict, in the defendant in that suit, and has passed to the present defendants under a judicial sale.

But if no privity existed between the complainants and the plaintiffs at law, it is res inter alios acta, and they can derive from it neither prejudice nor benefit. The negroes were levied on and sold as the property of Gilbert Dinkins. They were so purchased by the defendants. On the part of the complainants, it is insisted that they are entitled to a moiety of these negroes, under the deed of gift from Gilbert Dinkins, executed in March 1821.

The Chancellor who heard the cause reports, as the result of the testimony, that
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this deed, and the subsequent *conduct of the parties, "have all the leading characteristics of fraud"—that two out of three of the deceased parties repeatedly disclaimed any interest in the property, declaring that the only object of the deed was to protect the property from the creditors of the donor, and that the remaining party was present when one of the witnesses was in treaty with Gilbert Dinkins for the purchase of some of the negroes, and interposed no objection. The conclusion of the Chancellor is, that it was a fraudulent transaction. In this view the deed can have no more effect against the rights of a purchaser, for valuable consideration, than against creditors. In a case of much more doubt, this court would not interfere with the judgment of the Chancellor, on a question of this character. But if the rights of the complainants under the deed of gift, were of a much less equivocal nature, the repeated disclaimers of the parties, standing by and permitting Dinkins to treat for the sale of the property as owner, without interposing any objections, &c. would, upon familiar equity principles, forbid the interference of this court.

On the subject of the costs, the court see no ground to vary the decree.

It is ordered that the appeal be dismissed.

JOHNSON and HARPER, Chancellors, concurred.

JOHNSTON, Ch., absent from indisposition.

Speers, Eq. *281

*DR. HENRY RAVENEL v. SAMUEL A. LYLES et al.

(Columbia. Dec. Term, 1843.)

1. By a resolution of the Directors of the Limestone Springs Company, A, on the 18th January, 1839, was appointed superintendent of the same, and also authorised to borrow for the company a sum not exceeding $10,000; to execute their bond for the money, and to make their real estate liable for it by mortgage.

2. A. applied to the Bank of the State for the purpose of effecting the loan, but the Bank having already made a loan to the Company, secured by a mortgage of their real estate, was unwilling to make a further one on the security of the property; a portion, however, of the sum desired was obtained on the personal indorsement of B, in February, 1839, on the condition that a part of the sum loaned should be paid in the July or August following, and the balance out of the income of the season of 1839, at the springs. B. was to be secured, if necessary, by the mortgage which A. was authorized to give. During the summer of this year, C., not then a director of the company, agreed to make advances to the company on their bond, and to pay for them their note in the bank. In October, 1839, it was resolved, on a meeting of the company, that the government of it should thereafter be vested in a President and two directors. C. was chosen President, with B. and M. as Directors. In Dec. 1839, C. informed B. that he declined to pay the note in bank, upon which intimation B. took from A. the mortgage pledging the personal estate of the company, and bearing date the 7th January, 1840.

3. C. paid the note, but did not inform A. and B. of the fact until after the mortgage was executed. Subsequent to this transaction, no further meeting appears to have been held either of the President and Directors, or of the stockholders of the company. In September, 1840, B. assigned the mortgage to A., the company being likely to prove insolvent, and provided that he was not to be made accountable for the same.

4. The sales of the personal property included in this mortgage, in the hands of the commissioner, amounted to $3,187.41.

[5. *Insolvency* ⇐108.]
The Court were of opinion that whatever might have been the strength of complainant's claim, it would seem from the terms of the instrument, that the funds in the custody of the Court could not be made chargeable until it had been shown that the other sources mentioned in the mortgage had been exhausted and proved inadequate.

[Ed. Note.—For other cases, see Insolvency, Cent. Dig. § 166; Dec. Dig. ⇐108.]

[6. *Principal and Agent* ⇐100.]
The Company never having sanctioned or approved the act of A., in pledging the personal estate, the Court were further of opinion, that if A's. agreement with B., in February, 1839, amounted to an equitable mortgage, and could be established to the extent of the authority

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which he might then *have exercised under the resolution, it could not avail the complainant, as the proceeds of the real estate were insufficient to satisfy the elder liens.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 267; Dec. Dig. ⇐100.]

[7. *Mortgages* ⇐237.]
In December, 1839, A., as the superintendent of the company, reciting C's. agreement in the summer of that year, executed to him the bond of the company, in a penal sum, conditioned to pay the amount due on the note, with interest from the date of the bond, when thereunto requested. The note becoming the proper debt of C., and being accordingly paid by him, he had no equity to set it up, or any incident of it, the company having extinguished it by a higher security which he had agreed to take.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 596; Dec. Dig. ⇐237.]

[8. *Corporations* ⇐480½.]
Had C. literally advanced the money to the company, when the bond was executed, and they had taken up the note in bank, he could not have availed himself of the mortgage executed to the endorser of the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1874; Dec. Dig. ⇐480½.]

[9. *Costs* ⇐101.]
[Where several defendants having a common defense file separate answers, the court will, in its discretion, charge them with the costs occasioned thereby.]

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 394; Dec. Dig. ⇐101.]

[10. *Corporations* ⇐426.]
[There can be no ratification of the acts of an officer of a corporation in its behalf in the absence of knowledge thereof by the corporation or its governing authorities.]

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1716; Dec. Dig. ⇐426.]

Before Dunkin, Ch., at Spartanburgh, June Term, 1843. The facts of the case will be fully understood from the circuit decree.

Dunkin, Ch. This bill was filed on 24th October, 1840. The principal, perhaps entire, object, is to marshall the assets of the Limestone Springs Company.

At June sittings, 1841, a decretal order was made for the sale of the real and personal estate. That the commissioner should call on the creditors to establish their several demands, that he should take an account of the estate, and the debts, and report on the same; "the equities of the parties and the distribution of the funds being reserved for the future adjudication of this court."

Some intermediate orders have been passed, directing the appropriation of the greater part of the fund to certain preferred creditors, whose demands have been established, and whose right of priority was not disputed. The principal question presented by the commissioner's report, arose out of the claim of the complainant, under a mortgage executed to Judge O'Neall.

In order to decide on the validity of this claim, it is necessary to refer to the history of the transaction. The testimony is in writing, and consists of certain instruments exhibited with the bill, extracts from the journals of the company, and the statement of Judge O'Neall.

It appears that prior to the 18th January, 1839, J. W. Clark had been the superintend-

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ent of the Limestone *Springs company. On that day a regular meeting of the directors was held, at which it was resolved, among other things, that William Murray should be appointed superintendent of the company, and that Mr. John W. Clark should hand to Mr. Murray the seal of the corporation. It was also resolved, that Mr. Murray should be authorized to borrow for the company a sum not exceeding $10,000, and that he be authorized to execute a bond for the same, as the bond of the company, and to make the real estate of the company liable for the same by mortgage—that if possible, the money should be borrowed from the bank of the State, and added to a loan already made from that institution, and which was secured by a mortgage of the real estate of the company.

Judge O'Neall states that these resolutions were placed in the hands of Mr. Murray, who came to Charleston in January or February, 1839, for the purpose of effecting the loan. The bank were not willing to make a further loan on the security of the property; but the cashier thought that a part of the loan could be obtained by a personal endorsement. Judge O'Neall, very reluctantly, as he says, agreed to endorse Murray's note for $3,600, "on the following conditions." "that $1000 should be paid in July or August, and the balance out of the income of the season of 1839, at the Springs." "I was to be secured," says he "if necessary, by the mortgage which Mr. Murray was authorized to give."

The loan of $3,600, was accordingly obtained from the bank, on the note of Mr. Murray, endorsed by Judge O'Neall. In July or August, $1000 was paid, and the note renewed for $2,600.

Judge O'Neall further testified, that while he was at the Springs, in the summer of 1839, Dr. Ravenel not being then a director, a meeting of the directors of the company was held. By the arrangement with Murray,

the current income of the season was to be applied to the extinguishment of the note in bank. Dr. Ravenel says, he agreed to "make advances to the company on their bond," and in order to allow the income to be applied to the debts of the establishment, Dr. Ravenel agreed that he would pay for the company the note in bank. If he desired

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it "he was to have the *privilege of renewing it to the expiration" of the credit allowed to the company. "Judge O'Neall thenceforth considered himself discharged from all personal responsibility."

On the 12th October of that year, (1839,) a meeting of the company was held at the Limestone Springs. It was then resolved, "that the government of the company shall hereafter be vested in a President and two Directors, to be elected at each annual meeting;" and at that meeting Dr. Ravenel (the complainant,) was elected President, and Judge O'Neall and Col. Maybin, directors.

In December, 1839, the complainant informed Judge O'Neall, by letter, that he declined to pay the note in bank, and "advised him to be prepared to meet it." "In reply," says the Judge, "I expostulated warmly with him on the subject, pointing him to the fact, that but for his undertaking, the note would have been paid out of the income of '39." In consequence, however, of the doctor's intimation, the Judge "required Mr. Murray to meet him at his own house, and give him the mortgage." The complainant did, in fact, take up the note, but, as he says in his bill, "he did not inform Judge O'Neall and Mr. Murray of the fact, until after the mortgage was executed."

The mortgage bears date 7th January, 1840. After reciting that Judge O'Neall was the indorser of Murray's note, then in bank, negociated for the benefit of the Limestone Springs company, it was stipulated that, if he should be compelled to pay the same, or any part thereof, he was authorised, in satisfaction of the amounts so paid, to receive from Col. Gregg any moneys he might collect on demands in his hands, belonging to the company, and if they were not collected by Col. Gregg, then that Judge O'Neall should receive from any one who had collected the debts and interest, in certain cases therein enumerated, in favor of the Limestone Springs company; and if these should be insufficient, "then as security for the re-payment of the sums which may be so advanced to him, he, Murray, assigned and set over to him three slaves, by name, &c. the stock of mules, wagon, hogs, cattle and oxen, and the whole household and kitchen furniture, belonging to the Limestone Springs company."

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*It does not appear that subsequent to this transaction any meeting was ever again held, either of the President and Directors, (constituting the government,) or of the stockholders of the Limestone Springs company. Judge O'Neall says that he "at that time, and for months afterwards, supposed the doctor intended to be the owner of the Springs, and that in the price he would give, his own debt and those of all the other creditors would be paid." During the summer of that year, he found, however, that the complainant had abandoned the idea of purchasing, and he, the witness, foreseeing, from circumstances, the bankruptcy of the company which was approaching, and "thinking the doctor ought to have the benefit of the mortgage, (if it could avail him any thing,) on his return home wrote the assignment on the mortgage, and enclosed it, by letter, to him." This assignment bears date 24th September, 1840, and stipulates that the assignor is, in no shape, nor in any way, to be made accountable for the same.

The commissioner's report states, that the sales of the personal property included in this mortgage, amounted to $3187.41.

The contest is between the execution and general creditors of the Limestone Springs company, and a creditor claiming a specific lien.

Whatever may be the strength of the complainant's claim, it would seem from the terms of the instrument, that the fund in the custody of the court cannot be made chargeable, until it has been shewn that the other sources mentioned in the mortgage have been exhausted, and have proved inadequate. But this is not the principal difficulty.

It is insisted that the mortgage of 7th January, 1840, was executed by Murray without any authority on the part of the corporation. It was not suggested, or rather it is not perceived by the court, that he had any other authority, than that derived from the resolutions of 18th January, 1839. Judge O'Neall says these resolutions were placed in his hands when he received authority to make the loan, and that when he, the witness, afterwards agreed to become his indorser, he "was to be secured, if necessary, by the

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mortgage which Murray was authorized *to give." The resolution authorizes Murray to execute for the loan, a bond, as the bond of the company, and to make the real estate of the company liable for the same by mortgage. He had no authority, then, to pledge the personal estate of the company. He made no agreement to give such pledge, when, twelve months afterwards, he executed the instrument of 7th January, 1840—he probably had not the resolutions before him, and the provisions of them may not have been distinctly recollected by either of the parties.

Whether Murray was at that time authorized to execute any instrument in the name of the company, (Dr. Ravenel being then the President,) the court is unable satisfactorily

to determine, without a more accurate acquaintance with the bye-laws. But if the agreement of Murray with Judge O'Neall, in January or February, 1839, amounted to an equitable mortgage, it might, perhaps, be now established to the extent of the authority which he might then have exercised under the resolutions. But this would not avail the complainant, as the proceeds of the real estate are entirely insufficient to satisfy the elder liens.

It was suggested that the corporation subsequently approved or sanctioned this act of Murray in pledging the personal estate. But how can this be inferred? The mortgage of 7th January, 1840, is neither witnessed nor recorded. It was, probably, never out of the possession of the mortgagee. For all his purposes the object of the mortgage had ceased to exist before the mortgage was executed. Neither the corporation, nor the government of the corporation, so far as the court can understand, ever had any knowledge of the existence of the instrument, until the institution of these proceedings.

But it is proper to consider this case in another point of view. Suppose that, in February, 1839, when Judge O'Neall indorsed the note of the Limestone Springs company, they had then executed to him the mortgage which Murray gave him in January, 1840.

In the summer of 1839, Dr. Ravenel agreed, at a meeting of the board of directors (he not being then a director,) that he would make advances for the company on their bond. In furtherance of that agreement, as

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the court un*derstands the testimony, he was to pay for the company the note in bank.

On the 5th December, 1839, Murray, as the superintendent of the company, reciting the agreement of Dr. Ravenel, to pay the note in bank of $2,610, due by the Limestone Springs company, executes to him the bond of the company, in the penal sum of $5,220, conditioned to pay the $2,610, with interest from the date of the bond, whenever thereunto requested. The note, which had thenceforth become the proper debt of Dr. Ravenel, and for which he had received the bond of the company, is accordingly paid by him. What equity then has he to set up the note, or any incident of it, when the company had extinguished the note by a higher security, which he had agreed to take? If he had literally advanced the money to the company, when the bond was executed, and they had taken up the note in bank, it is difficult to perceive on what principle he could avail himself of the mortgage, executed to the indorser of the note. It is not important to enquire what would have been the effect if his agreement had been with Judge O'Neall, and not with the company, for the testimony repels any such supposition. Nor is it important to discuss the effect of Judge O'Neall's assignment to the complainant. It is plain that the Judge had acquired no right to avail himself of the mortgage, and it is scarcely less clear, from the terms of the assignment, as well as from the testimony, that he did not contemplate to confer any new right, but only to facilitate the establishment of an equity already existing. In Hunt v. Rousmanier, 1 Peters, 1, [7 L. Ed. 27,] the court expressed their reluctance to interfere, and help the party to a new security, merely because that which he had agreed to receive, had, in consequence of unforeseen events, proved insufficient. "But," says Mr. Justice Washington, "if the court would not interfere in such a case generally, much less would it do so in favor of one creditor against the general creditors of an insolvent estate, whose equity is at least equal to that of the party seeking to obtain a preference."

The court is of opinion that the complainant can derive no right under the mortgage of the 7th January, 1840.

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*The report of the commissioner is not before the court, nor has any project of a decretal order been presented.

It would seem to be proper, however, that the commissioner should collect any assets which may be outstanding, and belonging to the Limestone Springs company, all the creditors of which have been made parties.

Some suggestion was made as to the payment of costs. Although the complainant has failed in the principal object of his bill, I do not think it is a case in which he should be charged with the costs. But it was said he had made not only prior incumbrancers parties defendant, but each of the execution creditors, and many of the general creditors of the Limestone Springs company parties defendant; and it was also stated that separate answers had been filed, for nearly every defendant. Certainly this is irregular. It was said that more than twenty answers had been filed. But none of the answers were submitted to the court. If the complainant had made parties, who were clearly unnecessary, he should pay the costs thereby incurred. On the other hand, where there are several defendants, who have a common defence, although each is entitled to answer separately, he does so subject to an ultimate question as to costs, if the proceeding is oppressive, Story Eq. Pl. 650, S. 848. See L'd. Eldon's opinion in the case Sowden v. Moore, 1 Rep. 441.

The decision of the question of costs must, therefore, be reserved until the state of the pleadings has been brought to the notice of the court.

It is ordered and decreed, that from the funds in his hands, the commissioner pay the amount due to the defendants, who were execution creditors of the Limestone Springs company, at the time of filing the bill, according to their respective legal priorities: that he proceed to collect the remaining as-

sets and choses in action of the Limestone Springs company; and that the parties be at liberty to apply for such further orders as may from time to time be necessary.

The complainant appealed from the foregoing decree, and moved the Court of appeals to reverse the same,

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*Because the proceeds of the property embraced in the mortgage should have been ordered and decreed to be paid to the complainant.

Dawkins, for the Appellant. Henry, contra.

PER CURIAM. This Court concur with the decree of the Circuit Court, and the appeal is dismissed.

Speers, Eq. 289

MARGARET A. LAMB v. J. J. LAMB, C. W. LAMB, M. J. LIDE, et al.

(Columbia. Dec. Term, 1843.)

[1. *Executors and Administrators* ⟸363.]

When in granting an order to an administrator, for the sale of personal property, the Ordinary specifies the day of sale, it should be made on that day; but this is not so indispensable as to exclude the exercise of any discretion on the part of the administrator. A storm, the absence of bidders, or other like circumstances, would not only warrant, but require, a postponement.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1494; Dec. Dig. ⟸363.]

[2. *Executors and Administrators* ⟸363.]

Should there be any postponement of the sale, it may be incumbent on the administrator to shew that he exercised a sound discretion, and acted with a view to the best interest of all the parties.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1488–1494; Dec. Dig. ⟸363.]

[3. *Executors and Administrators* ⟸391.]

Where an administratrix, in hiring the negroes of her intestate, on the day of the sale of the personal property, (the negroes not being embraced in the order of sale,) hired one to the Ordinary of the district, who was present, but took from him no security on his note, she was held liable for the amount: the Ordinary upon suit being insolvent, though it was in proof that on the day of the sale he was considered solvent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1589; Dec. Dig. ⟸391.]

Before Johnston, Ch., at Cheraw, February Term, 1843.

Bill for partition, &c.

The bill in this case states that Alexander Lamb, the intestate, departed this life, leaving his widow, the complainant, and the following children his heirs at law, viz: John J. Lamb, Alexander T. Lamb, David Wm.

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Lamb, Maria *Margaret Lamb, Samuel Sparks Lamb, Julia Elizabeth Lamb, Carney W. Lamb, Joseph A. Lamb, and Mary Jane Lide. That since the death of the intestate, Joseph A. Lamb has departed this life, also intestate, leaving neither wife nor lineal descendant. That letters of administration were granted to Margaret A. Lamb, the widow, upon the estate of Alexander Lamb, and to Carney W. Lamb upon the estate of Joseph A. Lamb. That Alexander Lamb was seized and possessed in his life-time of considerable real and personal estate, set forth in complainant's bill. Charges that Carney W. Lamb, Joseph A. Lamb, and Mary Jane Lide, were advanced in the life time of the intestate, and prays that administratrix may be allowed to account in this court, and for partition of the estate of intestate, according in the legal rights of the parties, and so forth.

The accounts of the administratrix were referred to the commissioner, who made the following report:

Commissioner's Report.

The commissioner, to whom it was referred to enquire into and report on the above case, begs leave to submit the following report: That he has held several references in this case, on the examination of the administratrix's accounts, and on various matters with which the heirs and legatees in this bill endeavor to charge the administratrix, which were not in her accounts rendered, as well as advancements to the elder children of intestate; and as there were numerous points of litigation argued before him, he begs leave to present them with, the recommendations he makes to them severally as they came before him.

First, then, there was an exception taken by defendants's solicitors to the account sales presented, as not agreeing with the appraisement. 1st. There were six beds appraised, and but five beds were sold at sale; value of the one not sold, allowed, say $ 5

2nd. There were 44 hogs, appraised at $50, not sold. 50

3rd. There were 17 hogs, appraised at $136, . 136

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These items, amounting to two hundred and ninety-one dollars, your commissioner recommends be charged to the administratrix.

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*There was also a claim set up by defendants's solicitors, for cotton seed, which should have been sold at sale, but the evidence on this point was not so clear as to make the administratrix account for more than was charged in the sales.

The defendants's solicitors also protested against an account of sales of cotton as rendered by the administratrix, and contended that she ought to have made the sale agree-

ably to the permission or order of the Ordinary of Marlboro' district, and in her refusing to do so, and selling it subsequently, without any order, she acted contrary to law, and the estate was greatly the sufferer by her neglect to comply with the order, and that the administratrix ought to account to the estate for the difference of the value at the time the sale was ordered by the ordinary and the price received for it when sold some several months afterwards when cotton had fallen very much in value.

There were several witnesses sworn in relation to the sale of the cotton, and the order for sale of the Ordinary of Marlboro' district to the administratrix, was also produced for the sale of the personal estate of intestate; at the bottom of the order a nota bene was affixed, saying the cotton to be sold for cash. Also a protest of the ordinary against the account sales rendered him by the administratrix.

After the most mature consideration which the commissioner is able to bestow on this matter, he recommends, (inasmuch as the administratrix did not sell the cotton as directed in the order for sale, and afterwards, to wit, several months after the time appointed by the ordinary, did sell the cotton without an order to do so from the Ordinary of Marlboro' district,) that the administratrix be charged with the difference in the value proven on the day she was directed to sell the cotton, and the price she has rendered sales at, which makes the following sums, to wit:

The account sales rendered as follows:

9477 lbs. at 9 cts.....	$852 93
The same cotton at 16 cts., would be..	1,516 32
Making the difference in price of.....	$663 39
To which the amount charged for hauling, in bill.....	5 00
	$668 39

Which makes the sum of six hundred and

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sixty-eight dollars and *thirty-nine cents, which the Commissioner recommends be charged to the administratrix in her accounts.

The complainant's solicitors objected to this charge against the administratrix, for several reasons. First, that the administratrix acted in good faith, and under the advice of prudent men, in not selling the cotton on the day of the sale of the personal estate, and that at the time it was sold, it was sold for a fair price.

They further objected to the jurisdiction of this court in the premises, and insisted if there was any damages at all, it was to be determined by an action in a court of law; with various other objections.

The defendants's solicitors replied to this and said, that the administratrix was not permitted to exercise her discretion in opposition to the written order of the ordinary of the district, and they further produced the account sales as returned by the administratrix to the Ordinary, on the back of which was the following endorsement: "This sheet contains a well known incorrect statement of the account sales as represented in it, and cannot, therefore, be received as a true statement of the said sales of the property of Alexander Lamb, deceased; and the administratrix has been formally notified of the same, and called to account for it, but has refused to do any thing in the matter. Signed, L. E. Stubbs, O. M. D."

The Commissioner, in coming to the conclusion before stated, that it was proper to charge the administratrix with the difference in the price of the cotton, did so upon this, as well as other grounds: Suppose the administratrix had rendered no sales at all of the cotton, (which she did not do, except to charge herself with the amount received, and not with the general sales of the personal estate,) then the commissioner would undoubtedly have the jurisdiction to charge the administratrix with the appraised value of the cotton, and the proper time to fix that value, the commissioner thinks, is at the time of the sale of the other personal property, and at the time the cotton was ordered to be sold. Now as the Commissioner views the sale of the cotton as being made contrary to law, he is of opinion that the administratrix is legally and equitably bound to answer to the heirs and legatees of the estate, for the value of the cotton on the day of sale of the other property, and so recommends.

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*The commissioner begs leave to refer to the exhibit A to this report, as a summary of the evidence taken by him at the different references on all the branches of this case. Also, to exhibit B, which is a copy from the Ordinary's office of Marlboro', of papers which were before him in evidence.[1]

In hiring out the negroes, Lewis E. Stubbs hired one of the negroes for one hundred dollars. Stubbs took the negro off and gave no bond; he was subsequently sued for the hire of the negro and his purchase at sale, which was fourteen dollars and fifty-nine cents, and execution was issued out and nulla bona returned. Stubbs was the ordinary of the district, and it was in proof, that at the time of the sale he was considered solvent. The commissioner recommends that the sum of one hundred and fourteen dollars and fifty-nine cents be credited to the administratrix in her account, as that amount stands charged against her. There were charges made against the administratrix for rent of land, negro hire, &c., which the commissioner has charged against her, the value being attested in evidence before him.

The defendants's solicitors objected to the

[1] Two other exhibits are referred to by the Commissioner, but they are not material to the subject matter of the appeal.

item in the administratrix's accounts for commissions, inasmuch as she had not made her annual returns to the ordinary, agreeably to law. It was in evidence before the commissioner, that letters of administration were taken out on the estate in 1837, and that the administratrix filed with the ordinary account sales in January, 1838. That there was a disagreement between the ordinary and administratrix, and on the 8th January, 1838, the bill in this case was filed, asking all the accounts of the administratrix to be audited in the Court of Equity, and this suit has been pending ever since. The commissioner recommends that she be allowed her commissions on her receipts and expenditures.

The advancements to Carney W. Lamb were then investigated.

Alexander Lamb died in 1836,—Carney W. Lamb was in possession of a tract of land, called the Swamp tract, at the death of his father, and kept possession from 1836 to 1842, five years, at $100 per year, $500

Evidence was offered to prove the advancement of negroes to Carney W. Lamb, and

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upon the subject as to the *time they ought to be valued, there was much discussion. The commissioner decided, that the value at the time of the death of intestate, reference being had to their size, situation, &c., when advanced, was the proper time, and all the negroes were valued at this standard of valuation.

One negro man named York, valued at..	1000
Carney W. Lamb was also charged with two other negroes as advancements, but from the evidence before me, I have charged him with one only, boy Shade, valued at	276
Also, a poney, which was contended by C. W. Lamb's solicitor as his own, and not advanced; but from the evidence, I charged the poney to C. W. Lamb, at..	100
Advancements to C. W. Lamb,.....	$1876

Advancements to Joseph Lamb.

Mr. Samuel Sparks proves a bay horse, at $125

The complainant's solicitors brought a number of claims of debts and executions, which were paid by Alexander Lamb, in his life time, for Joseph Lamb, but as it was in evidence before the commissioner, that Joseph Lamb was living with his father, during the time of the payments, as an overseer, he does not believe they were advancements, and recommends that they be not charged against Joseph Lamb's distributive share of intestate's estate.

Advancements to Mrs. Mary Lide.

There was proved as advanced to Mrs. Mary Lide, one negro girl, Binah, value.$	550
One negro boy, Jackson, value.....	450
	$1000

The complainant's solicitors endeavored to charge Mrs. Lide with another negro girl, named Rena, but from the evidence of C. W. Lamb, this negro was not an advancement, but purchased and paid for by John J. Lide, the husband of Mrs. Mary Lide. The commissioner, therefore, recommends that this last negro, Rena, be not charged as an advancement to Mrs. Mary Lide.

The evidence as to the advancements was here closed. It was here contended, that the fees as well as taxed costs of defendants's solicitors should be allowed out of the estate before its distribution, and the complainant's solicitors objected to this course, and contended that nothing but taxed costs should

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be al*lowed. The commissioner is not well enough acquainted with the practice in the Court of Equity to say what course should be adopted as to the counsel's and other fees, not taxed costs, whether they ought to come out of the estate before distribution, or whether each party ought not to pay their own solicitors all the fees, except the taxed costs, to which each party are respectively entitled, but would recommend that the taxed costs of complainant's and defendant's solicitors, together with a moderate fee of one hundred and twenty-five dollars each, be allowed for complainant's solicitors, and to one solicitor for each of the heirs represented, and that sum be deducted from the estate before distribution.

All of which is respectfully submitted.

David S. Harllee, C. E. C. D.

February 8th, 1843.

So much of Exhibit A as relates to this appeal.

Samuel Sparks was examined on this. Says, at the time of the sale of the estate of Lamb, that cotton was worth in the market about 16 cents per pound. Cotton was on the decline. It had been higher.

Cross-examined.—It was his opinion at that time that cotton would be better. He held to his own cotton under that belief. If it had been his cotton, he should have held on and not sold it. L. E. Stubbs was ordinary of Marlboro' district, and granted the order for sale of the estate of Lamb, and was present at the sale. Heard no objections from him in consequence of the postponement of sale of cotton. The administratrix was called before Stubbs, some time after the sale, does not know how long after, for not obeying the order for sale of cotton. Should not say a refusal to sell would be acting in bad faith. Thinks the administratrix held the cotton expecting to get a better price in spring.

General McQueen sworn.—Was guardian for the young Mr. Rogers, and had cotton of theirs on hand. He held the cotton, and did not sell. He was expecting a better price in the spring. Does not remember ever to have sold before spring.

Cross-examined.—Does not know what he would have done if he had been administratrix, acting under the orders of the ordinary,

but thinks he should have obeyed the order and sold the cotton.

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*Capt. Joshua David sworn.—Was present at the sale of estate of Lamb. Stubbs, the ordinary, was there. Does not think Mrs. Lamb was out of the house the day of sale. Acted for Mrs. Lamb in the sales. Kept the account sales. Mr. Sparks was present, and so was Mr. Stubbs, the ordinary. Stubbs was acting and assisting the administratrix in the sale, and so was Mr. Sparks. Stubbs was at the gin house where cotton seed was sold, and acted there as the agent of the administratrix. Witness advised the administratrix not to sell the cotton, and he did so believing that cotton would improve, and not knowing there were more than one or two cotton buyers at the sale, and there was not sufficient competition among the buyers, and he was under the impression a postponement of the sale would be for the interest of the estate. Witness is Ordinary of Marlboro' district. The order for sale here exhibited is the usual form of orders for sale of personal estate, except the nota bene at foot. As ordinary, if under such circumstances as the present, where the administratrix postponed the sale of any article, would not say it was in bad faith, but would receive such return of sales under the circumstances.

Cross-examined.—Would not feel authorized to specify a particular day for the sale of personal estate. If it were sold within the time prescribed by law, would have received the return of sale of estate, but as the cotton was not embraced, would have exacted a further return to embrace the cotton. Does not know whether Stubbs was satisfied on day of sale, nor does he know whether Stubbs said any thing about it, and a long time after the sale, he disagreed with the administratrix. Witness made but one return for the administratrix, and the return here is the one and the only one he ever made; don't remember to have noticed the order when he gave the advice to the administratrix. If he had been administrator, acting under the order, he would have claimed the privilege of postponing the sale if he thought he could have done better by the article. This order differs in specifying the day of sale from usual orders. When witness grants orders, he always grants them in reference to the best interest of the estate. If in the account sales of the administrator there were known to be any article not included, he would charge the administrator with the value of the article at the time of appraisement.

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*There was exhibited an order of sale of the personal estate of Lamb, at the bottom of which order there was a N. B. "The cotton to be sold for cash." The first return of the sale of the estate of Lamb was also before the commissioner, in which Stubbs, the ordinary, refused to accept the sales, as not having been made agreeably to the order.

The account sales rendered as follows:

9477 lbs. at 9 cents	$ 852 93
The same at 16 cents, sold August 1837	1,516 32
	$ 663 39
To which add hauling in bill	5 00
The amount claimed by C. W. Lamb and Mrs. Lide over amount sales rendered	$ 668 39

In the negro hire, there was a negro hired to Lewis E. Stubbs for $100. Stubbs took the negro off and gave no security. Stubbs was subsequently sued, and execution returned nulla bona. As Stubbs was the ordinary, and the administratrix acting under his directions, it was contended by the administratrix's counsel, McIver & Robbins, that the amount of the negro hire and articles bought at sale by Stubbs, of $114.59, in the whole, $114.59, and for which execution was obtained against him, and nulla bona returned, ought to be taken from her liability.

Col. Dudley sworn.—Says Stubbs was reported to be good and solvent in 1837. He would have trusted him at that time.

Third Reference.

Hartwell Ayers sworn.—Mr. Ayers was present at the sale of the estate of Lamb. L. E. Stubbs, ordinary, was there, and had the control of the sale, and did control the sale by calling out the articles to be sold. (Here the council of C. W. Lamb objected to the further testimony of Mr. Ayers, in relation to the sale of cotton, as parol testimony is not to be offered in opposition to the written order of the ordinary, and that the ordinary could not have control, having granted letters to the administratrix.) I allowed Mr. Ayers to proceed with his testimony. Mr. Ayers said, in passing the cotton gin, Mr. Stubbs said, it was best, he thought, to postpone the sale of the cotton

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until the whole crop *was gathered, and then sell altogether. Mrs. Lamb was not present at the time, and the conversation was not in presence of Mrs. Lamb. The conversation was to those standing about the gin. Capt. David acted as clerk and took the notes.

Samuel Sparks sworn.—Says the cotton that was not gathered of the estate of Lamb, was sold on the day of sale, and bought by John Lamb. Thinks there were two good bales.

Mr. Ayers cross-examined.—Quest. All you saw Mr. Stubbs do, was the calling out the articles from the list? Answer. The ordinary would consult Mrs. Lamb, and then call out the articles to be sold; any article out of sight, he called on Mrs. Lamb, and she would produce it, and then he would tell

the crier to cry it; and these facts were the reasons why he thought Stubbs had the control of sale.

Sparks cross-examined.—The cotton in the field was sold towards the latter part of the sale. The negroes of the estate were hired out on the day of sale, five or six hands to widow. It would take three hands not more than between two and three weeks to pick out, say about two weeks. Mr. Sparks ginned the cotton purchased by Mr. Lamb at sale. Furnished the bagging and rope for it. Thinks it was two large bales. Does not positively recollect. It may be four bales, but it strikes him forcibly it was two.

The account of sales was offered in evidence; $20 for all the cotton in the field.

So much of Exhibit B as relates to this appeal.

State of South Carolina, Marlboro' District.

By Lewis E. Stubbs, Ordinary of said district. Whereas, Margaret A. Lamb, administratrix of the estate of A. Lamb, deceased, has petitioned me for an order of sale to sell all the personal property of said estate, except the negroes, for the purpose of preventing waste:

These are therefore to authorize and empower you, the said Margaret A. Lamb, administratrix of said estate, to expose and offer to public outcry, and sell to the highest bidder, on Friday, the 19th instant, at 10 o'clock, A. M., the whole of the personal property, (except the negroes,) on a credit till the first day of January next, for all sums

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over five dollars, taking bonds or *notes, with good and sufficient security; for five dollars and under, cash, on the delivery of the articles; and fifteen days previous notice to be given by public advertisement.

Given under my hand and seal this the 5th day of January, A. D. 1837.

(Signed) L. E. Stubbs, O. M. D. [Seal.]

N. B. The cotton to be sold for cash.

L. E. Stubbs.

Then follows account of sales, articles enumerated. On this account of sales, is endorsed as follows: "Account of sales of the estate of A. Lamb, deceased, received, filed Dec. 11th, 1837.

L. E. Stubbs, O. M. D.

"Recorded in Book A, page 127."

"Recorded in Book B, pages 105, 108, inclusive, December 22d, 1837."

L. E. Stubbs, O. M. D.

"This sheet contains a well known incorrect statement of the account of sales as represented on it, and cannot, therefore, be received as a true statement of the said sales of the property of Alexander Lamb, deceased; and the administratrix has been formally notified of the same, and called to account for it, but has refused to do anything in the matter. L. E. Stubbs, O. M. D.

South-Carolina, Marlboro' District.

By L. Stubbs, Esq., Ordinary of said district.

Ordinary

vs.

Margaret A. Lamb, Administratrix, Joshua David and Samuel Sparks.

To Margaret A. Lamb, administratrix of the estate of Alexander Lamb, deceased, Joshua David and Samuel Sparks.

You are hereby notified that the account of sales of the estate of Alexander Lamb, deceased, as rendered in by the said Margaret, has not, nor can not, be received as a correct account of said sales; and you are, therefore, hereby required to be and appear in the Court of Ordinary, to be holden at Bennettsville, on Tuesday, the 16th instant, to shew cause, if any there be, why the said

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ac*count of sales has not been duly returned according to law, into the office of the ordinary, in the aforesaid district.

Given under my hand and seal, at Bennettsville, January 10th, A. D. 1838.

L. E. Stubbs, O. M. D. [Seal.]

The solicitors of complainant filed, with others, the following exception:

First—That the commissioner has charged the administratrix with a considerable sum of money, as the alleged excess in the value of the cotton belonging to the estate at the time of the sale ordered by the ordinary, above the price actually received.

And the defendant's solicitor filed three exceptions, the second being in the words following, viz:

"For not charging administratrix with amount of negro hire to L. E. Stubbs, to wit, one hundred dollars; also the amount L. E. Stubbs purchased at sale, to wit, $14.59."

On the hearing of the exceptions filed, his Honor made the following order:

Chancellor's Decree.

"On hearing the exceptions of plaintiff and defendant in this case, it is ordered that the second exception filed by Carney W. Lamb, one of the defendants, be sustained, and that all the other exceptions be overruled, and that the final confirmation of the commissioner's report await the decree of this court, upon the claim of Joseph A. Lamb, for certain negroes mentioned in the answer of Carney W. Lamb, administrator of Joseph A. Lamb, to certain negroes in bill mentioned; when that claim shall be disposed of, the court will make such order in relation to the matters of account involved in the report, as the circumstances shall then indicate."

The complainant appealed, on the following grounds, to wit:

1. Because his Honor erred in deciding that the order of the ordinary for the sale of the intestate's estate is imperative, and that

the complainant is liable for the loss sustained on the sale of the cotton.

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*2. Because the administratrix in postponing the sale of the cotton exercised a prudent discretion, and is, therefore, not liable.

3. Because the ordinary, by parol, revoked the order for the sale of the cotton.

4. Because the ordinary, by receiving and filing in his office the return of sales made by the administratrix, from which it appeared that the cotton had not been sold, sanctioned the postponement of the sale of the cotton, and in effect was a revocation of the order of sale in that particular.

5. Because, if the administratrix be liable, it is a question of damages, and the remedy is at law.

6. Because the second exception of the defendant, Carney W. Lamb, should have been overruled, it being in proof that Stubbs was wholly insolvent.

Robbins and McIver, for the appellant, contended that the order of the ordinary was not imperative.

If the order was imperative, and the administrator was obliged to sell under all circumstances, and had no discretion, losses would, in all probability, happen. Cited 2 Hill Rep. 562; 2 Hill Ch. Rep. 364; 1 Bailey Rep. 528; 3 Munford, 288.

David, Blakeney and Dargan, contra, cited 5 Stat. at Large, 109; (Act of 1789,) Acts 1839, sec. 18th, p. 43; 6 Stat. 238 (Act 1824;) 2 Hill Ch. Rep. 98.

Curia, per DUNKIN, Ch. The legal title to the personal estate being in the executor or administrator, it was very customary for the personal representative to sell the personalty without any authority from the ordinary, or any other court. This has been restricted by the Acts of Assembly. In granting the order or authority to sell, the ordinary sometimes fixes the day of sale; and, more frequently, leaves that to the discretion of the administrator. When a time is specified, the sale should be made on that day. But it cannot be supposed that this is so indispensable as to exclude the exercise of any discretion on the part of the administrator. A storm, the absence of bidders, or other like circumstances, would not only warrant, but require a postponement. The authority

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is granted at the instance *of the administrator. He ought, and will be likely, to conform to the provision in this respect. If there is any postponement, it may be incumbent on him to shew that he exercised a sound discretion, and acted with a view to the best interest of all the parties. In this case the administratrix had an interest of one-third in the sale of the cotton. She was advised to postpone the sale. Mr. Sparks, General McQueen and Mr. David, (the present ordinary,) were of opinion that she acted judiciously. The two former, (gentlemen of intelligence and experience,) pursued the same course with their cotton at that time. The ordinary, Mr. Stubbs, who granted the authority, was himself present, aiding the administratrix and he stated to one of the witnesses at the time, that "he thought it was best to postpone the sale of the cotton until the whole crop was gathered, and then sell the whole together." It seems to the court that, under these circumstances, the administratrix ought not to have been rendered liable for the loss, and the exception should have been sustained.

This court concur with the Chancellor as to the defendant's second exception. Having omitted to take security on the note, the administratrix was properly charged with the loss.

Let the report of the commissioner be reformed according to the principles of this decree.

JOHNSON and HARPER, Chancellors, concurred.

Speers, Eq. *303

*MARTHA JACKSON, per pro. Amie, v. JAS. McALILEY, and Others.

(Columbia. Dec. Term, 1843.)

1. By a decretal order of the Court of Equity, made July 1835, in a case for partition, certain slaves were ordered to be vested in M. J., then the wife of W. J., "for her sole and separate use for life, and on her death to such child or children as she may leave living, share and share alike; and upon her dying without leaving such child or children, then the said negroes are to be vested absolutely in W. J." Also ordered that said W. J., "do execute to the commissioner of this Court, proper trust deeds of the slaves assigned to his wife M. J., on the terms and under the limitations set forth in the decree, and that the deeds be immediately and within the time required by the Act of the Legislature, recorded in the office of the Secretary of State, in Columbia, and in the office of the Register of Mesne Conveyances for Chester district."

2. J. M. B. was guardian of his minor children, of whom complainant was one; and by an order of the Court of Equity, made at July Term, 1831, he was ordered "to account before the Commissioner for his guardianship, and to deliver over the estate of his children into the hands of the commissioner of this Court, unless he account fully before the commissioner, and give new security for the faithful discharge of his duty, &c."

3. Under this order the commissioner hired out the slaves of the estate, including those embraced in the decretal order of 1835; and at the end of that year permitted W. J. to take the negroes ordered to be vested in his wife, without executing the deed of trust directed.

4. A deed of trust was executed in 1841, and duly recorded.

5. Subsequent to his possession of the slaves the husband contracted a debt to the defendants, for which they obtained a judgment, and had their execution levied on the property.

[6. *Husband and Wife* ⟸135.]
It was held that the possession of the husband, under the delivery by the commissioner, was that of the trustee for the separate use of the wife; and that the property so held was not subject to the lien of judgments and executions for his debts.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 503; Dec. Dig. ⟸135.]

[7. *Trusts* ⟸356.]
Even a purchaser, still more a volunteer, taking possession of trust property with a notice of the trust, will be made a trustee by the Court.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 529–538; Dec. Dig. ⟸356.]

[8. *Husband and Wife* ⟸11.]
In order that the marital rights may attach, at all events in this Court, it is necessary that the husband should take possession as husband and as of his own property, and not as trustee.

[Ed. Note.—Cited in Trustees v. Bryson, 34 S. C. 412, 13 S. E. 619.

For other cases, see Husband and Wife, Cent. Dig. §§ 39, 40, 47–57; Dec. Dig. ⟸11.]

[9. *Husband and Wife* ⟸135.]
Permitting the property to go into the husband's possession, though he may have thereby gained credit, could not of itself constitute fraud. It must be the fraud of the party beneficially entitled which will preclude him from asserting his title to it; and as in this case

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the wife was such party, *the possession of the husband not having been acquired by any fraudulent contrivance of hers, her right could not be affected.

[Ed. Note.—Cited in Harley v. Platts, 6 Rich. 318.

For other cases, see Husband and Wife, Cent. Dig. §§ 501–507; Dec. Dig. ⟸135.]

Before Dunkin, Ch., at Chester, June Term, 1842.

By a decretal order made in the case of James Barber and others v. Rebecca Barber and others, at July Term, 1835, for partition, it was ordered, that the slaves Ibby and Jane be vested in the complainant, (who was then married to Wm. Jackson,) "for her sole and separate use for life, and on her death to such child or children as she may leave living, share and share alike; and upon her dying without leaving such child or children, then the said negroes are to be vested absolutely in Wm. Jackson." It was also ordered, that the said Wm. Jackson "do execute to the commissioner of this Court, proper trust deeds of the slaves assigned to his wife, Martha Jackson, on the terms and under the limitations set forth in the decree, and that the deeds be immediately and within the time required by the Act of the Legislature, recorded in the office of the Secretary of State, in Columbia, and in the office of the register of mesne conveyance for Chester district." By an order made at July Term, 1841, in the case James B. Pickett and John Peay v. John M. Barber, [1 Hill Eq. 95,] the letters of guardianship granted to the defendant in that case, as guardian of his minor children, (of whom the complainant was one) had been revoked, and he was ordered "to account before the commissioner for his guardianship, and to deliver over the estate of his children into the hands of the commissioner of this Court, unless he account fully before the commissioner, and give new security for the faithful discharge of his duty, &c."

The parol evidence of Mr. Samuel McAliley, (who was then the commissioner,) stated that under the last recited order of Court, he, as commissioner, hired out the negroes of the estate, including those now in litigation, until the decretal order first recited was made, and that at the end of the year 1835, after that decretal order, he permitted the husband, Wm. Jackson, to take the negroes allotted to his wife, without having executed the deed of trust. If Wm. Jackson

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had them in his possession previous to *January 1836, it was under a contract of hiring with the commissioner. Subsequently to the 1st of January 1836, the debt of William Jackson was contracted with the defendants, McAliley and Ross, who afterwards obtained judgment thereon, and had their execution levied on the negroes now in litigation, as the property of Wm. Jackson, in order to satisfy their execution, without notice of the decretal order of 1835. A deed of trust was executed in October 1841, which was then recorded in proper time after its execution. The bill was filed to July Term, 1842, by the complainant, to have the benefit of the decretal order which had been made in 1835, ordering a partition of the negroes and a settlement of her proportion of them upon herself and children, and to enjoin the defendants from selling. His Honor Chancellor Dunkin pronounced the following decree, dismissing the bill:

Dunkin, Ch. The Court has carefully compared the circumstances of this case with those of Price v. White (1 Bail. Eq. 244) and has been entirely unable to discover any distinction in favor of the complainant.

Nothing can better illustrate the insufficiency of such decrees to protect the rights of married women than is developed by this cause. The husband is ordered to "execute to the commissioner of this Court proper trust deeds, on the terms and conditions set forth in the decree." The order is made in 1835, the husband having been in possession since January previous. He has a strong interest to remain absolute owner and defeat the settlement. No one but his own wife and children have any interest to require the execution of the deed. But suppose him willing, as it is believed he was in this case, who is to prepare and tender the deed?

Can the Court require the commissioner, against his consent, to act as trustee in such case? Is he to be charged with the duty of

preparing and recording the deed? And to be responsible for the consequences, if not recorded in time? Can the commissioner of the Court be required to look after the conduct of the husband; and, if he is about to eloign or waste it, must he take measures to

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*restrain him, and take the immediate custody of the trust estate?

Without any apparent wilful neglect on the part of any one, a deed, ordered to be executed and recorded in June, 1835, was not executed till October, 1841, and the present commissioner then declined, without the positive mandate of the Court, to accept the trust, as he did not conceive it fell within his duties as commissioner; and would, probably, materially conflict with the performance of his other duties. These remarks are made in order that some remedial rule may be established by which efficacy may be given to the decree of the Court, passed for the protection of married women, while the just rights of creditors are not disregarded.

It was admitted by the counsel of the defendant that the marital right of Jackson did not attach until the partition in 1835. The Court is of opinion that, on the authority of Price and White, the bill must be dismissed, but without costs. And it is so ordered and decreed.

The complainant appealed, on the following grounds:

1st. That the former decree vested the property in Martha Jackson, and that the possession of the husband was as trustee under that decree, and in consequence the marital right did not attach so as to make the property subject to the husband's debts.

2d. That no settlement having been made under the decree, it was not a case depending upon the registry Acts, in relation to marriage settlements.

3d. That no settlement having been made under the decree, and no final report of a settlement having been made to the Court, the case was still sub judice, and the possession of the property was in the Court, and having been delivered to the husband by the officer of the Court, without a settlement, such delivery was in derogation of the decree of the Court, and wrongful, and the Court will set it aside, and recognize the deed of settlement which was subsequently made.

McCall, for the appellant, cited 1 Baily Eq. 244; 4 Ves. 18; 10 Ves. 90; 4 DeSaus. Rep. 591; 1 Mad. Ch. 485.

Gregg, contra.

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Curia, per HARPER, Ch. There is certainly no question with respect to the recording of a marriage settlement, (supposing the conveyance directed by the order of the Court to be such settlement.) The only settlement executed was duly recorded. Then on what ground is the property in possession of the husband to be regarded as liable to his creditors? The argument is, that the slaves in question were the property of the wife, which the husband has reduced into possession, and which must therefore, to all intents, be regarded as his property. But in order that the marital rights may attach, at all events in this Court, it is necessary that the husband should take possession as husband, and as of his own property, and not as trustee. It has been repeatedly decided, that if the husband be in possession as administrator of an estate, of which his wife is entitled to a distributive share, the marital rights will not attach until the estate be fully administered and partition made. If he be in possession, as executor, of a specific legacy given to his wife, the marital rights will not attach until, by some act, he signifies his assent to the legacy, and his intention to take possession in the character of husband. If property be given to the separate use of the wife, by deed or by will, without the intervention of a trustee, it is the well settled doctrine of this Court, that, though the marital rights may attach at law, the husband will be regarded as trustee; still more, if property were given to the husband, expressly, in trust for the separate use of his wife. And the lien of a judgment or execution will not attach on property which a man holds only as trustee. A specific legal lien will prevail against subsequent general legal liens, as where land is articled to be sold, the contract will be enforced against subsequent judgment creditors. Finch v. Marquis of Winchelsea, 1 Pr. Wms. 277. Is there any doubt, but that in the present instance a bill would at any time have been sustained on the part of the wife against the husband, to compel him to execute a settlement in pursuance of the order of the Court? But a trust in personalty may be created by parol, without deed or writing, and the same law would apply if personal property were delivered to the husband, with a parol declaration, that it was in trust for

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the separate use *of his wife. But this is precisely what I understand to have been done in the present case. The commissioner in equity was a trustee for the wife, and delivered the property to the husband, in pursuance of the order of the Court, and with a view to a settlement being made. Even a purchaser, still more a volunteer, taking possession of trust property with a notice of the trust, will be made a trustee by the Court.

I know of no other ground on which the decree could be sustained, unless that there was fraud in permitting the property to go into the possession of the husband, so as to enable him to gain credit. But this cannot of itself constitute fraud, or every one who lends or hires property to another, or furnishes him with goods on credit, would be guilty of the same sort of fraud. Though the commissioner may have been guilty of

negligence, in delivering the property to the husband, until the settlement made and recorded, I do not perceive that any fraudulent purpose can be imputed to him. But it must be the fraud of the party beneficially entitled to the property, which will preclude him from asserting his title to it. The wife was such party in the present case, but it does not appear that the property went into the possession of the husband, by any fraudulent contrivance of hers, or that she had any agency in the matter.

It is ordered and decreed, that the decree of the Chancellor be reversed, and that the defendants be perpetually enjoined from enforcing their execution on the slaves in question.

JOHNSON, Ch., concurred.

JOHNSTON, Ch., absent from indisposition.

Speers, Eq. *309

*MARY SWEET v. GOSPERO SWEET.

(Columbia. Dec. Term, 1843.)

[1. *Guardian and Ward* ⇦24.]

As a guardian is bound to account for the interest of his ward's funds by the same rule as a borrower, with the advantage that interest is constantly accumulating without loss of time in reinvesting them when paid in by the borrower; and as the security which he gives as the condition of obtaining the guardianship, is given under the supervision of the court, and is always under its control, additional security being required where there is even a suspicion that that already given is insufficient, the fact that he has retained the funds in his own hands, and applied them to his own use, is not a cause for his removal.

[Ed. Note.—Cited in Spear v. Spear, 9 Rich. Eq. 197; Nance v. Nance, 1 S. C. 219; McDuffie v. McIntyre, 11 S. C. 564, 32 Am. Rep. 500; Clark v. Crout, 34 S. C. 441, 13 S. E. 602.

For other cases, see Guardian and Ward, Cent. Dig. § 83; Dec. Dig. ⇦24.]

[2. *Guardian and Ward* ⇦24.]

Where it was alleged by the mother of the ward, that his guardian had failed to pay for his board and tuition, and the facts were that the guardian had the mother's receipt in full for board, having given her his note for it, which she had transferred to a third person; and as to tuition, had offered to pay it, but the ward's mother insisted on paying it herself as a gratuity to her son, and had not afterwards notified the guardian that she wished him to pay it; the Court refused to remove the guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 78; Dec. Dig. ⇦24.]

[This case is also cited in Spear v. Spear, 9 Rich. Eq. 202, without specific application.]

Before Johnson, Ch., at Marlboro', February Term, 1843.

This was a petition for the removal of Gospero Sweet, as guardian of Asbury Sweet, on three grounds, to wit:

1. That the guardian had appropriated the funds of his ward to his own use.

2. That he had not paid the board of his ward.

3. That he had not paid for the tuition of his ward.

The guardian having been served with a rule to shew cause why he should not be removed on the grounds stated in the petition, made the following answer.

In answer to the facts stated in the petition and urged for the removal of Gospero Sweet, as guardian of Asbury D. Sweet, the said Gospero Sweet, being sworn, says, that he admits that he has appropriated the funds of his ward's estate, being money in hand, in a great measure to his own use, considering that being bound for the lawful interest, and deeming the funds well secured, he had as good a right to use the money as to let it out at interest to others, in which last case he could only have realized the interest, and have been responsible for the funds.

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*This deponent further answering says, that as to the charge of his not paying the ward's board, he has the receipt of Mary Sweet, the mother of his ward, for the board of his said ward, in full to the 1st of January, 1843. And although he did give his note for the board, this deponent says, that the said Mary Sweet has transferred the said note to Samuel Gasque.

This deponent further answering says, that he was willing and did offer to pay for his ward's tuition, but his mother insisted upon paying it herself as a gratuity to her son, and never has since told this deponent that she wished him to pay for the tuition.

This deponent further answering says, that he considers his pecuniary affairs in a solvent condition, and that he is ready and willing to give additional securities to his guardianship bond, if this honorable court deems it necessary. Gospero Sweet.

Sworn to before me, this 21st Feb. 1843.

Thos. Evans, C. E. M. D.

On hearing the answer, the presiding Chancellor made the following order: "Ordered, that the appointment of Gospero Sweet, as guardian of Asbury Sweet, be rescinded, and his letters of guardianship be revoked."

The guardian appealed, and moved this court to reverse the foregoing order of the Chancellor, on the ground, that the answer contains a sufficient shewing against the prayer of the petition; that the guardian ought not to have been removed for simply using the money of his ward, as stated in his answer; and that the answer was satisfactory as to the other grounds stated in the petition for his removal.

Dargan, for the motion. C. Evans, contra.

Curia, per JOHNSON, Ch. Amongst the leading duties of a guardian to his ward, are those of providing for his maintenance and

education, in a manner suited to his circumstances and rank in society, and to make his estate as productive as may be practicable.

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Has the respondent failed in *the performance of these duties? One of the charges against him is, that he retained the funds of his ward in his own hands, and applied them to his own use, but it does not follow that this was not the very best use of them. He is bound to account for the interest upon them (the funds, consisting, as I understand, entirely of money,) by precisely the same rule that a borrower would be, with the advantage that the interest would be constantly accumulating, whereas time would generally be lost in reinvesting funds that were paid in by the borrower. Nor does it follow that the fund would be less secure in his hands; on the contrary, the security which he gives as the condition of obtaining the guardianship, is given under the supervision of the court, and is always under its control, and additional security will be required, where there is even a suspicion that that already given is insufficient; and I cannot perceive how the security he might require on the loan of money would make it more secure. I do not know, indeed, how the court can control a guardian in the use he makes of a money fund. It is not usual, particularly in the country, to require a guardian to invest funds of inconsiderable amount in government or other public securities, nor is it always practicable to do it to advantage, and there is no alternative but to lend it on bond. In this form, it is always under the control of the guardian, and in the end, the whole responsibility devolves on him.

The other charges against the respondent are, that he neglected to pay for the board and tuition of his ward.

These charges are, I think, well answered by the respondent. The obligation of the guardian is to his ward, and not to strangers; and if, as I infer from the charges, the respondent's ward has been maintained and educated by him, I do not know that the ward is concerned as to the source from whence the means were derived. I am not, however, to be understood as laying down the rule that the neglect of the guardian to pay for the maintenance and education of his ward, would, under all the circumstances, be excusable. The want of punctuality might render him a less acceptable boarder or scholar, and subject him to mortification. It might also have the effect of encreasing the expense, as men notoriously punctual, deal on better terms than those who are not.

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*A creditor might, perhaps, justly complain of the want of punctuality; but from the facts stated in the answer, which are not controverted, the petitioner has now no interest in the matter, and for any thing we know, the actual creditor is perfectly satisfied.

It is ordered and decreed, that the decree of the Circuit Court be reversed.

HARPER and DUNKIN, Chancellors, concurred. JOHNSTON, Chancellor, absent from indisposition.

Speers, Eq. 312

THOMAS ANDERSON and Wife and Others, v. J. H. SMOOT and Wife and Others.

(Columbia. Dec. Term, 1843.)

[1, 2. *Wills* ⇐548.]

Testator bequeathed as follows: "I give to my wife, A. M., in lieu of her dower, the use of one-fourth part of my personal estate, during her life, and, at her death, to return to my estate, with the increase of the negroes, and the whole to be equally divided among my surviving children, or the heirs of their bodies, share and share alike."

It was *held*, that this provision was intended for such of the children as might survive the tenant for life, and for the heirs of the body (or children) of those who might not have so survived.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1182, 1183; Dec. Dig. ⇐548.]

[3. *Wills* ⇐548.]

This construction gives full effect to the term "or" which it was held must be used in its natural sense.

[Ed. Note.—Cited in Matthis v. Hammond, 6 Rich. Eq. 405; Heyward v. Heyward, 7 Rich. Eq. 325.

For other cases, see Wills, Cent. Dig. §§ 1182, 1183; Dec. Dig. ⇐548.]

[4. *Wills* ⇐524.]

When a distribution is directed among his surviving children, or the heirs of their bodies, it is equivalent to saying, among my children who may survive, or the heirs of the bodies of those who may not survive; for no children could, at that time, have heirs, except those who had not survived.

[Ed. Note.—Cited in Blum v. Evans, 10 S. C. 80; Simpson v. Cherry, 34 S. C. 75, 12 S. E. 886.

For other cases, see Wills, Cent. Dig. § 1123; Dec. Dig. ⇐524.]

[5. *Wills* ⇐548.]

In the last clause of his will, testator declares: "All the remaining parts of my personal estate, I leave to be equally divided between my children, share and share alike, as soon as they shall arrive at the age of twenty one years, or otherwise, at the day of marriage, which shall first commence; but, if either of my children should die before they are of age, or have law-

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*ful issue to survive them, then, and in that case, their share, so dying, to return to my surviving children, share and share alike." This clause *held* to aid the construction that the testator intended a right, by survivorship, to attach only in the event that a deceased child had left no lawful issue to survive him; as also, to aid the construction which the parties themselves adopted in making partition.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1182, 1183; Dec. Dig. ⇐548.]

[For subsequent opinion, see 2 Rich. Eq. 285.]

Before Harper, Ch., at Sumter, June Term, 1843, from whose circuit decree the facts will fully appear.

Harper, Ch. By his will, executed on the 28th of August, 1804, Manassah Michau, who died in 1805, bequeathed as follows: "I give to my wife, Ann Michau, in lieu of her dower, the use of one-fourth part of my personal estate, during her life, and at her death to return to my estate, with the increase of the negroes, and the whole to be equally divided among my surviving children, or the heirs of their bodies, share and share alike." The testator, at his death, in 1805, left surviving him, his wife and five children. The widow received possession of the portion of the estate devised to her by the aforesaid clause, and retained possession thereof until her death, in 1833 or 4. Of the children of the testator, three died in the life time of the widow tenant for life; one of them, Manassah, having had children, but survived them; of the other two, one, Jacob, left three children, who are three of the complainants, and the other, Isaac, one child, the complainant, Ann E. Anderson. Of the children of testator, who survived their father, one, Mary M. Michau, married the defendant, Caleb Rembert, and the other, the defendant, Josiah H. Smoot. After the death of the tenant for life, (who had married one Rembert,) the defendant, Josiah H. Smoot, took out letters of administration on her estate, and also administered with the will annexed on the estate of the testator, Manassah Michau. With the consent, as it is stated, of the defendants, Rembert and wife, and Smoot and wife, certain gentlemen were appointed to make partition of the slaves given by the testator to his wife for life, with their increase, which was large. They did divide them accordingly, allotting one-fourth part to the three complainants, then infant children of Jacob Michau, one-fourth part to the complainant, Ann E. Anderson,

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then Ann E. Michau, an in*fant, one-fourth part to the defendants, Rembert and wife, and one-fourth part to the defendants, Smoot and wife. It is admitted that the guardian of the infant, Ann E. Michau, was present at the division, but denied, that any guardian of the infant children of Jacob Michau was present. The defendants deny that the negroes allotted to the complainants respectively, were ever delivered to them, the said defendant, Josiah H. Smoot, refusing to deliver them, and requiring a bond to save him harmless in the premises from the guardian of the said Ann E., and also from some person legally authorized to act for the children of Jacob Michau.

The defendants state that they concurred in the division, supposing that the complainants were entitled, as they claim to be, to one half of the negroes, but that upon afterwards consulting counsel, they were advised, that under the clause of the will in question, they alone were entitled to the whole of the slaves; and that express notice was given to the guardian of Ann E. Michau, and the other parties, that they were not to receive any portion of the said slaves, unless recovered by law. The defendants thereupon made a division between themselves, of the negroes which had been allotted to the complainants; the names of the slaves received by each, being set forth in these answers. The bill prays for the delivery of the slaves, to which complainants are entitled, under the will of Manassah Michau, and by virtue of the partition mentioned, with their increase, and account of their hire.

The defendant, Smoot, by his answer, states that he has sold or given away several of the slaves claimed by the complainants. The defendant Rembert states, that being about to depart for Alabama, and supposing it possible that by construction of law the children of Jacob and of Isaac Michau might be entitled to a portion of the slaves, he paid to the guardian of the children of Jacob, nineteen hundred dollars, and to the guardian of Ann E. Michau, fifteen hundred dollars, to be applied to the satisfaction of their demands against him, in case they should recover, but not intended to be reclaimed if they did not. He prays that these sums may be refunded.

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*If the whole of the children of Jacob and Isaac Michau had been of age at the time of the partition, and the slaves allotted to them respectively had been put into their possession and received by them, and this were a bill by the defendants for the recovery of these slaves, on what ground would they sustain such bill? It was competent for them to put their own construction on the will. By their own act, they would have acknowledged the legal title to be in the parties to whom the slaves had been allotted. If it had been intended merely as a gratuity, once executed by the delivery of possession, it could no longer be recalled. The only ground on which such bill could have been attempted to be sustained, would have been that the defendants had acted under a mistake of law. But how could I infer such mistake? The will was before them, and they saw that the property was limited to surviving children. It might occur to the most common understanding, that the question might be raised as to which the survivorship should be held to relate. What right should I have to conclude any thing else, but that knowing that such question might be made, they chose to acquiesce in the construction which appeared to them, if not the most obvious, certainly the most reasonable and equitable? It is not like the case of Lawrence v. Beaubien, 2 Bail. [623, 23 Am. Dec. 155]. In that case it was

plain that the parties intended to settle their contract according to law. For this purpose they mutually submitted their case to a lawyer, and were palpably misadvised as to the law. The source of the mistake was obvious. The distinction is made in the case between ignorance and mistake. Mistake is matter of evidence, and like every other matter of fact, must be proved by the parties alleging it. But if a party, from the spontaneous suggestion of his own mind, take up an erroneous impression of law, or of fact, as in the case of Heilbron v. Bissell & Warner, 1 Bail. Eq. 430, how is it possible to offer evidence of the operation of his mind? That he has done an act unfavorable to his own interest, is not regarded as sufficient. Men do sometimes perform kind or generous actions. The only evidence for the defendants, supposing the true construction of the will to be as now contended for by them, is, that having done

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an act to their own prejudice, they en*deavored to correct the error and reclaim their rights, upon being better advised. But apart from the fact, that parties are not to make evidence for themselves, it is not uncommon to the infirmities of human nature, that one who, in pursuance of a generous impulse, has done a liberal act, should regret it and wish to recall it upon cooler reflection. There is no evidence of their having been advised by counsel. But I am of opinion, that in order to defend themselves, the defendants must make out the same case as if they had brought a bill to set aside the partition. It is supposed that the legal title of complainants to the slaves allotted to them, never attached, because the defendants say they were never delivered. I am of opinion, that they were as fully delivered as if they had been taken possession of by themselves or their guardians. Specific slaves were allotted to each of the defendants, and to the complainants, according to their rights. Those allotted to the defendants, Rembert and wife, were delivered to them. Defendant, Smoot, took possession of those allotted to the complainants, as being their property, and in their right. They may properly be regarded as delivered to him by the commissioners; certainly he no longer held them as administrator of the testator or of his widow, any more than the negroes delivered to him as his own. The very offer to deliver them to the guardian of complainants, upon receiving an indemnity, was an admission that he held the slaves as their property: it was in effect a declaration of trust. Though I see no reason why he should have required indemnity where there was a guardian authorized to receive. Rembert and wife were the only persons to whom he could have supposed himself to incur responsibility, and they were parties to the transaction, and concurred in it. If Smoot, then, took possession of the property in right of the complainants, as their agent or voluntary trustee, he would be concluded to deny their title by setting up a title in himself or any one else, upon its being demanded by them. If the court saw, however, that if in complainants's possession, defendants might sustain a bill to set aside the contract, by which their title to slaves accrued, it would not do so nugatory a thing as to order them to be delivered up,

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that they might be reclaimed by a se*parate bill. But were defendants under any mistake in their construction of the will? I have very fully examined the authorities in relation to the subject, and am of opinion, that if it were no more than a limitation by the testator to his wife for life, and at her death, to his surviving children, equally to be divided, the construction was the correct one, and that the term surviving, must be taken to relate to the testator's own death, in order to prevent a possible lapse by death in his life time. The case of Drayton v. Drayton, 1 Desaus. 324, is directly in point, nor do I think its authority shaken by that of Swinton v. Legare, 2 McC. Eq. 440. The only circumstance to make a difference in the present case, is that the testator directs the property to return to his estate to be divided, as showing an intention that nothing was to vest in the children till then. I do not think it necessary to give an opinion as to the effect of this, or to enter into a full examination of the general doctrine, as I am clear that defendants are concluded by the partition.

It is ordered and decreed, that the defendants deliver up to the complainants respectively, according to their right, the slaves in their possession, which were bequeathed by the testator, Manassah Michau, to his wife for life, and which were allotted to the said complainants in the proceedings, together with the issue of the females; that they account for the hire of the said slaves while in their possession, and the value of such of them as they have sold or disposed of, with interest. Defendants to be allowed all sums paid or advanced by them on account of complainants.

The defendants moved the Court of Appeals to reverse the decree of the Chancellor in said cause, on the following grounds:

1. Because, by the proper construction of the will of testator, the survivorship must be held to relate to the death of the tenant for life, and the defendants were, therefore, entitled in remainder, to the exclusion of complainants.

2. That the mere fact of the defendants having the negroes divided into four lots or parts by persons, at their own instance, without any further act by the defendants, did

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*not divest them of their right to the whole, or confer on complainants any rights to which they were not entitled under the will.

3. That if by the true construction of the

will, the survivorship is to be held to relate to the death of the testator, then the complainants were not entitled to any thing under the said clause—the estate surviving to the five children of testator, none of whom were before the court but the defendants, and Smoot, the administrator, with the will annexed, still liable to the personal representatives of the three deceased sons, who survived the testator.

4. That the intention of the defendants to divide the property with the complainants, in mistake of their rights, cannot operate to divest them of their whole interest under the said will.

5. That the decree is, in other respects, against justice and equity.

Haynesworth, for the appellants. Those only can take who are alive at the time of division, where there has been a previous estate, unless the contrary be specially shewn. Cited 19 Ves. 534; 1 Jacobs and Walker, 146; 4 Mad. 11; 3 Russel, 124; (3 Cond. Eng. Ch. Rep. 323;) 6 Ves. 29. In 1 Eq. Rep. 137, the survivorship is limited to the death of the testator, when division was to be made after payment of debts.

The case from 1 Eq. Rep. 324, is confined to the death of the testator.

The case in 1 Eq. Rep. 497, is not applicable. In 3 Eq. Rep. 186, survivorship is limited to the time of division. Cited 2 McC. Ch. 440; 1 Hill Ch. 311. The words "or heirs of their bodies," refer to the heirs of the surviving children.

As to the division. A partition under the order of the court does not bind until confirmed by the court.

DeSaussure, contra, on the construction of the will, cited 1 Peere Williams, 96; 2 Ves. sen. 265; 3 Ves. 204; 8 Id. 10; 3 Brown Ch. Cases, 27; Bacon Ab. (Legacy E. 2.) Law Lib. 119, Ward on Legacies; Id. 175.

If all the children had died, who would have taken the estate? Cited 3 Burr. 1881. The words "share and share alike," create a tenancy in common. Cited 1 Ves. sen. 165; 22 Law Lib. 253; 4 Eq. Rep. 459; 18 Law Lib. 55, 56.

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*Withers, same side.

Moses, in reply. If the survivorship is referred to the death of the testator, the estate must be divided into five, instead of four parts.

The direction that the estate should return to his estate and be equally divided, shows that testator intended that the legacy should not vest until the death of the wife. Cited 4 Ves. 551. The vesting on the death of the testator is not favored. Cited 18 Law Lib. 229; 10 Ves. 562.

Curia, per DUNKIN, Ch. It is not deemed necessary to consider the second and fourth grounds of the defendants's appeal, as the court are of opinion that, upon the construction of the will, the complainants's claim must be sustained.

The clause of the will on which the rights of the parties depend, is in these words, viz:

"I give to my wife, Ann Michau, in lieu of her dower, the use of one-fourth part of my personal estate, during her life; and, at her death, to return to my estate, with the increase of the negroes, and the whole to be equally divided among my surviving children, or the heirs of their bodies, share and share alike."

It is manifest that the will was not prepared by a professional man, although it exhibits no want of ordinary clearness, in conception or expression. Its language should receive, then, the ordinary interpretation; and, if possible, every word should have its full efficacy. In this view, the term "or" must have its common, natural signification, which is alternative on the part of the complainants. It is insisted, in the first ground of appeal, that "by the proper construction of the will, the survivorship must be held to relate to the death of the tenant for life, and the defendants were, therefore, entitled in remainder, to the exclusion of complainants." This construction can only benefit the defendants by disregarding the latter branch of the sentence. Conceding that the survivorship refers to the period of the termination of the life estate, what is meant by the alternative provision, "or the heirs of their bodies?" Certainly not the heirs of the bodies of the surviving children. Again, if only the sur-

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viving children could take, and all *had died, pending the life estate, leaving children, these children could take nothing as purchasers under their grand-father's will, because the parents did not survive the tenants for life. The court would not adopt such construction, except from necessity. As the terms "or the heirs of their bodies" cannot, sensibly, be construed to mean heirs of the bodies of the children then in esse, it is proper to enquire whether they are susceptible of a different interpretation, without doing violence to any established rules. On the death of his widow, the testator directs the share given to her, with the increase, to return to his estate, "and the whole to be equally divided among his surviving children, or the heirs of their bodies, share and share alike."

It seems to the court, that this provision was intended for such of the children as might survive the tenant for life, and for the heirs of the bodies (or children) of those who might not have so survived. This gives full effect to the term "or," used in its natural sense. When a distribution is directed among his surviving children, or the heirs of their bodies, it is equivalent to saying, among my children who may survive, or the heirs of the bodies of those who may not survive;

for no children could, at that time, have heirs, except those who had not survived.

To give any effect to the alternative expression, and to the latter part of the sentence, it must be construed to refer to the heirs of the bodies of the children who had predeceased the tenant for life.

In Montague v. Nuelea, 1 Russell, 170, Lord Eldon uses this language: "The words cannot be fully satisfied without giving to each some interest." "Here the word is 'or;' both are not to take; but either the parent or the children in the alternative; and though, in many cases, 'or' has been construed 'and,' you must shew an intention requiring that. The natural import is to exclude the one from any participation of that which is given to the other."

It was said, in the argument, that the testator evidently did not look beyond his children, and did not contemplate the contingency of their death, leaving issue. This supposition seems not warranted by a reference to other clauses of the will making provision for his children. In the last clause, the testator thus declares: "All the remaining

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*parts of my personal estate, I leave to be equally divided between my children, share and share alike, as soon as they shall arrive at the age of twenty-one years, or, otherwise, at the day of marriage, which shall first commence; but if either of my children should die before they are of age, or have lawful issue to survive them, then, and in that case, their share so dying, to return to my surviving children, share and share alike." From this clause it would seem that the testator intended a right by survivorship, to attach only in the event that a deceased child had left no lawful issue to survive him. This aids the construction which the parties themselves adopted in making the partition, and which, as far as the court can judge, best comports with the general intention of the testator.

It is ordered and decreed that the appeal be dismissed.

JOHNSON, Chancellor, concurred.

JOHNSTON, Chancellor, absent from indisposition.

Speers, Eq. *322

*ELIZA C. BROWN v. JOSEPH CALDWELL, Executor of Richard S. Brown, et al.

(Columbia. Dec. Term, 1843.)

[1, 2. *Wills* ⟸782.]

Testator, in the first clause of his will, directed that the whole of his estate should be kept together for twelve months, and that the proceeds be applied to the payment of his debts. In the second clause he bequeathed as follows: "I devise that at the expiration of the above-mentioned time, my wife shall have one negro man named Jim, and wife Sarah, with her entire issue. One negro woman, Clarissa, child, and future issue. One negro boy, Shade, the one third of my household furniture, my carriage and horses, to be hers forever. I will, that my boy Jesse, remain with my other property, for five years to come, then to be the property of my beloved wife forever; also, my whole property in the Glenn's Springs, to be hers forever." In the third, fourth and fifth clauses, he gave to his three children, each one third part of his "remaining property;" and in the sixth clause directed that all the property, both real and personal, devised to his children, be kept together until his eldest child arrived at the age of twenty-one, "then to be equally allotted and drawn for by my beloved children."

This provision in the will *held* no bar to the wife's right of dower.

[Ed. Note.—Cited in Bailey v. Boyce, 4 Strob. Eq. 87; Bannister v. Bannister, 37 S. C. 532, 16 S. E. 612.

For other cases, see Wills, Cent. Dig. § 2022; Dec. Dig. ⟸782.]

Before Johnson, Ch., at Newberry, June Term, 1842, from whose circuit decree the facts of the case will be fully understood.

Johnson, Ch. The defendant's testator, in the first clause of his will, directs that the whole of his estate be kept together, for twelve months, and that the proceeds be applied to the payment of his debts. In the second clause, he bequeathed as follows, viz: "I desire that at the expiration of the above named time, my wife, (the complainant,) shall have one negro man, named Jim, and his wife Sarah, with her entire issue. One negro woman, Clarissa, child, and future issue. One negro boy, Shade, the one third of my household furniture, my carriage and horses, to be hers forever. I will that my boy Jesse, (the blacksmith,) remain with my other property, for five years to come—then to be the property of my beloved wife, forever. Also, my whole property in the Glenn's Springs, to be hers forever." In the third, fourth and fifth clauses of his will, he gives to his three children, James L., Sims E. and Martha, each one third part of his "remaining property."

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In the sixth *clause, he directs that "all the property both real and personal" devised to his children, be kept together until his eldest child, James L. arrives at the age of twenty-one, "then to be equally allotted, and drawn for by my beloved children." [1] The bill al-

[1] "Newberry District, South Carolina.

In the name of God—amen. I, R. S. Brown, of the State and District aforesaid, being of sound and disposing mind and memory, but weak in body, and calling to mind the uncertainty of life, and being desirous to dispose of all such worldly estate as God, in his kind providence, hath seen fit to bless me with, do make and ordain this my last will, in manner following, viz:

"Primus.—I desire that my entire property be kept on my place for twelve months to come, and that the proceeds be applied to my debts.

"Secondly.—I desire that at the expiration of the above named time, my beloved wife shall

leges that this provision for complainant, was inadequate, considering the value of the estate, and ought not to be regarded as evidence of the intention of the testator, that the complainant should not have dower in his real estate. The answer, on the other hand, insists, that it was very liberal, the testator being largely indebted at the time of his death. There was no evidence on the point.

The testator died possessed of real and personal estate of considerable value. The bill prays a writ for the admeasurement of complainant's dower in the lands, and for an account of the rents and profits. The leading question is, whether the provision made for her in the will, is a bar to her right of dower.

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*Preliminary to the consideration of this question, it will be necessary to state in relation to the testator's property in the Glenn's Springs, devised to his wife, that a company called the Glenn's Springs Company was incorporated by the Legislature, of which the testator was at the time, or afterwards became, a member. They owned a considerable body of land, within which was the Mineral Spring, called Glenn's, and on which had been erected a hotel for the accommodation of visitors; the testator purchased a lot on the premises, and made improvements thereon for his personal convenience. This was the property, doubtless, intended to be designated, in the devise to his wife of his "whole property in the Glenn's Springs." But it was stated at the bar, and understood to be conceded, that he purchased his interest in the Springs, on credit, and mortgaged it to Glenn, the original proprietor, for the payment—that since his death, the mortgage had been foreclosed, and that the sales did not pay the debt, so that complainant took

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*nothing under that devise. For the general doctrine on this subject, I refer to Gordon v. Stevens, 2 Hill's Eq. Rep. 47, [27 Am. Dec. 445,] in which it is laid down that no provision made by the husband for the wife, will exclude her from the right of dower, unless such an intent is clearly expressed, or arises by necessary implication. It is not expressed in this will, and the question is whether it arises by necessary implication.

It will be implied in all cases where the dispositions of the will are so inconsistent with the wife's right of dower, that they can't both take effect; or if the provision for the wife be so ample, regard being had to the value of the estate, as to excite the belief that the testator could not have intended that she should take both; as where the estate in which dower is claimed, is charged with an annuity for the wife, it has been held that would support the implication, but even that was doubted by Lord Loughborough, if the estate was sufficient to satisfy both. I suppose, too, that it would be implied, where the testator disposed of the residue of his estate specifically. But I have not been able to find any case in which it has been held, that any general disposition of his estate would raise the implication. The direction in this will, that his "remaining property" should be kept together until his oldest child should arrive of age, and then be divided, is the principal circumstance relied on to shew that the testator intended to exclude the complainant from dower. But I can't distinguish between this and the case of Gordon & Stevens, where the direction was to the executor, to sell all the estate, and after paying debts, to distribute the remainder amongst children. If in that case there was nothing inconsistent with the wife's right of dower, because the directions may be supposed to have been given with the knowledge that she would be entitled to it, so in this, the devise to the children, and the directions that the estate should be kept together, may be supposed to have been made with the same knowledge; and if the dispositions of the will in the one case be consistent with the right of dower, it must be so in the other.

The right of dower is amongst the most favored by the law. It is put on the footing of life and liberty, and in looking through

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the cases, one is led almost to conclude, *that common sense and sound reasoning have been violated in giving it effect. But there is less

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have one negro man, Jim, and wife Sarah, with the entire issue; one negro woman, Clarissa, child, and future issue; one negro boy Shade; the one-third of my household furniture; my carriage and horses; to be hers forever. I will that my boy Jesse, (the blacksmith,) remain with my other property for five years to come, then to be the property of my beloved wife forever; also, my whole interest in the Glenn Springs to be hers forever.

"Thirdly.—I will and bequeath to my beloved son James L. Brown, the one third of my remaining property, both real and personal, to be his forever.

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* "Fourthly.—I will and bequeath to my son, Sims E. Brown, one other third, to be his forever.

"Fifthly.—I will and bequeath to my beloved daughter, Martha Brown, the remaining third, to be hers forever."

"Sixthly.—All the property, both real and personal, named in the third, fourth and fifth clauses, to be kept together until the eldest son, James L. Brown, arrives at the age of twenty-one, then to be equally allotted and drawn for by my beloved children.

"And lastly, I do constitute and appoint Joseph Caldwell, my executor of this my last will and testament by me made heretofore. In testimony whereof, I have hereunto set my hand and affixed my seal, this 27th February, eighteen hundred and forty one.

R. S. Brown. [L. S.]

"Signed, sealed, published and delivered as and for the last will and testament of the above named R. S. Brown, in presence of us.

Test. T. J. Brown.
J. A. Renswick.
J. P. Caldwell."

apparent impropriety in it, when it is recollected with what facility the husband may put his intention beyond all dispute, by declaring that the provision made for the wife was intended to bar her right of dower. It is, therefore, ordered, that a writ for the admeasurement of the complainant's dower in the lands described in the pleadings do issue, and that defendant, Joseph Caldwell, do account for the rents and profits.

The defendant appealed from the decision, and moved the court of appeals in equity to reverse it, on the following grounds:

1st. Because the complainant, the widow, is not entitled to take the legacies left to her under the will, which she has accepted, and to claim her dower in testator's lands, but ought to make her election.

2d. Because the executor, Joseph Caldwell, ought not to account to complainant for the rents and profits of the lands, as the will directs, in the first clause, that the "entire property be kept together on my place for twelve months to come, and that the proceeds be applied to my debts." The debts of testator, exclusive of those for which he was surety, exceed twenty-three thousand dollars. The sixth clause requires "all the property, both real and personal, named in the third, fourth and fifth clauses, to be kept together until the eldest son, James L. Brown, arrives at the age of twenty one, then to be equally allotted, and drawn for by my beloved children."

J. J. Caldwell, for the appellant, cited 2 Vesey, jun., 577; 2 Beames, 236.

An annuity charged on leasehold estate is a bar to dower. Cited Lambert on Dower, 69, 70; 3 Bro. Ch. Cases, 355; 2 Johnson's Ch. Rep. 458.

Devise of an annuity, and the use of a house, held a bar to dower. Ambler, 682. Id. 730; 4 Mad. Rep. 119.

Fair, contra, cited Whilden v. Whilden, Riley's Ch. Cases, 205.

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Curia, per DUNKIN, Ch. In affirming the decree of the Chancellor, the court would only add to the authorities cited, the case of Whilden v. Whilden, Riley's Ch. Cases, 205. The testator bequeathed to his wife, one thousand dollars, as soon as the money could be collected. He then directed the whole of his estate, real and personal, to be sold, and the money laid out in bank stock, for the support of his children, until his youngest child should come of age, &c. and then the money to be equally divided among all his children. It was argued that the widow must elect between the legacy and the claim of dower.

Chancellor De Saussure says, "dower is a provision made by law, for the support of the widow. A legacy is a provision made by affection for the better support of the wife. As the right of dower is a clear legal right, an intent to exclude that right, must be demonstrated by express words, or by clear and manifest implication, and in order to exclude that right, the instrument must contain some provision inconsistent with the right to demand dower." After reviewing the authorities, the Chancellor decided that the widow was entitled both to her dower and the legacy.

The appeal court held that the conclusion of the Chancellor was amply sustained by the authorities cited.

The decree of the circuit court is affirmed, and the appeal dismissed.

JOHNSON and HARPER, Chancellors, concurred.

JOHNSTON, Ch., absent from indisposition.

Speers, Eq. *328

*JOHN C. ELLERBE v. THE HEIRS AND LEGATEES OF WILLIAM ELLERBE.

(Columbia. Dec. Term, 1843.)

[1, 2. *Wills* ⇐620.]

Testator provided in his will, that his estate, both real and personal, should be kept together until his just debts were paid, and until the decease of his wife; and further, that his wife, together with his daughter and grand-son, should have "a reasonable and competent support," out of the proceeds of his estate, until his just debts were paid, and during the natural life of his wife.

The reasonable and competent support provided for, held not to mean merely the food and clothing necessary to sustain life, nor any other fixed quantity or allowance, but must depend on circumstances and exigencies.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1438, 1439; Dec. Dig. ⇐620.]

[3. *Wills* ⇐620.]

Where a provision of this kind is made for different persons, the inquiry would be, what is reasonable and competent in the situation of each.

[Ed. Note.—Cited in McFeely v. Gadsden, 2 Strob. Eq. 70.

For other cases, see Wills, Cent. Dig. §§ 1438, 1439; Dec. Dig. ⇐620.]

[4. *Wills* ⇐620.]

There seems to be no other practicable method of construing a bequest for support or maintenance than to mean, that support shall not be wanting. If the legatee's private means are unable to supply it, the deficiency shall be made up out of the testator's bounty.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1438, 1439; Dec. Dig. ⇐620.]

[5. *Wills* ⇐620.]

A different intention, gathered from the terms of a particular will, might lead to a different construction.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1438, 1439; Dec. Dig. ⇐620.]

[6. *Wills* ⇐620.]

The daughter having a sufficient property for the support of herself and child, the bequest could not take effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1438, 1439; Dec. Dig. ⇐620.]

[7. *Wills* ⟸620.]
The argument that the grand-son had no property of his own, and, therefore, came within the scope of testator's bounty, not sustained.
[Ed. Note.—Cited in Rhode v. Tuten, 34 S. C. 502, 13 S. E. 676.
For other cases, see Wills, Cent. Dig. §§ 1438, 1439; Dec. Dig. ⟸620.]

[8. *Wills* ⟸620.]
There seems to be no instance of a mother of ability to maintain her children, though having no property themselves, who has been reimbursed for doing so.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1438, 1439; Dec. Dig. ⟸620.]

Before Johnson, Ch., at Cheraw.
Bill for account, partition and relief.
The bill in this case was filed by the executor of Wm. Ellerbe, for account, partition and relief, and sets forth, that William Ellerbe departed this life, having first duly made and executed his last will and testament. So much of which as is material to the understanding of the question made in this case, will be found in the circuit decree of the Chancellor.
That he left a widow, Elizabeth Ellerbe, and the following named children, to wit: Thomas C. Ellerbe, Mary Ellerbe, wife of Samuel Spencer, Harriet Ellerbe, the wife

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*of William Cole, Obedience Ellerbe, wife of Zachariah Ellerbe, Michael C. Ellerbe, William C. Ellerbe, Elizabeth E. Ellerbe, and John C. Ellerbe. That William C. Ellerbe administered upon the estate of the testator, cum testamento annexo. That upon the death of William C. Ellerbe, John C. Ellerbe, the executor named in the will, was duly qualified as executor and entered upon and continued in the trust to the time of the filing of this bill. That William C. Ellerbe left a widow, and Allen Ellerbe, Wm. Ellerbe, Robert Ellerbe and Napoleon Ellerbe, his heirs at law. That Elizabeth Ellerbe, the widow of William Ellerbe, complainant's testator, departed this life, having first duly made and executed her last will and testament. That William Ellerbe, the testator, in his life-time sold a tract of land to William Gullege and Obadiah Gullege, but did not execute titles for the same. That John C. Ellerbe, the executor, managed the estate to the best of his ability, keeping the same together until the death of Elizabeth Ellerbe. That, authorized and empowered by the will aforesaid, the complainant sold the entire estate, real and personal, upon the terms directed by the will.
The bill prays that complainant may settle his accounts in this court, and that partition may be made, and so forth.
To this bill, the defendant, Elizabeth E. Ellerbe, one of the children of William Ellerbe, the testator, filed her answer, (E. B. C. Cash, the grand-child, being a minor, answered by guardian, ad litem, submitting his rights,) not objecting to the material facts and allegations in complainant's bill, and consents that partition be made, as sought by the bill, of the estate of William Ellerbe, after the payment of her claim under the third clause in the last will and testament of her father, William Ellerbe. Avers, in her answer, that she has received but a very inconsiderable part of said claim, and now claims such amount as she may be entitled to receive under the clause aforesaid, in the will aforesaid, in addition to her equal and distributive portion of said estate.
Upon a reference before E. A. Law, Commissioner, on the question raised by the answer of Elizabeth E. Ellerbe, the following testimony was offered.

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*Col. D. S. Harllee, sworn, says he was present when the estate of Capt. William Ellerbe was sold. Witness was asked what would be a reasonable and competent support for Elizabeth E. Cash and E. B. C. Cash, out of the estate of testator, having reference to the value of the estate? The question was objected to. Objection overruled. Witness thinks that one thousand dollars would be requisite to support them in Cheraw; that is, to furnish every thing, including house rent, negro hire, and feed of servants and horses, and clothing.
The old lady died in 1841. The estate owned upwards of fifty negroes, a river plantation, and grist and saw mills. Witness thinks income of the plantation ought to have been 100 bags of cotton, at an average value of $3,000.
Board at taverns in Cheraw, averages $15 per month, washing not included.
Witness thinks that $15 per month, would be sufficient to furnish the raw material of provisions for two persons, that is what they would eat. For the whole time from testator's death, Mrs. Cash and her son's clothing would be worth, on an average, if making is included, $175 per annum. Young Cash was eight or nine years old when his grand-father died. He is now nineteen or twenty years of age. If making of the clothing is not included, it would not exceed $150. There would be a gradual increase in the expense of clothing for the young man. During the latter part of the time witness knows that the expense of clothing has exceeded what he has given as the average expense. Mrs. Cash lived eighteen months at her mother's, who lived at the family residence, as she, Mrs. Cash, informed witness. She also said she never received any thing towards a support, but board for herself and son, and that only for eighteen months. She says she lived at Cheraw for some time after the old man's death. She has not lived there since December, 1831. She said she lived two years, or near two years, after she left her mother's, at Buck Springs. She there became the wife

of James Ellerbe, and removed to Ellerbe's place, and has lived there ever since. While at Buck Springs, she lived on a plantation of her own, and also since her marriage she has lived on her own plantation.

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*If Mrs. Ellerbe and her son had lived in the country, witness thinks that if 25 per cent. was deducted from his estimate of what was necessary to support them in Cheraw, it would be a fair estimate of necessary expenses, excluding clothing expenses, which would be less in the country. If every thing were to be bought in Cheraw and the country, they could be got as cheap in Cheraw as in the country.

Mrs. Cash's means of living, independent of her interest in the estate, were limited, previous to her marriage with Ellerbe, compared with what they are now. Her marriage with James Ellerbe increased her means very much. She had, previous to her marriage, a small plantation, and ten or twelve negroes, as witness supposes. She was married, witness thinks, in the early part of the year 1835. While Mrs. Cash lived with her mother, they both dealt at witness's store, and they had separate accounts. What Mrs. Cash bought she either paid for it, or it was charged to her separate account. Witness's estimate of house rent in Cheraw, for Mrs. Cash, is $100. The hire of two servants, (the number in witness's estimate,) feed and clothing, would be worth $250. The furnishing a horse and gig, $100. Physician's bills, at Cheraw, $50. In the country it would be about the same. The old man died in May, 1850.

C. D. Wallace, sworn, says that he thinks there is very little difference in the expense of living in Cheraw and in the country. The following is witness's estimate of necessary expenses of Mrs. Cash and her son, in Cheraw:

Two Horses	$200
Clothing	175
Three servants	150
House Rent	150
Sugar, Coffee and Tea	60
Bacon	75
Butter	15
Flour	15
Meal	30
Clothing Servants	25
Pin Money	50
	$945

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*Witness thinks there would have been no difference in the expense, whether the articles necessary for Mrs. Cash's support had been bought in Cheraw, or sent to her from the plantation of the estate. X Witness thinks his estimate of expenses is fair, even if the supplies were made on the plantation.

William Gulledge, sworn, says he was well acquainted with testator in his life-time, and his manner of living. He was not extravagant in his living, but kept a good table. The board and expenses of living of Mrs. Cash and son, at the family residence, would not have been more than half as much as it would at Cheraw. Witness overseed for Capt. Ellerbe when Mrs. Cash lived at Cheraw, before the old man's death. The old man frequently sent meal. Sometimes the boy came from towards the old man's house, having meat, (he did not know where the meat came from,) and as he came to the mill for meal, he having charge of the mill, supplied the boy with meal, about 1 1-2 or 2 bushels a week. Generally the boy carried meat when he got meal. Mrs. Cash did not keep a horse in the old man's life time; but Capt. Ellerbe sent her a horse whenever she wanted one, and sent her his carriage when she wanted it. She had possession of negroes which did not belong to the estate. House servants at her place in Cheraw. Mrs. Cash, in her father's life time, was very economical in her clothing. Thinks $50 would have fully clothed her and her son. Witness did business for the family eleven years, managing the mill and plantation. He was general superintendant of the old man's business. Witness thinks it would not take more than $100 to supply old Mrs. Ellerbe with board and clothing per annum. The same would have supported Mrs. Cash, and the same her son. The same carriage and horses were kept on the plantation after the old man's death, that were there before, but does not know whether Mrs. Cash used them after the death of the old man. The old man had a plain stick bodied gig when witness left him. Witness left in January, and the old man died in May after. Mrs. Cash had a gig when her husband died. A very good gig. A first rate one. It had a top to it.

X Board in the country is worth about $8

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per month. *Witness says he did not say it was worth half as much to live in the country, as in Cheraw. Witness says that the old woman and Mrs. Cash dressed a good deal in homespun, when they lived on the plantation. The old man gave Mrs. Cash some negroes when she married Cash. They afterwards came back, and were always called Mrs. Cash's negroes. It would have cost each of the family of Capt. Ellerbe, to live as they did $8 per month. As the family lived $100 would support each one, and furnish them with clothing per annum.

Obediah Gulledge, sworn: say she was acquainted pretty well with Capt. Ellerbe in his life. Often worked for him. Has heard the statement of William Gulledge, foregoing. Thinks his statement about the worth of board correct, that is, he thinks $8 per month is sufficient in the way they lived. He does not think $100 per annum enough for both board and clothing.

Capt Ellerbe kept a good table, and a plenty of every thing. Often eat with him. Always saw a plenty, and of that which was

good. The fare was plain and substantial and good, but nothing extravagant. Thinks it would take 15 or 20 or 25 dollars for the clothing of Mrs. Cash, per annum. For her son, at the time of the old man's death, when he was small, it would not take so much, but as an average of the whole time, thinks that his board and clothing would be as much as his mother's. Does not think it would take more than $100 per annum to support the old lady (testator's wife) in board and clothing in the way in which she lived. Thinks that Mrs. Cash would have taken more, both in board and clothing, than her mother. When she moved to her place at Buck Springs, she continued to live pretty much as she had lived whilst with her mother. Witness has been at her house while she lived at Buck Springs.

X Witness has never calculated what it cost to support his own family. His family are not always alike. They vary as to numbers. He can't tell what it costs to support his family per head. He lives a great deal cheaper than Capt. Ellerbe did. Has had to provide as much as $100, to the head, in his family, but it was not all consumed by his family, but by visitors and friends. Witness

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entertained more *company than Capt. Ellerbe. Witness thinks still that his estimate before given is correct. He, witness, would not incur more than half of that amount for his family, in the way he lived. Thinks that Mrs. Cash could have lived about as cheap away from her father's as she did there. It would cost no more to provide for one than for five, if they were all the same size and age.

When he says he entertained more company than Capt. Ellerbe, he refers to his keeping the jail of Chesterfield, where he entertained the prisoners committed to his charge. He ceased to be jailor last October. Was jailor two years, and at a former period three years.

Mr. Strother, sworn: says he knew Capt. Ellerbe and family. Would suppose the estimate of the expense of living of Mrs. Cash and her son, made by Mr. Gulledge first examined, was correct, speaking in reference to board. In the old man's life-time, board and clothing for Mrs. Cash and her son, would not have been worth more than $100 per annum, as the old man's family lived, and they lived plain but plentifully. Witness knows that Capt. Ellerbe had a gig, and frequently saw Mrs. Ellerbe riding in a gig while she lived at Cheraw, but does not know that it was the same gig. She might live in the country and board for $100 per annum. Says that the items of expenses mentioned by Messrs. Wallace and Harllee are reasonable for persons living in the style supposed by them. Mr. Gulledge's estimate of the expense of living in the manner Capt. Ellerbe's family lived, is fair for the first part of the time, but it must have been more the latter part of the time. Does not think it could have cost the old man more than $500 to support himself, his wife, Mrs. Cash and her son, per annum. Capt. Ellerbe was very economical, he lived plainly, but plentifully; lived very much within himself. He is pretty certain that the horse Mrs. Cash used while she lived at Cheraw and at Buck Springs, was one of Capt. Ellerbe's carriage horses. That she drove the horse in a gig.

Col. Harllee, again called: says old Mrs. Ellerbe and Mrs. Cash dealt at his store a good deal. They generally got good clothing. He has seen Mrs. Cash dressed in a way in which her outer garments must have cost $25.

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*The Commissioner reported as follows, viz:

Commissioner's Report.

The Commissioner, to whom it was referred to enquire into and report upon the support to which Mrs. Elizabeth E. Ellerbe and her son E. B. C. Cash, are entitled, under the last will and testament of William Ellerbe, begs leave to report, that he has had the subject under consideration, and has examined a number of witnesses upon the matter referred, whose testimony is herewith submitted. The commissioner is of the opinion that the will of William Ellerbe, in the third clause, contains a patent ambiguity, which may be explained by parol testimony. In order to ascertain what the testator meant by the expression, "a reasonable and competent support," it is natural and proper to refer to the standard of expenditure which he had himself established in the support of his own family. His own acts afford the surest indications of the meaning he attached to the above expression; at least, they afford safer guides for interpretation or construction, than the varying opinions of any number of witnesses, as to what is a reasonable and competent support. The Commissioner is also of opinion, that the word "support" was intended to include clothing as well as boarding. He, therefore, recommends that Mrs. Elizabeth E. Ellerbe and her son, E. B. C. Cash, be allowed each one hundred dollars annually from Nov. 1831, with interest on the same up to the time of old Mrs. Ellerbe's death, in 1841, nothing being allowed for their support during the eighteen months, from May 1830, to November, 1831, when they lived with old Mrs. Ellerbe. This allowance is intended to include only boarding and clothing, taking the estimate of those witnesses who testified as to the value of board, or cost of a support, according to the style and manner of living in the family of the testator previous to his death.

In the course of the reference, the question was made, as to whether a part of this claim for a support was not barred by the

statute of limitations. I held that no part of it was barred.

All of which is respectfully submitted.

E. A. Law, Comm'r. Equity.

28 May, 1842.

Upon this report exceptions were filed by
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the solicitors *of complainant, and defendants. Elizabeth Ellerbe and E. B. C. Cash, and E. M. Ellerbe.

Exceptions.

The complainant excepts to the report of the commissioner in the above case in relation to the claim of Mrs. Elizabeth E. Ellerbe and son, for support under the 3rd section of the will of William Ellerbe, deceased, on the following grounds, viz:

1st. Because they were not entitled to any support out of testator's estate after Mrs. Elizabeth E. Ellerbe and son ceased to reside at the family residence with the widow of testator; or, at all events, after said Elizabeth E. Ellerbe married James Ellerbe.

2d. Because the Commissioner should not have allowed interest.

Hanna, Solicitor of Complainant.

The defendants, Elizabeth Ellerbe and E. B. C. Cash, except to the report of the commissioner in the following particulars:

1st. Because the Commissioner decides that the third clause of testator's will contains a patent ambiguity, and may be explained by parol.

2d. Because the support allowed by the commissioner, being for board and clothing, is wholly inadequate, and against the testimony in the case.

3. Because the commissioner decides that the support to be allowed to E. E. Ellerbe and E. B. C. Cash, is to be regulated by the standard of testator's expenditures.

4th. Because the term support implies more than board and clothing.

5th. Because the credit for the support of E. E. Ellerbe and E. B. C. Cash, of eighteen months, is allowed, as if furnished from May 1830, to November, 1831, whereas it was furnished from May, 1832, to November, 1833.

6th. Because the commissioner allows nothing for the support of E. E. Ellerbe and E. B. C. Cash, from May, 1830, to November 1831.

7th. Because the amount allowed for support, should be regulated by the expense of living in Cheraw.

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*8th. Because the commissioner, in his report, allowed nothing for clothing during the eighteen months in which boarding was furnished to E. Ellerbe and E. B. C. Cash.

T. J. Withers, Solicitor.

The defendant, Mrs. Ep. Sanders, and her minor children, except to the report of the commissioner in said case:

1st. Because there were no proceeds of the estate which could have been applied to the support of the said Mrs. Cash, now Ellerbe, and her son.

2d. Because the testator never provided or intended that their interest under his will, should be applied to the said support. And the sum reported by the commissioner would abate their interest under the said will.

3. Because the said Mrs. Ellerbe and son, were not entitled to any support out of testator's estate after they ceased to reside at the family residence with the widow of testator; or, at all events, after said E. E. Ellerbe married James Ellerbe.

4th. Because the commissioner should not have allowed interest.

F. J. Moses, Solicitor.

These exceptions were argued before Chancellor Johnson, at Sumter, who gave the following decree:

Johnson, Ch. The original object of this bill appears to have been for a settlement of the estate of the complainant's testator, but the only question now is, whether any, and what, allowance ought to be made for the support of the testator's daughter, Elizabeth E. Cash, and her son, E. B. C. Cash, under the provisions of his will.

In the first clause of the will, the complainant is appointed his executor. The second and third clauses, out of which the question in controversy arises, are as follow: "2d. It is my will that my estate, both real and personal, be kept together until my just debts are paid, and until the decease of my wife, Elizabeth Ellerbe. 3d. It is my will that my wife, Elizabeth Ellerbe, and my daughter, Elizabeth E. Cash, and my grand-
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son, E. B. C. Cash, *have a reasonable and competent support out of the proceeds of said estate, until my just debts are paid, and during the natural life of my wife, Elizabeth Ellerbe." He then goes on to give some specific legacies, and among other things, a house and lot in Cheraw, to his daughter, Elizabeth E. Cash. The residue of his estate he directs to be kept together until the death of his wife. The annual profits, after paying debts, to be divided amongst his wife and children. At her death, the whole to be sold and the proceeds distributed amongst certain of his children.

The testator had a considerable estate, consisting principally of land and negroes, the annual proceeds of which, according to the estimates of some of the witnesses, might be estimated at an hundred bales of cotton and provisions. Elizabeth E. Cash was a widow at the death of testator, and lived in the house devised to her by the will. She had a horse, servants, and a plantation, and a few slaves that were employed on it. On the death of the testator, she went with her child to live with her mother, who resided at the family mansion, and remained there about eighteen months. She then removed

to her own plantation, and not long after intermarried with James Ellerbe.

The testator's widow died in 1841, but it does not appear that the defendant, Elizabeth E. Ellerbe (late Mrs. Cash,) and her son, E. B. C. Cash, derived any assistance or support from the estate of the testator, from the time they left the mansion house until the death of the widow, and they now claim to be paid what their support may have been reasonably worth, from the death of the testator to the death of his widow.

The matter was referred to the commissioner, and in his report, he recommends that each should be allowed one hundred dollars, annually, from the time they left the mansion house until the death of the widow, with interest thereon.

This report has given rise to various exceptions on both sides. The only one, however, which it is thought necessary to consider, is made on the part of the other residuary legatees of the estate, and denies that Mrs. Ellerbe and her son are entitled to any thing.

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*The case of Whilden v. Whilden, decided in Charleston, at February term, 1837, reported in Riley's Chancery Cases, 205, is decisive of this question. There, the testator, by his will, after giving a pecuniary legacy to his wife, directs that all the residue of his estate, real and personal, should be sold, and the proceeds invested in bank stock, for the support of his children, until his youngest child should come to the age of twenty-one, or get married, and then the whole to be divided amongst his children. The testator had two families of children, by different marriages. Those by the first marriage, had attained full age, and were, to a limited extent, provided for by the testator, in his lifetime. Those of the last marriage were all minors, and were not otherwise provided for, than by the will. One of the questions was, whether all the children were entitled to be supported out of this fund, or the minors, only. And it was held, on the authority of Raulins v. Goldfray, 2 Ves. 440, and other cases cited, that provision for the support of children, made by a will, was only in aid of their own means, and that these, no matter from what sources they were derived, must be exhausted before the fund can be touched, and that quantum of support must be measured by the means and necessities of the children severally.

A support, on the most latitudinarian interpretation of the term, can't extend further than the necessaries and conveniences of life; and it will hardly be believed that any one would think of providing them for another, who had ample means of his own. If a positive and certain benefit was intended, the donor would put it in some other form, and it would seem to follow, necessarily, that a provision for a support was only intended to take effect when the circumstances of the beneficiary should render it necessary.

At the time the testator made his will, his daughter was a widow, and her son an infant, and so far as I can collect from the evidence, her means and income were inconsiderable, and the testator might well have reasoned that they might not prove sufficient for their support, and that he intended by this provision, to provide for that contingency. That it was not necessary, is shewn by the fact, that they have never

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made any demand on the executor *for any aid from this source, and have been supported and maintained without it. Nor is there any thing in the evidence, from which it can be collected that Mrs. Ellerbe and her son, or either of them, were ever under the necessity of resorting to this fund for the purpose of their support.

It is, therefore, ordered and decreed, that this demand be not allowed in the settlement of the estate of the testator.

From this decree, the defendants, Elizabeth E. Ellerbe and E. B. C. Cash, appealed, upon the grounds following, to wit:

That his Honor erred in disallowing the claim made by the answer of these defendants, for a reasonable and competent support, out of the estate of testator.

1st. Because, on a fair construction of the words of the will, the testator's intention is manifest, that his estate should be charged with such support of defendants, Elizabeth E. Ellerbe and E. B. C. Cash.

2. Because the testator well knew that these defendants had property, independent of his estate, sufficient for their necessary support, and must, therefore, by the clause of his will in question, have intended to relieve that property to the amount of a reasonable and competent support to be furnished out of his own estate, and not merely in aid of their means.

These defendants also insist, before this court, upon the exception filed by them, to the report of commissioner, fixing the amount of the reasonable and competent support claimed by them.

McIver and Withers, for the appellants.

Hanna, Moses and Dargan, contra.

McIver cited Riley's Ch. Ca. 265. Withers referred to 1 Con. Ch. Rep. 397; 1 Russel, 590.

Curia, per HARPER, Ch. The principal question in this case, is not one of construction, as seemed to be thought in argument, but of fact. No doubt a reasonable and competent support is given by the will, both to

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the testator's *widow, and to his daughter and grand-child. But this reasonable and competent support, does not mean merely the food and clothing necessary to sustain life, nor any other fixed quantity or allowance,

but must, as contended for on the part of the appellant, depend on circumstances and exigencies. If, as in the case of Whilden v. Whilden, a testator leaves a fund for the support of a large family, of whom one is an infant, one a boy at school, one at College, you would not give an equal allowance for the support of each of these. The enquiry would be, what was necessary, or suitable and proper, or what amounts to the the same thing, reasonable and competent, in the situation of each.

But suppose, as in the same case, that you should find one established in the world of a large fortune, perhaps larger than that of the father, living in a style of fashion and expense, how would you make an allowance for his support? One would hardly think of making him such an allowance as should supply necessary food and clothing. But beyond this, there is no limit but such a provision as will enable him to live in the style and manner in which the testator knew him to be living, so as to exempt his private fortune from that expense, and enable it to accumulate. But this would be to defeat the purpose for which support was provided.

In the case before us, it is contended on behalf of the appellant, that she should have such an allowance as would support her in the place and manner she had been accustomed to live. There seems to be no other practicable method of construing a bequest for support or maintenance, than to mean, that support shall not be wanting. If the legatee's private means are unable to supply it, the deficiency shall be made up out of the testator's bounty. Of course, a different intention, gathered from the terms of a particular will, might lead to a different construction. In the present case, the widow, so far as appears, had no property of her own. Her support, therefore, must, of necessity, have been provided for, altogether out of the testator's estate. But it is agreed that his daughter had sufficient property for the sup-

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port of herself and child, and *there was no room for the bequest for the support to take effect.

It was argued, with respect to the grandchild, that he had no property of his own, and must, therefore, come within the scope of the testator's bounty. The claim, however, is not on his behalf, but that of his mother. He has, in fact, been supported by her, and the claim must be similar to that of one who has advanced his money to fulfil the object of a trust, and comes to be reimbursed of the trust fund. But I have known no instance of a mother, of ability to maintain her children, having themselves no property of their own, who has been reimbursed for doing so. It is said, generally, that parents of ability are bound to maintain their children, though a difference is indicated, where the mother has entered into a second marriage. 1 Bl. Com. 446. Reeve dom Rel. ch. 9. In Volentine v. Bladen, Harp. 9, it was held, that the mother might maintain an action on a contract made with her for the work and labor of her son. But if she be entitled to the services of her child, she must be bound for his maintenance. The decree is affirmed.

JOHNSON and DUNKIN, Chancellors, concurred.

JOHNSTON, Ch., absent from indisposition.

Speers, Eq. *343

*JOSEPH REID v. W. T. CLARK and Wife.

(Columbia. Dec. Term, 1843.)

1. Bill filed by defendants against J. R., an executor, and others, for an account. At the time of filing the bill, J. R. was resident in another State, but upon being informed of the fact, returned, for the purpose of making a final settlement of the estate of his testator. At his request, the guardian of testator's minor children, who also acted as the agent of their mother, together with defendant, C. and another, who had intermarried with testator's daughter, and who constituted the parties interested in the settlement, met; and upon a statement of the accounts of J. R., with vouchers produced by him, the result was, that together with the property received and purchased by the testator's widow, which belonged to the estate, and monies advanced her by J. R., as guardian of her children, she having been the former guardian, and having relinquished it on another marriage, he was in advance to her, over and above all the funds of the estate which came into his hands. The widow, before her last marriage, had conveyed to her successor in the guardianship, all the property of which she was possessed, in trust, for the payment of her debts, and particularly her liability to her children. The account stated by J. R., was filed in the Ordinary's office, as a return of his transactions with the estate, which he regarding as satisfactory to all parties, and supposing no further proceedings would be had in the cause, left the State. Afterwards, a decree was obtained against him alone, upon which he was sued, in the State where he resided, and on his return to this State, arrested on a ca. sa.

[2. *Executors and Administrators* ⟸473, 474.]

The fact that the mother, as the guardian of her children, had received upwards of $5000, ascertained by the settlement, and known to defendant, C. for which no credit was allowed in the report of the Commissioner, would not, of itself, entitle complainant to relief, had he neglected to make the necessary defence, when he might have done so; but as it was apparent from the testimony, that complainant had reason to believe that defendant assented to the settlement, and intended to abide by it, the court were of opinion, that the decree obtained by defendant, was not a bar to a bill for relief on the part of complainant.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2057; Dec. Dig. ⟸473, 474.]

[3. *Equity* ⟸446.]

It is not essential in an original bill, in the nature of a bill of review, containing a general allegation of fraud, that the facts stated, should be particularly characterized as fraud-

ulent. Fraud is a deduction from facts, and however they might be characterized, the conclusion must be the same. Facts, fair and honest in themselves, could not be converted into a fraud, by the mere allegation; nor could facts, fraudulent in themselves, be transformed into fair dealing by so characterizing them. Fraud is the general foundation of an original bill, in the nature of a bill of review;

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but such bill *may be maintained, although there is no actual fraud. Coker v. Bevis, 1 Ch. Ca. 61.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1090; Dec. Dig. ⟸446.]

[4. *Equity* ⟸442.]

The mode of proceeding by bill of review, applies only in two cases. 1st. When there is error apparent in the record; and 2d. when new matter which would affect the rights of the parties has been discovered subsequently to the hearing. Story's Eq. Pl. 326—7. Neither of which entered into this case.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1065–1070; Dec. Dig. ⟸442.]

Before Johnson, Ch., at Union, June Term, 1843.

Johnson, Ch. The late Jethro L. Reid appointed the complainant and Dr. L. B. Askew, the executors of his last will and testament, both of whom qualified. He died in 18—, leaving a widow, Jemima, (who has since intermarried with Jesse Maybin) and three children: the defendant, Nancy, who has since intermarried with her co-defendant; Teresa, who has since intermarried with Maybin, and Jethro Reid. At the time of his death, the children were all infants, and Jemima, their mother, was appointed their guardian; and upon her marriage with Jesse Maybin, she relinquished the guardianship, and Robert Moorman, her son by a former marriage, was substituted in her place. Before her marriage, she had conveyed, by deed, to the said Robert Moorman, all the property of which she was possessed, consisting, amongst other things, of twenty-six negroes, in trust to pay her debts, and particularly her liability to her children, of whom there were two families. Those before named, and the said Robert Moorman, and a daughter, since intermarried with one Reuben Chick, by a former marriage with Thomas Moorman.

In April, 1840, the present defendants filed their bill in this court, against the complainant and Dr. Askew, as executors of the testator, and against the complainant, Jesse Maybin and his wife, as guardians, praying an account of the estate of the testator. Pending that suit, Dr. Askew died, and the bill was revived against his executors. The matters of account were referred to the Commissioner of the Court, and on the coming in of the report, at June Term, 1842, a decree

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was made against complainant *alone, for $4013.32, as the distributive share of the surplus on the estate of the testator.

The complainant seeks in his bill, to have that decree opened, and to be let into an account of his transactions with the estate of the testator; and as grounds for relief, he states, that at the time the original bill was filed, he was, and still is, a resident of Mississippi; and hearing that the bill had been filed, he came to this State for the purpose of making a final settlement of the estate. That, at his request, Robert Moorman, the guardian of the minor children, who also acted as the agent of his mother, Jemima Maybin, the defendant, W. T. Clark, and Reuben Chick, met him at Union Court House for that purpose, in October, 1841. That calculations were made, and an account stated from vouchers produced, which in the result showed that, together with the property received and purchased by Mrs. Maybin, which belonged to the estate, and monies advanced by complainant to her, as guardian of her children, he was in advance to her $811.00, over and above all the funds of the estate which came into his hands; and that this account was filed in the Ordinary's office, as a return of his transactions with the estate. That defendant, W. T. Clark, was present at the settlement, and complainant understood that all the parties Clark amongst them, assented to it. And he states, as evidence that Clark participated in, and assented to, the settlement that he had been obliged to dispose of some bonds which he had taken for the purchase money of the property, sold at a considerable discount, to raise money to pay pressing demands against the estate; and that he submitted to them, whether they would or would not consent, that he should be charged with no more than he had already received; and that they all agreed, Clark amongst them, that he should not. That in the confident belief that the settlement so made, was satisfactory to all the parties, and that no further proceedings would be had against him, he returned to Mississippi; and was wholly ignorant of any further proceedings in the cause, until after the decree was obtained. That he has since been sued on the decree, in Mississippi; and on his return here, some time ago, he was arrested on

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a ca. sa., issued out of this *court, for the same cause. He prays for an injunction to restrain these proceedings, which has already been granted by the Commissioner of the court; and amongst other things, that the decree may be opened, and that he may be let into an account of his management of the estate of his testator.

The defendant, W. T. Clark, in his answer admits that he was present at the time of the settlement referred to in the bill, at the request of complainant, communicated through Robert Moorman, and understood that it was intended to make a settlement of the testator's estate, and that Robert Moorman sat

down to make a settlement of the assets of the testator; and before that settlement was completed, he left the place and returned home. He believes, however, that the settlement was returned to the Ordinary's office; but he denies, positively, that he in any manner participated in, or consented to, any portion of the settlement made; neither had the said Robert Moorman any power or authority to enter into any settlement or statement with the complainant, touching his or his wife's interest. In said statement some vouchers were exhibited by complainant, but to what extent he does not know; and some calculations were made, but defendant had nothing to do with them or the settlement; and uniformly said, when speaking of it, that if complainant wished to make any settlement with him, he must do it with his attorney; and he states, that he never regarded the settlement made as binding on him, and always intended to prosecute his claim to a final settlement and decree of the court unless adjusted by complainant with his attorney. And that he never gave complainant the least cause to believe that the cause would be otherwise disposed of, directly or indirectly. He concedes, however, that the complainant is entitled, and he is now willing that he should now be credited with so much of the debts of the testator, paid by complainant, as was chargeable on his wife's interest in the estate, which was not allowed him in the decree, amounting to 8 or $900; and states that he had instructed his attorney in Mississippi, who brought the suit there on the decree, to allow it to him. He insists that the decree is conclusive, and that it is a bar to this bill.

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*That the report of the Commissioner, on which the decree was predicated, was made in the absence of the complainant, and without any actual accounting, without even an answer, would, of itself, furnish a very strong presumption that injustice had been done to the complainant. The concession of the defendant that he was entitled to be credited with money paid on account of the debts of the estate, not included in the report of the Commissioner, is another evidence of it. And the proof is very satisfactory, that together with the property received by Mrs. Maybin, on a partial partition of the estate, the purchases made by her at the sales of the estate, and monies advanced by the complainant, she had received more than $5000, as the guardian of her children, of whom the defendant, Mrs. Clark, was one; and that fact, ascertained by the settlement, was known to the defendant, W. T. Clark, and yet no credit for it is allowed in the report of the Commissioner.

That, of itself, would not be sufficient to entitle the complainant to relief, for if he wilfully neglected to make the necessary defence, when he might have done so, he would be forever concluded; and the case turns on the question, whether the complainant had reason to believe that the defendant assented to, and intended to abide by, the settlement made in 1841.

The evidence is, that the parties concerned, met for the purpose of settling the accounts of the complainant with the estate of the testator. The calculations were made, and the account stated, by Robert Moorman, the guardian of two of the children, and the agent of Mrs. Maybin, his mother, he being a business man and accustomed to accounts. It commenced in the evening, and continued until the evening of the next day. The defendant did not, himself, sit down to state the account, or particularly examine the vouchers, but he was generally present, and might have done so; and when he answered that he had no participation in it, he had, probably, forgotten that he consented that the complainant should not be charged with the loss sustained by the sale of the bonds. He consented, too, that the complainant should be credited with a medical account paid to

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Dr. Bobo, for which he had no vouch*er. He remained there until late on the second day, and until after the account was fully stated; and although it was not finally closed until the next day, Robert Moorman testified that it was left open only for the purpose of examining some of the vouchers to be procured by complainant, which he did; and the only alteration made in it afterwards, was the addition of some charges against the complainant, which had been omitted; and the defendant, Clark, went away without expressing any dissent or disapprobation to any one item in the account, and there is not a tittle of evidence to show that he ever at any time, directly or indirectly, communicated to the complainant any dissatisfaction as to the statement of the account, or the result. That he knew what the result was, and the manner in which the account was made up, there cannot be a doubt. He was present at the settlement, as before stated. He knew that the account was filed in the Ordinary's office, and it was from that origin, and out of the same file, he obtained evidence to charge the complainant on the reference before the Commissioner.

The circumstances taken together, were, I think, well calculated to induce the complainant to believe that no further proceedings in that cause would be had against him. He had shown, on the settlement, that the whole of the estate had passed out of his hands, into the hands of Mrs. Maybin, the mother and guardian of Mrs. Clark; and he had left the vouchers to establish it, in the hands of her brother. And there is much reason to believe he availed himself of the absence of the complainant, and his ignorance that the suit was going on, to obtain an advantage over him. He agreed with the execu-

tors of Dr. Askew, that he would not ask a decree against them; and in that, probably, there was nothing wrong, as it seems to be conceded, that nothing remained in his hands. But he asked no decree or account against Mrs. Maybin, the person more immediately responsible to him; having, as he must have had, the best reason to believe, that whatever there was of the estate to be distributed, was in her hands, and that she had conveyed to Robert Moorman a large estate, charged with the payment of it.

If the defendants have obtained an advan-

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tage over the *complainant, it would, under the circumstances, be an abuse of the powers of the Court, to suffer them to retain it, and especially as no injury can result to them from a fair and full investigation of the accounts. It is, therefore, ordered and decreed, that the decree obtained by the defendant against the complainant, referred to in the proceedings, do stand as a security for any sum (if any) that may be found due to the defendant, on a final account, and the decree of this Court; and that the same be opened, and the complainant enter into an account of his administration of the estate of his testator de novo, and that the Commissioner of the Court do state and report the account accordingly.

The defendants appealed in this case, on the following grounds, viz:

1. Because the complainant is concluded by the decree, in the case of W. T. Clark and wife, against the present complainant and others, and the plea in bar of the record and proceedings in said case, is a bar to the present bill.

2. Because no injunction ought to be sustained against a final decree of this Court, upon the case made by the bill and answer.

3. Because, from the case made by the pleadings and evidence, the decree is erroneous, and ought to be revised.

4. Because the bill cannot be sustained upon any rules or principles of equity.

Herndon, for the appellants. Dawkins, contra.

Curia, per JOHNSON, Ch. In the argument in support of this appeal, the grounds principally relied on are,

1. That this is an original bill, and cannot, therefore, be sustained as a bill of review.

2. That it cannot be sustained as an original bill, in the nature of a bill of review, because fraud is neither charged or sustained by the evidence.

It has not been attempted to sustain this proceeding as a bill of review. That mode of proceeding applies only in two cases.

1. Where there is error apparent in the record; and

2. When new matter which would affect

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the rights *of the parties, has been discovered subsequently to the hearing. Story's Eq. Pl. 326—7; neither of which enter into this cause.

The bill is in its form and substance, essentially an original bill, in the nature of a bill of review. It contains the general allegation of fraud, but does not particularly characterize the facts stated as fraudulent, nor is that essential to the form of the bill. Fraud is a deduction from facts, and however they might be characterized, the conclusion must be the same. Facts, fair and honest in themselves, could not be converted into a fraud by the mere allegation; nor could facts, fraudulent in themselves, be transformed into fair dealing, by so characterizing them. Fraud is the general foundation of an original bill, in nature of a bill of review; but such a bill may be maintained, although there is no actual fraud, as in Coker v. Bevis, 1 Ch. Ca. 61. Where the court decreed the foreclosure of a mortgage, unless the defendant should pay the money in a certain time, with which the defendant was unable to comply, from inevitable circumstances, and without any wilful default, Lord Redesdale granted relief, not so much on the ground of fraud, as on the special circumstances. See Story's Eq. P. 342, note 1. So much for the pleadings.

The argument has not operated to change the views I entertained on the circuit, as to the conclusion to be deduced from the facts proved, and if, in the decree, they are not characterized in strong and harsh terms, it was because it was thought no one could read them without coming to the conclusion, that the defendant had taken advantage of the absence of complainant, to obtain a most unconscientious decree in his favor.

Appeal dismissed.

HARPER and DUNKIN, Chancellors, concurred.

JOHNSTON, Ch., absent from indisposition.

Speers, Eq. *351

*MOSES WHITE and JAMES ALEXANDER v. SAMUEL FLOYD, Administrator of John White, and JAMES NESBITT.

(Columbia. Dec. Term, 1843.)

[1. *Judgment* ⊂⊃883.]

Bill filed by the son and only heir of an intestate, against his administrator, for an account of his estate, and for an injunction to restrain the enforcement of a judgment obtained by the administrator, against the complainant, the judgment being founded on an action of trover, for the conversion of a negro, and commenced by a foreign attachment to which complainant never appeared. The attachment was levied on a tract of land belonging to complainant, which was sold. The ad-

ministrator had in his hands a sum of money, as ascertained by the report of the commissioner, to whom the matters of account had been referred, to which complainant was entitled; and the administrator claimed to be entitled to set off his judgment against this demand; but, *held* by the court, that the judgment could not be received for this purpose, as it was neither prima facie nor conclusive evidence of a debt due by complainant to the administrator.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1669–1688; Dec. Dig. ⟸883.]

[2. *Attachment* ⟸217.]

The principle upon which those cases proceed, in which it has been held that a judgment in attachment in one State, is not conclusive in an action brought upon it in another State, is, that nothing is evidence against a party except what he, himself, makes so by some act or word, either positively or negatively; and that never can be when he is wholly ignorant of the matter, or when he would be heard if he knew it; which is the case in foreign attachment, unless the party put in bail to the action. Vide Seargeant on Attachment, 2.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 749; Dec. Dig. ⟸217.]

[3. *Attachment* ⟸217.]

That part of the Attachment Act, (1 Brev. Dig. 35,) which provides, that unless the defendant shall appear and make his defence within a year and a day after declaration filed, final and absolute judgment shall be given and awarded for the plaintiff, is fully answered by allowing the judgment to be final as to the thing attached.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 735–752; Dec. Dig. ⟸217.]

[4. *Equity* ⟸401.]

A proposition, that it be referred to the commissioner to ascertain the fact of the trover and conversion, and the amount of the damages, or that an issue at law should be ordered for that purpose, to furnish defendant with matter of defence to his suit, on the ground that complainant resided out of the State, and had no other effects within it, refused by the court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 869; Dec. Dig. ⟸401.]

[5. *Attachment* ⟸200.]

Complainant, by an amendment to his bill, prayed that the sale of the land which had been attached, might be set aside, on account of inadequacy of price, the land having been bid off by defendant, N., for ten dollars, when it was in proof that it was worth one thousand dollars, as well as on the ground that defendant, F., the administrator, had in his hands nearly a sufficient amount, belonging to complainant, to satisfy the demand for which the attachment issued; but before the sale, com-

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plainant had conveyed the *land by deed, without warranty, to one W., and W. to G., in like manner. Defendant N. brought trespass to try titles against G., and had a verdict, on the ground that complainant had conveyed to W. with an intent to defraud defendant F. *Held*, that the effect of setting aside the sale, would be to give complainant the benefit of his own fraud.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 651; Dec. Dig. ⟸200.]

[6. *Judicial Sales* ⟸39.]

Mere inadequacy of price, not enough to set aside the sale. Fraud is the ground, and inadequacy the evidence of it, which could not be predicated on a judicial sale.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 77; Dec. Dig. ⟸39.]

[7. *Attachment* ⟸200.]

Even if the sale were set aside, complainant would not be benefitted, as he had conveyed to W. and W. to G., to whose benefit it would enure, and he was concluded by the recovery against him at law.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 651; Dec. Dig. ⟸200.]

Before Johnson, Ch., at Spartanburgh, June Term, 1843.

Bill for Account and Injunction.

Johnson, Ch. This bill was originally a bill for an account against defendant, Floyd, as administrator of the estate of defendant's intestate, John White, of whom complainant, White, was the son and only heir, for an account of his estate, and for an injunction to restrain defendant, Floyd, from enforcing a judgment at law, obtained against complainant, White, in an action of trover, for which complainant, Alexander, was bound as his bail. All the matters arising out of this bill were disposed of by the decree of the court, at June term, 1842, except the matters of account, and as to these, the commissioner reports that defendant, Floyd, has in his hands $275.90, to which complainant, White, is entitled, computed up to the 17th Nov. 1838; and as to this, the only question is, whether Floyd is entitled to set off against it a judgment for $592.89, which he obtained against complainant, White, at law. The judgment was founded on an action of trover for the conversion of a negro, which was commenced by a foreign attachment, levied on a tract of land belonging to complainant, White, to which he never appeared. After judgment, execution issued, and the land was sold under it, and purchased by defendant, Nesbitt; and the true question is, whether this judgment can be received as conclusive or prima facie evidence of a debt due by complainant, White, to defendant, Floyd.

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*The question is a novel one here, nor have I been able to find that it has been any where directly decided. The proceeding by foreign attachment, was intended to give a creditor a remedy against his debtor who had fled or was absent from the State, leaving property within it, and is against the thing itself, and whilst from necessity it must be suffered to operate upon it, extreme danger would result from suffering it to operate beyond it. No one would leave a large estate, for any length of time, without procuring some one to superintend or take care of it, from whom he might expect to receive all the information necessary to the preservation of it; but the most trifling articles of property are the subjects of attachment, and if one claiming to be a creditor, could entitle himself to a judgment on attachment, by levying it on a stray pig or pocket handkerchief which belonged to the absent party, and to have that judgment regarded as conclusive or even prima facie evidence of a debt, it might lead

to the most injurious consequences. If that be so, there is no relative proportion between the amount of the debt claimed, and the value of the property attached. If that be of the amount of one dollar, the judgment may be for an unlimited amount, having no better foundation than fraud and perjury, and that too, without the actual knowledge of the party chargeable. The wealth of the Indies could not sustain the absent party against the demands that might be created against him by these means. Say that it is only prima facie evidence of the debt or demand, and the absent party may rebut or disprove it; that is, requiring of the defendant to prove a negation, a thing always difficult, and most frequently impossible. If, for example, the declaration in attachment charged money lent, or a trespass on the person of the plaintiff, (for it appears that in the interpretation of our Attachment Act, it has been held that attachments lie for trespass,) how could the defendant prove that he had never borrowed the money or beat the plaintiff?

According to the custom of London, on which our Attachment Act is based, there can be no judgment against the absent debtor, on foreign attachment. It goes against the goods and effects actually attached, or

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against the gar*nishee. Seargeant on Attachments, 111; 2 Ib. 121; and it has been again and again decided, that a judgment in attachment in one State, is not conclusive in an action brought upon it in another State. See Phelps v. Holker, 1 Dallas, 261, [1 L. Ed. 128;] Betts v. Death, Addison's Rep. 265; and in Kilburn v. Woodworth, 5 Johnson's Rep. 37, it was held that a judgment in Massachusetts was inadmissible in evidence of a debt in the courts of New York, because the attachment of an article of property could not bind the defendant, and only bound the goods attached as a proceeding in rem; and the case of Kebbe v. Kebbe, Kirby's Rep. 119, is to the same effect. These were judgments obtained in other States than those in which the records were offered in evidence, and it may be said are not analogous; but the 1st section of the 4th article of the Constitution of the United States provides that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings in every other State; and if they were evidence, either conclusive or prima facie, in the courts of the State in which they were obtained, they would be so in all the other States. The principle on which the cases proceed, is that nothing can be evidence against a party, except what he, himself, makes so by some act or word, either positively or negatively, and that never can be where he is wholly ignorant of the matter on which he would be heard, if he knew it, and such is the case in foreign attachments, unless the party put in bail to the action. Seargeant on Attachments, 21.

We are here met with the Attachment Act, 1 Brev. Dig. 35, which provides, that unless the defendant shall appear and make his defence within a year and a day after declaration filed, "final and absolute judgment shall be given and awarded for the plaintiff in attachment." The demands of the Act are, I think, fully answered by allowing the judgment to be final as to the thing attached; and I will not force a construction to operate upon a person not a party, and over whom the court had no jurisdiction, in violation of the plainest principles of common sense and common honesty. The judgment in attachment offered in evidence in this case, cannot, therefore, be admitted.

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*In anticipation of this result, it was proposed that it be referred to the commissioner to ascertain the facts of the trover and conversion, and amount of the damages, or that an issue at law should be ordered for that purpose, to furnish the defendant with matter of defence to this suit; and the ground of it is, that complainant, White, lives out of the State, and has no other effects within it. But I know no precedent for such a proceeding, and I am not disposed to make one, which would have the effect of introducing into court a matter entirely foreign to its jurisdiction. The defendant has all the rights and remedies for a wrong done which any one else would have against one absent from the State.

The land attached, as before stated, was bid off by defendant, Nesbitt, at ten dollars, and the proof is, that it was worth $1000. By an amendment to the bill, the complainant prays that this sale may be set aside, on the ground, 1st. Inadequacy of price. 2d. That defendant, Floyd, had in his hands a sufficient, or nearly a sufficient amount of money, belonging to the complainant, White, to satisfy the demand for which the attachment issued.

This bill cannot be sustained. Before that sale, complainant, White, had conveyed the land, by deed, without warranty, to Jos. Wofford, and Wofford had conveyed in like manner to one Samuel Gentry, and in an action of trespass to try titles, brought by Nesbitt, a verdict was found for the plaintiff, on the ground that the complainant, White, had conveyed the land to Joseph Wofford, with an intent to defraud the defendant, Floyd, and was, therefore, void. That circumstance was calculated to prevent, and probably did prevent, the land bringing a fair price, and to set aside the sale would be to give the complainant, White, the benefit of his own fraud. Besides, the mere inadequacy of price, is not enough to authorize the court to set the sale aside. Fraud is the ground, and inadequacy the evidence of it, and I do

not know how that could be predicated on a judicial sale. It would not be presumed, and there is no evidence of actual fraud. There is another reason equally conclusive. White could take nothing by setting aside the sale, for he had conveyed to Wofford, and Wofford to Gentry, and if the sale was set

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aside, it must *enure to the benefit of Gentry, and he is concluded by the recovery against him at law. Defendant, Nesbitt, was no party to the original bill, but was made so by the amendment, and according to his own answer, all the litigation has been brought about by his own procurement, for the joint benefit of himself and his co-defendant, Floyd, on an agreement that he should pay all the expenses and divide the profits with Floyd, a transaction which, if not strictly legal, is of most mischievous tendency and wholly irreconcilable to sound morality, and he will hardly complain if he is held jointly liable with Floyd for the costs of the original bill. The amendment to the bill, except so far as was intended to make Nesbitt a party to the original bill, has been shewn to be without foundation, and of this, complainant, White, must pay the costs.

It is, therefore, ordered and decreed, that the defendant, Samuel Floyd, do pay to complainant, Moses White, $275.90, with interest from the 17th November, 1838, and that defendants, Samuel Floyd and James Nesbitt, do pay the costs which have accrued on the original bill and the costs of the answer of defendant, Nesbitt, to the amendment to the bill. Complainant, Moses White, to pay all the other costs of the amendment.

The defendants appealed, on the grounds that the judgment in attachment was properly a subject of discount, and ought to have been admitted.

That the decree of Chancellor Dunkin was conclusive upon the admission of the judgment.

That Floyd ought to have been allowed his expenses, and fees paid as executor.

That no exceptions having been filed to the report which admitted the judgment in discount, the complainants had no right to strike it out on objections at the hearing.

That the costs ought to have been paid by complainants; or, at least, out of the funds in dispute.

That the decree is in other and many respects contrary to law, and the practice of courts of equity.

Henry & Bobo, for the appellant, cited 3 Brev. Rep. 34; 3 McCord, 251; 1 Stark. 215; 7 Stat. at Large, 116; 9 Mass. Rep. 473. (n.)

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*Young, contra, cited 1 Bail. Rep. 242; 13 Johnson's Rep. 203; 5 Id. 37.

PER CURIAM. The court concur in the decree of the circuit court. The matters referred to in the 2d and 4th grounds of appeal, were not before the circuit court, and are inadmissible here. Appeal dismissed.

Speers, Eq. 357

NAPIER, RAPELYE and BENNETT v. W. J. WIGHTMAN, and ANN, His Wife, and JOHN BAUSKETT.

(Columbia. Dec. Term, 1843.)

1. J. M. died in 1834, possessed of considerable real and personal estate. A. M., E. M. and H. M. were his next of kin, and heirs, all of whom were aliens. The interest of the State in the realty was granted to A. M., in Dec. 1834, by the Legislature; and in 1835, administration of the personalty having been granted by the Ordinary, to defendant, B., he sold the same at public auction, the greater portion of which was purchased by defendant, W., who had intermarried with A. M., to an amount beyond her interest in the estate. W. did not comply with the terms of the sale, by giving note and security, or any other obligation for the purchase money, but retained possession of the property, under an agreement with the administrator, that the legal title should remain in him, as a security for any sum which might be due him by W., on settling the accounts of the estate: and that the balance should be settled on the wife of W., on such terms as should be deemed expedient. In July, 1837, defendant joined in a deed, in which, after reciting the facts above stated, W. and his wife conveyed to the administrator, B., three several plantations of which J. M. died seized, together with the property purchased by W., at the sale, upon certain trusts: 1. To discharge any arrears or balance due the administrator, by W. and wife, or by W., on account of his purchases at the sale of J. M., beyond the distributive share of his wife, or on account of money advanced by the administrator to W. since his administration. 2. That the administrator permit W. and wife "to have, hold, use and enjoy, the income and profits of all and singular the said property, both real and personal, dur-

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ing their joint lives, and from and *after the death of one of them, then for the exclusive use and benefit of the survivor, during life."

[2. *Executors and Administrators* ⇐⇒386.]

The deed further provides, in the event that W. died first, he should have power to dispose of one half the personalty by will, to take effect after the death of his wife, reserving to her a life estate. If he made no will, then to be distributed according to the statute of distributions, as in cases of intestacy; and in the event that the wife died first, the same power is reserved to her, as to the other half of the personalty, and all the real estate, to take effect after the death of the husband, to whom a life estate in both is reserved. Should she not make a will, to be distributed in like manner amongst her kindred. Deed recorded in the office of the Secretary of State, 5th August, 1837, and in that of the Register of Mesne Conveyance, 1st January, 1838. Complainants were the creditors of W., to whom, in June, 1823, he confessed judgment, in the Superior Court of Richmond County, Georgia, and in June, 1836, the sheriff returned nulla bona on the execution. They, afterwards, brought debt on the judgment in the Federal Court for the district of South Carolina, and recovered. The marshal returned nulla bona on the execution. By letter of the 1st July, 1839, W. informed the marshal that he had no other than the set-

tled property, referring to that described in the deed. It was alleged that defendant, B., after formal notice of the demand of complainants, sold the greater portion of the estate, both real and personal; and admitted by defendants that sales, to a considerable extent, were made under an order of the Court of Equity, but that a large portion of the property remained undisposed of. It was *held* that the administrator, B., had a lien on the property for whatever balance might be due him from W., on a settlement of the estate. Also, that the remaining property, after paying B., would be liable to complainants's demand.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1570; Dec. Dig. ⟸386.]

[3. *Fraudulent Conveyances* ⟸95.]

Also, that the deed was not a marriage settlement, within the meaning of the Registry Act, and not void as to creditors, for want of recording. Vide, The Banks v. Brown, 2 Hill's Eq. Rep. 565, [30 Am. Dec. 380.]

[Ed. Note.—Cited in Cloud v. Calhoun, 10 Rich. Eq. 374.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 286; Dec. Dig. ⟸95.]

[4. *Wills* ⟸386.]

Under the agreement with the administrator, the legal title to the property purchased at the sale, did not vest in defendant W. Vide, Dupree v. Harrington, Harp. Rep. 391; Bennett v. Sims, Rice Rep. 421.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 859; Dec. Dig. ⟸386.]

[5. *Executors and Administrators* ⟸368.]

As defendant, B., had a prior lien on the property, for a demand not yet ascertained, the Law Court having no authority to direct an account, this court had jurisdiction of the cause.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1514; Dec. Dig. ⟸368.]

[6. *Fraudulent Conveyances* ⟸227.]

It was the interest of both parties, and especially the defendants, that their rights should be first ascertained, and this is the foundation of the general rule that when a deed stands in the way of a creditor, he may come into this court to set it aside. See 2 Story's Equ. 9, 10.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 589, 659, 665–667; Dec. Dig. ⟸227.]

7. Query. Whether defendant, W., under the statute of Uses, had a vested interest in the whole of the real estate for life?

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[8. *Husband and Wife* ⟸31.]

*All other matters being out of the way, the entire income of the estate for the joint lives of defendant, W. and wife, and the one half of the personalty, saving the life estate of the wife, if she survive, would be liable for his debts. Per Johnson, Ch.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 188; Dec. Dig. ⟸31.]

[9. *Appeal and Error* ⟸843.]

Defendant, B. ordered to account before the Commissioner for his administration of his intestate's estate, so far as the interests of his codefendants were concerned. Also, for monies advanced them since his administration, with a view to ascertain whether any, and what, balance might be due them; but the court declined to express any opinion on a motion on the part of complainants, to extend the order, so as to require B. to account for the rents of the land; for the hire of the slaves conveyed to him by the trust deed; also, for money received by him on account of sales of portions of the real estate, as its merits would necessarily arise on the reference as to W.'s indebtedness to defendant, B.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3341; Dec. Dig. ⟸843.]

Before Johnson, Ch., at Edgefield, June Term, 1841. The facts of this case will be fully understood from the decree of the presiding Chancellor.

Johnston, Ch. John Moore died in September, 1834, intestate, being at the time seized and possessed of a considerable real and personal estate. The defendant, Ann, her brother, Henry Moore, and her sister, Eleanor Moore, his nieces and nephew, were the next of kin, and heirs, and they were all aliens. His real estate, of course, escheated to the State, and the Legislature, by an Act passed in December, 1834, granted to the defendant, Ann, all the interest of the State in the realty. Administration of his personal estate was granted to the defendant, Bauskett, who sold the whole at public auction, in 1835, under the authority of the ordinary. At this sale, the defendant, William J. purchased a large portion of the property, consisting, among other things, of seventy-nine negroes, a large number of live stock, furniture, &c., to an amount greater than the interest of his wife in it. He did not comply with the terms of the sale, by giving note and security, or any other obligation for the money, but he retained possession of the whole; and the defendants all state in their answers, that this was permitted under an agreement between him and defendant, Bauskett, that the title to the property should remain in Bauskett, as a se-

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curity for any *sum that might be due him from William J. on a settlement of the accounts of the estate, and that the balance should be settled on the defendant, Ann, under such limitations as might be deemed expedient; and Bauskett states in his answer, that he "never did permit him to reduce said property into his possession, as the share of his wife, and never would have permitted him to do so, without proper security to himself, and an adequate settlement on his wife."

In July, 1837, the defendants all joined in a deed,[1] wherein is recited the death of

[1] Wm. J. Wightman and Ann Wightman. to John Bauskett. } Deed.

The State of South Carolina, Edgefield District.

This indenture, made this 4th day of July, in the year of our Lord, one thousand eight hundred and thirty-seven, between William J. Wightman and Ann Wightman his wife, of the District and State aforesaid, of the first part, and John Bauskett, of the same place, of the second part, witnesseth: That whereas John Moore, late of the District and State aforesaid,

John Moore, intestate; the interest of the defendant, Ann, therein; the grant of the State to her, of the lands of which he died seized; the sale of the personalty by the administrator, and the purchases by defendant, William J.; his omission to give the

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security *required by the terms of the sale, and the agreement that the legal title to the property should remain in Bauskett, as a security for any sum that might be found due to him from the defendant, William J., on a settlement of the estate, and the residue to be settled on defendant, Ann, on such terms as should be deemed expedient; and in consideration thereof, the defendant, William J. and his wife, Ann, conveyed to defendant, Bauskett, in the usual form, three several plantations whereof John Moore died seized, and all the personal property purchased by William J. at the administrator's sale, all of which is particularly described, upon the following trusts, viz: 1st. To pay off and discharge any arrears or balance due to the said John Bauskett, by the said Wil-

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liam J. Wightman and wife, or Wil*liam J. Wightman, on account of the prices or sums at which said personal property was bid off beyond the amount of the distributive share of the said Ann Wightman, in the personal estate of the said John Moore, deceased; or on account of money advanced by the said John Bauskett to the said William J. Wightman, since the date of his administration. 2d. That the said John Bauskett "shall and do permit and suffer the said William J. Wightman and Ann, his wife, to have, hold, use, and enjoy, the income and profits of all and singular the said property, both real and personal, during their joint lives, and from and after the death of one of them, then for the exclusive use and benefit of the survivor, during life." The deed then goes on to provide that William J., in the event of

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*his dying first, should have power to dispose of one half the personalty by will, to take effect after the death of the said Ann, reserving to her a life estate; and if he

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departed this life intestate, on or about the month of September, one thousand eight hundred and thirty-four, being, at the time of his death, seized and possessed of a large real and personal estate, a portion of which will be hereinafter more particularly described, and leaving the said Ann Wightman as one of the distributees of his personal property, and as sole heir or distributee, as it is supposed, of his real estate. Doubts being suggested as to the competency of the said Ann Wightman to inherit from her uncle, the said John Moore, deceased, his real estate, and as to the right of the State to claim the same under the laws regulating escheats, the Legislature of said State, by an Act passed the seventeenth December, one thousand eight hundred and thirty-four, vested in the said Ann Wightman, all the right, title and interest of this State in the real estate of said John Moore, deceased, lying in said district, as by reference to said Act will more fully and at

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*large appear. And whereas, at the public sale made by the said John Bauskett, as administrator of the said John Moore, deceased, of the goods and chattels of the said John Moore, the said William J. Wightman, with a view of the securing to his wife, the said Ann Wightman, the value of her distributive share in said personal estate, in the property itself, instead of the avails for which it might be sold, and with the consent and approbation of the said John Bauskitt, bid off a portion of said property, as hereinafter more particularly described, with the understanding that the title was not to be changed, or the terms of sale complied with, until an adjustment of the accounts of the estate was had, and then the property to be settled on the said Ann Wightman, upon such terms as should be deemed expedient. And it being now agreed by and between said parties, to convey and transfer said property, as hereinafter described, to the said John Bauskett, as trustee, for the purpose, first, of paying off any balance or arrears that may be due to him on account of monies advanced to said William J. Wightman, or the excess of the amount of the property so bid off over the share or portion of the said Ann Wightman; then in trust for their joint use, during their joint lives; then to the use of the survivor during life, with the right of each of them to dispose by will of the one half of the personalty, and the exclusive right of the said Ann Wightman to dispose of, by will, the whole of said real estate, notwithstanding her coverture. Now, this indenture witnesseth, that the said William J. Wightman

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and Ann his wife, for and in con*sideration of the premises, and in the further consideration of ten dollars, to them in hand paid by the said John Bauskett, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell and release unto the said John Bauskett, all and singular, those several plantations or tracts of land, &c.

And the said William J. Wightman, and Ann, his wife, do bargain, sell, and deliver, unto the said John Bauskett, the following personal property, that is to say, seventy-nine negroes, &c.

Also all the stock of horses, mules, &c. Together with all and singular the rights, members, hereditaments and appurtenances to the said lands and premises belonging, or in any wise incident: To have and to hold all and singular the said estate and property, both real and personal, together with the future increase of the females of the said negroes, unto the said John Bauskett, his heirs and assigns forever; in trust, nevertheless, and for such purposes and under such provisions and agreements as hereinafter mentioned; that is to say, in the first place, to pay off and discharge any arrears or balance due to the said John Bauskett, by the said William J. Wightman and wife, or William J. Wightman, on account of the prices, or sums, at which said personal property was bid off, beyond the amount of the distributive share of the said Ann Wightman in the personal estate of the said John Moore, deceased; or on account of any money advanced by the said John Bauskett to the said William J.

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Wightman, since the date of said admin*istration; and from and after the payment of the said sums of money, then in trust, that he, the said John Bauskett, his heirs, executors, administrators and assigns, shall and do permit the said William J. Wightman, and Ann, his wife, to have, hold, use and enjoy, the income and profits, of all and singular, the said property, both real and personal, during their joint lives;

made no will, it should be distributed as directed by the statute of distributions in cases of intestacy. In the event of Ann's dying first, the same power is reserved to her over the other half of the personalty, and all the real estate, to take effect on the death of William J., to whom a life estate in both is reserved; and in the event of her not making a will, to be distributed in like manner amongst her kindred.

This deed bears date in July, 1837, the day of the month having been left blank. It is recorded in the office of the Secretary of State, 5th August, 1837, and in the office of Register of M. C., for Edgefield, 1st January, 1838.

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*The complainants are creditors of the defendant, William J. In June, 1823, he confessed a judgment to them in the Superior court of Richmond county, for $1857.-73, a debt due to them by the house of Campbell and Wightman, of which he was a partner; and on the 23d June, 1836, the sheriff of that county returned nulla bona to an execution in that case. In 1838, complainants brought debt on that judgment in the Federal court for the district of South Carolina, and there recovered judgment against the defendant, William J., for the amount of debt, interest and costs, and the marshal for the district returned nulla bona on the execution. A letter from defendant, William J., to the marshal, dated 1st July, 1839, was given in evidence, in which he states

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that he had no other than the *settled property, referring to the property before described.

The complainants insist that this deed is void, and that the property is liable to their demands, on two grounds, 1st. That the said deed is a marriage settlement, and is void as to creditors, because it was not recorded in the office of Register M. C., within the time prescribed by law. 2d. That the property bid off by William J., at the administrator's sale, vested in him, and his conveyance of it to the uses expressed in the deed, was voluntary, and void as to creditors, although the deed be not regarded as a marriage settlement.

The defendants take issue on these two grounds, and they further insist that the

and from and after the death of one of them, the said William J. Wightman and Ann, his wife, then for the exclusive use, benefit and behoof of the survivor during life; and after the death of the survivor, that he, the said John Bauskett, his heirs, executors, and administrators, will transfer, assign, set over and deliver all the right, title and interest in said estate and property, herein and hereby conveyed to him, unto such person or persons, and at the time and times, and in such parts and proportions, manner and form, as they, the said William J. Wightman, and Ann, his wife, by their several wills and testaments, duly executed in writing, and attested in the presence of three witnesses, shall direct, limit and appoint; and in default of such disposition by will, to be delivered over, free and discharged from any trust, to such person or persons as may be entitled to the same under the statutes of this State, disposing of the estates of persons dying intestate. Provided always, and it is hereby expressly agreed and declared by and between the parties to these presents, that the said William J. Wightman shall have power to bequeath and dispose of, by will, the one undivided moiety of all the said goods and chattels, and the increase thereof, to take effect aft-

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er the death of the *said Ann Wightman, so that the bequest and disposition, the power to make which is hereby reserved to the said William J. Wightman, may not encroach upon or interfere with the life estate of the said Ann Wightman in the whole estate, both real and personal, in case she be the survivor: and in the event the said William J. Wightman should die intestate, as to the said undivided moiety of the said personal property and the increase thereof, then said undivided moiety is to go, vest, and be delivered unto his next of kin, according to the provisions of the statutes of distribution now of force in this State. And it is further declared and agreed by and between said parties, and the said W. J. Wightman, for himself, his heirs, executors and administrators, expressly covenants to and with the said John Bauskett, that the said Ann Wightman shall have full power and authority, notwithstanding she be a married woman, at any time during her present coverture, freely and voluntarily, and without any let or hinderance, to devise and bequeath the whole of the said real estate, and the other undivided moiety of all the personal property, described in this deed, and the increase thereof, by will executed in the presence of and attested by three witnesses, to whomsoever and in such portion or manner, as she may, of her own free will and accord, think proper: provided, however, that such devise or bequest do not take effect until after the decease of the said William J. Wightman, so as not to encroach upon or interfere with his life estate in the whole of said estate, real and personal, in case he should be the survivor; and

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in the event the said Ann *Wightman should die without making such disposition as is herein specified, then, and in that case, the said real estate, and the undivided moiety of the said personal property, are to go, vest, and be delivered unto such person or persons, and in such portion or portions, as are of next of kin to her, or distributees of her estate, according to the provisions of the Acts of Assembly of this State, commonly called the Statutes of Distribution, now of force.

In witness whereof, we have hereunto set our hands and seals, on the day and year first above written. William J. Wightman. [Seal.]
Ann Wightman. [Seal.]
John Bauskett. [Seal.]

Signed, sealed and delivered, in the presence of
O. Towles.
Treumund Breithaupt.

South Carolina—Edgefield District.

Personally appeared before me, Oliver Towles, and after being duly sworn, sayeth he saw William J. Wightman, Ann Wightman, his wife, and John Bauskett, sign, seal, and deliver the within deed, for the uses and purposes therein mentioned and that he, with Truemund Breithaupt, at the same time, and in the presence of each other, witnessed the due execution thereof. O. Towles.

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complainants are not entitled to *come into this court until they have exhausted their remedy at law, against the defendant, William J. Preparatory to the consideration of these questions, it will be necessary to inquire into the defendant, Bauskett's, connexion with, and interest in, the property in question. The complainants state in their bill, that defendant, Bauskett, after formal notice of their demand, sold the whole or greater portion of the estate, both real and personal; and the defendants admit in their answers, that sales were made to a considerable extent, under an order of this court, of the last term, for what purpose is not stated; but I suppose it was on account of William J's. liability to Bauskett; but that forty negroes and other property of considerable value are yet undisposed of; and whether

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the deed be void *for want of recording or not, or void as to creditors, as merely voluntary, there is no question that Bauskett has a lien on the property for whatever balance may be due him from William J., on a settlement of the estate. No settlement has yet been made, and as I have come to the conclusion that the remaining property, after paying Bauskett, will be liable to complainant's demand, I shall direct an account of that matter.

The case of the Bank v. Brown et al., 2 Hill's Eq. Rep. 565 [30 Am. Dec. 380], is decisive of the first ground taken on the part of the complainants, to sustain their bill. There, it was held that a conveyance made by the husband, to the use of the wife, in consideration of her renouncing her inheritance in real estate, was not a marriage settlement within the meaning of the Registry Acts, and is not void as to creditors for want of recording; and the same rule applies, in all its force, to a conveyance founded on any

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other con*sideration proceeding from the wife, provided the value of the property so conveyed is not so disproportioned to the consideration as to induce the belief that it was intended to defraud the creditors of the husband.

Here the whole estate belonged to the wife, and the husband was utterly insolvent. The personal estate was in such form in the hands of the administrator, that the husband could not have obtained possession of it without his assent, and that, in his answer, he declares that he would not have given, or by a bill in this court. Under these circumstances, there can be no question that the court would have secured to her a large portion, if not the whole, of the personalty. Now, by this deed, the husband is entitled to the income of the whole, in common with the wife, during their joint lives; to the whole, if he survive her, during his life, with the power of disposing of one half absolutely. In the event of the wife's dying first, the husband would only have been entitled to the share of the real estate allowed by the Act of Distributions, and this deed secures to him the whole for life. These circumstances abundantly show that this settlement was founded on a consideration proceeding from the wife; and, as will be seen in the end, the rights relinquished by her greatly exceed any interests reserved to her by the deed.

It is stated in the answers, that defendant, William J., did not comply with the terms of the sale of the property which he purchased, and that defendant, Bauskett, suffered it to remain in his possession under an agreement that the title of the property should remain in Bauskett, as a security for any money that

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*Sworn to before me, the 4th August, 1837.
Geo. Pope, C. C. P.
Recorded 1st January, 1838.
Geo. Pope, Clerk and R. M. C.

The dower recorded, Book A. A. A., page 37.

Ann Wightman, to John Bauskett. } Relinquishment of inheritance to deed, recorded in Book, Z. Z. page 23, 313, 14, 15 and 16.

The State of South-Carolina, Edgefield District.

I, George Pope, one of the Justices of the Quorum, in and for the District and State aforesaid, do hereby certify unto all whom it may concern, that Ann Wightman, the wife of the within named William J. Wightman, did this day appear before me, and upon being privately and separately examined by me, did declare that she did, at least seven days before this, her examination, to wit: in the month of July, in the year one thousand eight hundred and thirty-seven, actually join her husband, the said William J. Wightman in executing the annexed release unto the said John Bauskett, for the uses and purposes therein mentioned, and did then, and at the time of this, her examination, still does, freely, voluntarily, and without any manner of compulsion, dread or fear of any person or persons whomsoever, renounce, release, and forever relinquish, all her estate, interest and inheritance in the premises mentioned in the said annexed deed unto

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the said *John Bauskett and his heirs and assigns, upon the trusts and for the uses and purposes therein mentioned; and the said Ann Wightman further declares, that the said deed or release was positively and bona fide executed by her, at least seven days before this, her present examination.

Given under my hand and seal, this 27th day of February, one thousand eight hundred and thirty-nine. Ann Wightman.

[Seal.] Geo. Pope, Clerk, and Q. U. ex officio.
Recorded 27th February, 1839.
Geo. Pope, Clerk, and R. M. C.

South Carolina—Edgefield District.

I, Geo. Pope, Clerk of the Court of Common Pleas and General Sessions, for the District and State aforesaid, do hereby certify the foregoing pages, No. 1, 2, 3, 4, 5, 6 and 7, to be a correct copy of a deed from William J. Wightman and wife, to John Bauskett, as will appear from Book Z. Z., of clerk's office, pages 313, 14, 15 and 16, and parts of 7 and 8, the relinquishment of inheritance from Ann Wightman to John Bauskett, as will appear from Book A. A. A., page 37, of said office, this 13th August, 1839. Geo. Pope, C. C. C.

might be due him on a settlement of the estate, and that the balance should be settled on the wife. No evidence was offered on either side as to this agreement; but in the argument, the fact of such an agreement was assumed, and the question is, whether the property vested in William J.

In Dupree v. Harrington, Harp. Rep. 391, the plaintiff sold a horse to one Haney, with a stipulation that the right of property should not pass to the vendee until one half of the price was paid; and it was held that until payment made, the legal property in the horse remained in the vendor. The principle

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of this case was followed in Ben*nett v. Sims, Rice Rep. 421, and is conclusive of this question. There is another matter of some importance that has not been argued, which I suppose escaped the notice of counsel.

I take it as universally true, that a debtor is bound to surrender to his creditor all the available means which he possesses, in satisfaction of his demand, and that the courts of justice will compel him to do that which he ought to do. At law, all the property, real and personal, of a visible and tangible nature, and of which he is seized or possessed in his own right, is the subject of execution, and by a ca. sa. he may be compelled to surrender all his monies and choses in action, and other rights of an untangible nature. So all property in which he has a vested interest, though not in possession, is liable to execution. In Harrison et al. v. Maxwell, 2 Nott & McCord, 347 [10 Am. Dec. 611], it was held that a vested interest in real estate, dependent on the termination of a life estate, and whilst the tenant for life was in possession, was the subject of execution. A mortgaged estate is liable to execution against the mortgagor; State v. Laval, 4 McCord Rep. 336. So if one be in possession of land under a contract to purchase, his interest may be taken in execution and sold; Jackson v. Scott, 18 John's Rep. 94. So if there be joint partners, and execution against one, the whole partnership effects may be taken in execution, and the interest of the one sold; Com. Dig. Execution D. 4. And it would be slander on the Court of Equity to suppose, that the remedy there, in cases of which it has jurisdiction, falls short of that afforded by the law courts.

Now, this settlement provides that the defendant, William J. and his wife, shall have the whole of this estate during their joint lives, without assigning any part to her separate use; and if it be true, and that will not be controverted, that all the chattel interests of the wife belong to the husband, he is entitled to the whole income of this estate, as long as they both live; and if arrested on a ca. sa. from the court of law, would be required to assign it.

I shall not stop here to enquire whether, under the statute of uses, the defendant, Wil-

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liam J. has not a vest*ed interest in the whole of the real estate for life. It is very clear, however, that under the provision in the settlement, he is entitled to the income of the whole estate, real and personal, for the joint lives of himself and his wife, and during his life, if he survives, with the power of disposition in either event, as to one half of the personalty, absolutely. I can not conceive of any higher claim that one could have to property, than the right to the present use, and the power of absolute disposition, and unquestionably these rights are subject to the claims of his creditors.

These questions have not been argued, and are not required, necessarily, to be decided now. These suggestions have been thrown out for the consideration of the counsel, and will necessarily arise on the coming in of the report of the commissioner, on the accounts, a reference as to which will be ordered. I am, however, strongly inclined to think that, all other matters being out of the way, the entire income of the estate, for the joint lives of the defendant, William J. and his wife, and the one half of the personalty, saving the life estate of the wife, if she survive, is liable for his debts. About the question raised by the defendant, as to the jurisdiction of the court, there can be no difficulty. It may be that by fi. fa. or ca. sa., or both, from the law court, the complainants might have obtained satisfaction of their debts. But defendant, Bauskett, has a prior lien on the property, for a demand not yet ascertained, and the law court has no authority to direct an account, and however well defined the right of defendant, William J., under the deed may be, when brought to a judicial investigation, the difficulties which the defendants have now thrown in the way of a discovery, prove that no one would have purchased at a sheriff's sale who did not desire to be involved in litigation, or who could not obtain the property at a price which would indemnify him against the expenses and delays of a law suit and all other contingencies. It was the interest, therefore, of both parties, and especially defendants, that their rights should be first ascertained, and this is the foundation of the general rule, that when a deed stands in the way of a creditor, he may come into this court to set it aside. 2 Story's Eq. 9, 10.

It is, therefore, ordered and decreed, that the defendant, Bauskett, do account before

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the commissioner, for his ad*ministration of the estate of the intestate, John Moore, so far as the interests of the co-defendants are concerned, and for money advanced to them since his administration, with a view to ascertain whether any, and what, balances may be due to him.

I shall not, for the present, make any further order, as it will be necessary to ascer-

tain the amount due to Bauskett, before any relief can be afforded to the complainants, and on the coming in of the report, all the orders that circumstances may render necessary may be made.

The defendants moved in the Court of Appeals, to reverse the Chancellor's decree, upon the following points:

1. That the decree is not responsive to the allegations and prayer of the bill; as the plaintiffs claim nothing under the trust deed, as a valid instrument.

2. That the plaintiffs are not entitled to the jurisdiction of this court, as they have not exhausted their legal remedies.

3. That the said William J. Wightman has no interest under said trust deed, which is liable for his debts in law or equity.

4. That the said trust deed should be reformed, if necessary, according to the intentions of the parties, for the protection of the interests of Mrs. Ann Wightman, in the estate and property conveyed.

5. That, under the pleadings and proofs, the defendants were entitled to the dismissal of the bill.

The plaintiffs also appealed from the decree of his Honor, and moved the court to reverse it, on the following points:

1. As to the deed from Wightman and wife, to Bauskett, they will insist that the same is void for want of recording, and because it was voluntary and fraudulent as to the creditors of Wightman.

2. They will insist that there is no just ground upon which the claims of Bauskett, as administrator or otherwise, can be preferred to the claims of the plaintiffs.

Wardlaw, for the motion. Griffin & Burt, contra.

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Curia, per JOHNSON, Ch. This appeal has been abandoned, on the part of the defendants, and it is conceded on the part of the complainants, that the grounds of their appeal cannot be sustained. It has, however, been moved, on the part of complainants, that the order directing the defendant, Bauskett, to account before the commissioner, for his administration of the estate of John Moore, his intestate, should be extended so as to require him to account for the rents of the land and the hire of the slaves conveyed to him by the trust deed, and for money received by him on account of the sale of portions of the real estate. It is not intended to express any opinion as to the merits of this motion, for it is thought unnecessary, as all the questions raised by it must necessarily arise on enquiring on the reference as to the amount of Wm. J. Wightman's indebtedness to the defendant, Bauskett. Appeal dismissed.

HARPER, DUNKIN and JOHNSTON, Chancellors, concurred.

Speers, Eq. *373

*JOSIAH P. LEE and Others v. TERZA STREET, Adm'r of Eleazer Lee, Deceased, and DEMPSEY GRAHAM and His Wife, and N. A. PEAY, Ex'or of Roland Cornelius.

(Columbia. Dec. Term, 1843.)

[1–3. *Executors and Administrators* ⟸537.]

Bill filed against an administratrix for an account who then resided beyond the limits of the State and a decree made. She returned within the time allowed by the Act of the Legislature and upon her petition the decree was set aside and leave granted to answer. An order was also passed making the sureties in the administration bond parties. A reference was had before the commissioner and a report made for the succeeding Term, at which leave was granted to one of the sureties to adduce further evidence before the commissioner; none, however was offered. This surety died, and his executor was afterwards made a party.

At the following Term, the administratrix having died intestate and wholly insolvent, a motion was made to confirm the report of the commissioner, and refused.

The Court were of opinion, and held that complainants could not proceed further with the cause without an administration on the estate of the deceased administratrix. Vide Buchan v. James, adm'r, post, page 375.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2541; Dec. Dig. ⟸537.]

[4. *Executors and Administrators* ⟸537.]

The Act of 1839 prescribes the mode of proceeding in the Court of Ordinary, and has no application to this case.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2453, 2485–2581; Dec. Dig. ⟸537.]

Before Johnson, Ch., at Chester, June Term, 1843.

Bill for account and relief.

Terza Street administered upon the estate of her first husband, Eleazer Lee, deceased, and Rebecca Graham, (now the wife of Dempsey Graham,) and Roland Cornelius, were her sureties to the administration bond. Complainants are the children of Eleazer Lee.

The first bill was filed against Terza Street, who then resided beyond the limits of this State, and a decree made thereon. She returned within the time allowed by the Act of the Legislature, and petitioned to have the decree set aside, and for leave to answer, which was done accordingly; and by consent, an order was passed that Dempsey Graham and wife, and Roland Cornelius, sureties to the administration bond, be made parties; which was done.

The case was referred to the commissioner, to ascertain and report the amount due to the complainants. All the testimony was taken by the commissioner, the refer-

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ence *closed, and his report made for June Term, 1841. At June Term, 1841, leave was granted to the defendant Cornelius, to adduce further evidence to the commissioner. No further evidence, however, was offered,

and some time before June Term, 1842, Roland Cornelius died, having made a will, and constituted N. A. Peay his executor. In consequence of the death of Cornelius, and his executor not being made a party, no proceedings were had in the case, at June Term, 1842. The executor of Cornelius has since been made a party.

Some time in the winter of 1843, the defendant Terza Street died intestate, leaving no property, and wholly insolvent. No person has administered on her estate. In fact she left no estate.

At June Term, 1843, a motion was made to confirm the report of the commissioner. The motion was consented to by the counsel on part of estate of Cornelius; but opposed by the counsel of Dempsey Graham and wife.

His Honor, Chancellor Johnson, decided that complainants could not proceed in the cause, without administration on the estate of Terza Street.

Complainants appealed, and moved to reverse the decision made by his Honor on the Circuit, upon the ground, that by the A. A. 1839, proceedings are authorized against the sureties to an administration bond, when the administrator is dead, and there is no personal representative of such administrator.

Clarke & McDowell for the appellants. McCall contra.

Curia, per JOHNSON, Ch.—The Court concur in the judgment of the circuit Court. For the necessity of an administration on the estate of Terza Street, and making the administrator a party, I refer to the opinion of the Court delivered during the present Term in the case of David Buchan v. James, administrator of James, and the cases therein referred to. The Act of 1839 prescribes the mode of proceeding in the Court of Ordinary, and has no application to the mode of proceeding here. Appeal dismissed.

HARPER and DUNKIN, Chancellors, concurred.

J. JOHNSTON, Ch., absent from indisposition.

Speers, Eq. *375

*DAVID BUCHAN v. JOHN S. JAMES, Adm'r, and Others.

(Columbia. Dec. Term, 1843.)

[1, 2. *Limitation of Actions* ⟸102.]

Bill filed by a legatee against defendant, an administrator, and others, with himself the distributees of his intestate, for an account of monies which, it was alleged, had been received by their intestate and not accounted for, as one of the executors of the will under which he claimed. The executors proved the will of their testator, and assumed the administration of his estate in Virginia, in 1804. Defendant's intestate, in 1807, made a letter of attorney, in which he authorized his attorney to settle and adjust all matters of debt and account whatever, and with whomsoever, in which he might be interested in his private capacity, or as executor or administrator, with the usual powers to sue for and receive all monies that might be due, to execute releases, and to make partial and final settlements, &c.; and in 1808 removed to South Carolina. There was no evidence of the receipt of any funds by the intestate of the estate of the testator, except some drafts drawn by him and paid to his order by his attorney in Virginia in 1824 and 5; nor was there any proof that the monies drawn for, were not received by the attorney immediately after the execution of the letter of attorney under which he acted. The complainant resided abroad, and his bill was filed in 1840, twelve years after a final settlement and distribution of the estate of defendant's intestate, and fifteen after his death. Twenty one years had elapsed from the probate of testator's will till the death of the intestate, and from the probate till the filing of the bill, thirty-six. Until this time, it did not appear that any notice of the existence of this demand had been given to any of the parties. The Court were of opinion, and held that complainant's demand was barred by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 494–505; Dec. Dig. Dig. ⟸102.]

[3. *Limitation of Actions* ⟸102.]

The well established doctrine of this Court, based on the English Chancery, is, that the statute of limitations will not bar a demand growing out of a direct trust, but will a demand arising out of a trust raised by implication of law. And whether it is in obedience to the positive enactment of the Legislature, or a rule of Court, founded on a supposed analogy to the statute, is now immaterial, as it is followed implicitly. Vide Alexander v. Williams, 2 Hill, 522; Massey v. Massey, 2 Hill Eq. Rep. 496; Fisher v. Tucker, 1 McCord Eq. Rep. 176; Miller v. Mitchell, 1 Bailey Eq. 437.

[Ed. Note.—Cited in Long v. Cason, 4 Rich. Eq. 67; Brewster & Dickson v. Gillison, 10 Rich. Eq. 438; Lanier v. Griffin, 11 S. C. 581.

For other cases, see Limitation of Actions, Cent. Dig. § 500; Dec. Dig. ⟸102.]

[4. *Trusts* ⟸63¾.]

Distribution of the estate of the intestate having been made twelve years before complainant's bill was filed, each distributee believing he was entitled to retain what he had received, and not knowing that any one else had a higher claim, is in strict accordance with the definition of an implied trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 91, 92, 98, 99, 100; Dec. Dig. ⟸63¾.]

5. The question as to the presumption of pay-

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ment arising from the lapse of *time, not deemed necessary to the decision of the case; and as to its merits, the Court declined expressing any opinion.

[6. *Executors and Administrators* ⟸128.]

Although it has been decided that after the death of an administrator of an intestate, his next of kin cannot maintain a suit to recover property of the estate without an administration de bonis non, yet its universal application has been since questioned,[1] and the better opinion seems to be, that such a suit will be allowed without a new administration, when from the lapse of time it may be fairly presumed that

[1] Farley v. Farley, 1 McC. Eq. 506.

all the other concerns of the estate have been finally settled.

[Ed. Note.—Cited in Lee v. Street, Speers Eq. 373, 374.

For other cases, see Executors and Administrators, Cent. Dig. § 531; Dec. Dig. ⇐128.]

[7. *Limitation of Actions* ⇐87.]

[A person residing beyond the seas has no greater time, under the statute of limitations, than a resident, for prosecuting his claim.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 458; Dec. Dig. ⇐87.]

Before his Honor Chancellor Johnson, at Laurens, June Term, 1841.

Bill for account, &c.,

The decree of his Honor, the Chancellor, who heard this case on the circuit, presents all the material facts so fully as to render any further report unnecessary. It is as follows:

Johnson, Ch. The Rev. Robert Buchan, of Stafford County, Virginia, died there in the latter part of the year 1803. He left a will, wherein he nominated John M. Daniel and Benjamin James, his executors, and after disposing specifically of a part of his estate, he directed his executors to sell the residue, real and personal, and to remit the proceeds, together with all monies arising from debts due to him, by means of bills of exchange, to his brother David Buchan, (the complainant,) and James Buchan, who reside in Great Britain. The executors both proved the will and assumed the administration, and the complainant states in his bill that in March 1804, they sold two tracts of land, the proceeds of which amounted to $7,000. The sale is supposed to have been on a credit; and that the executors were delayed in recovering the amount from the purchasers by a claim interposed by the State of Virginia to the lands, as having escheated to the State, which led to a protracted litigation between the State and the purchasers, and was ultimately decided in their favor; and that they paid the executors the purchase money, but at what time does not appear. That the executors took possession of and sold the personal estate—collected the debts due, to an

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amount of *which complainant is ignorant. And that there was no inventory of the estate, or any account of their administration, except an account returned by Benjamin James alone to the county Court of Stafford; which is exhibited with the bill, which complainant charges is imperfect. John M. Daniel, one of the executors, died in Stafford county, many years ago. And in ——— ——— the complainant, and the legal representatives of his co-legatee, James Buchan, who was then dead, by a proceeding in the circuit Court of the United States, for the eastern District of Virginia, recovered against the legal representatives of the executor Daniel, the amount of the assets of the estate, which remained in his hands. Benj. James, the other executor, removed from Stafford, Virginia, to Laurens district, in this State, in 1808; died there intestate in 1825, leaving the defendants his heirs or distributees, and defendant, John S. James, administered on his estate. The bill charges that monies of the estate of the testator, Robert Buchan, to a large amount, came into the hands of the said Benj. James, which have never been accounted for, and prays that the defendant John S. James, his administrator, may account for and pay to complainant the balance remaining in his hands; and in the event of his having fully administered the estate, by paying it over to the other defendants, his distributees, that they may account, &c. The defendants answered severally. They admit that John M. Daniel and their intestate were appointed executors, and assumed the administration of the estate of Robert Buchan, and that their intestate survived the said John M. Daniel. But they deny any knowledge of his receipts and disbursements on account of the testator's estate, or any of his actings and doings in relation thereto, and demand strict proof of any liability he may have incurred. The defendant, John S. James, states in his answer that having paid all the demands exhibited against his intestate, and after having given public notice through the newspapers, calling on creditors to present their demands, in 1828 he came to a final account with the distributees of the estate of his intestate, his co-defendants, and paid them severally their distributive shares, retaining only his share as one of them, without hav-

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ing had any *knowledge or notice of the complainant's demand, until about the time of filing this bill, and he pleads this matter in bar to his personal liability. The other defendants admit the final account and settlement of the estate of their intestate, and the receipt of their distributive shares thereof in 1828. On the 24th December, 1807, defendant's intestate made a letter of attorney to one Thomas Sidden, authorizing him to settle and adjust all matters of debt and account whatever, and with whomsoever, in which he might be interested in his private capacity or as executor or administrator, with the usual powers to sue for and receive all monies that might be due—to execute releases, and to make partial and final settlements, &c. On the 5th August, 1824, the intestate drew on his attorney in favor of Capt. Wm. Moore, for one thousand dollars, expressed to be for money due him as the executor of Buchan; and on the 20th August following, that sum was paid to Moore by Sidden. On the 28th February, 1825, the intestate drew a similar order on his said attorney in favor of Moore, for the further sum of one thousand dollars—which was duly paid on 19th March following. It

seems also that on the 2nd September. 1820, the intestate drew on one Cary Sidden, in favor of his said attorney. Thomas Sidden, for any money which he (Cary Sidden) might still owe to the estate of the late Rev'd Robert Buchan deceased, on account of lands purchased from the executors at their sale of the said estate in 1804. It ought to have been remarked before, that both of the orders in favor of Moore express that they are to be paid out of the fund collected by the attorney from Cary Sidden, for the intestate, as executor of Buchan. This bill was filed in 1840, and from the foregoing facts, it will be seen that thirty-six years elapsed between the probate of Buchan's will, twenty-one years before the death of the intestate, James —fifteen years after his death, and twelve years after the final settlement and distribution of his estate, before the filing of the bill; and that no notice had been before given to any of the parties of the existence of this demand. Nor is there any evidence of the receipt of other funds by the intestate of the estate of the testator, but the sums paid to Moore by Thomas Sidden. The

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grounds *principally relied on in the defence, are: 1st. That if the defendants are accountable at all, they are liable only at the suit of an administrator de bonis non of Buchan, and not directly to the complainant as legatee. 2d. That from the lapse of time, the legacy will be presumed to have been paid. 3rd. That the statute of limitations is a bar to the complainant's demand. 1st. In Farley v. Farley, 1 McCord Eq. Rep. 506, it is laid down broadly, that after the death of an administrator of an intestate, his next of kin cannot maintain a suit to recover property of the estate, without an administration de bonis non; and that rule applies directly to the question first made here. The propriety of its universal application has, however, been since questioned, and the better opinion seems to be that such a suit will be allowed without a new administration, when from the lapse of time it may be fairly presumed that all the other concerns of the estate have been finally settled. It has grown out of the disinclination of the Court to delay the course of litigation, and increase the expences, in cases where all the parties interested are before it, and the whole merits of the case as fully exposed and as well understood without as with a man of straw. This qualification of the rule must govern here. The lapse of twenty years, as I shall have occasion hereafter more fully to state, will, according to the uniform current of our decisions, be sufficient of itself to authorize presumption of the discharge of all executory obligations, and the rule will apply more forcibly to those for which no demand is made. After thirty-six years, therefore, it is a fair and reasonable presumption that all the other concerns of Buchan's estate, if not his demands, have been finally settled.

It has been before said that the lapse of twenty years will be sufficient to authorize the presumption of the discharge or satisfaction of all executory obligations. It is so in the cases of bonds for the payment of money—Blake v. Quash, 3 McCord, 340. So in the cases of bonds for the performance of covenants—[Nixon v. Bynum] 1 Bailey, 148. So a legacy will be presumed to have been paid after a lapse of twenty years—Barnwell v. Barnwell, 2 Hill Eq. Rep. 233. The rule itself is not controverted, nor is there any difficulty in its application, when the presumption

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of payment is not *repelled by extrinsic circumstances, as the payment of interest on a money bond, or any part of the principal; the admission the legacy has not been paid, and that the covenants provided for in the bond have not been performed, &c. In computing the lapse of time, it is indispensably necessary to ascertain, where it is uncertain, when the liability of the party charged first attached. In this State one year is allowed to an excutor to ascertain the condition of his testator's estate; and if at the end of this time he has neglected to perform any of the duties required of him, he is liable to suit at the distance of either a creditor or a legatee. I do not know, nor have I the means of ascertaining, how these matters are regulated by the laws of Virginia; but taking it for granted that there is some reasonable time in which an executor is required to adjust the affairs and account for his administration of his testator's estate, and in the absence of any other, I propose to adopt that limited by the laws of this State. Allowing one year, therefore, before the presumption would attach, the question is, whether there is any thing in the case to postpone it. The complainant states in his bill that the executors made no inventory of the estate, and rendered no account of their sales; and the only account of receipts and disbursements, which was rendered by the intestate, James, he repudiates as imperfect on its face. Here, then, was abundant cause of complaint, and a bill for an account might well have been maintained; and so if he had neglected to take all necessary measures to make sale of the estate, and collect all monies due, and account for, and pay over the same, without unnecessary delay. In the absence of any proof, the presumption is, that he performed his duty. It is said that he was delayed in collecting the proceeds of the land, by the interposition of a claim on the part of Virginia, which led to a protracted suit. But we have no evidence of the fact of such a suit but naked rumor; and even that does not show when it commenced or terminated.

Three circumstances are mainly relied upon to repel the presumption of payment. 1st. The removal of the defendant's intestate from Virginia to this State. 2nd. That he

did not actually receive the money on his order drawn in favor of Moore until 1824.

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3d. The resi*dence of complainant abroad. There is no pretence that there was any secrecy in the intestate's removal to this State. He left behind him an attorney, clothed with ample powers to settle this and all other demands against him. He was a man of character and distinction, and any enquiry there would, in all probability, have led to a knowledge of the place to which he had removed. The intestate's letter of attorney to Thomas Sidden, it will be remembered, is dated in 1807, and from any thing that appears, he received the monies now claimed immediately after; and it will not be insisted that the intestate would not have been liable immediately on the receipt of his agent; and computing the liability from that time, thirty-three years elapsed before the filing of the bill. The nonresidence of the complainant is not sufficient to repel the presumption of payment. In the absence of proof, it will be presumed that he had knowledge of the legacy having been bequeathed to him; and it is not reasonable to suppose that he would have delayed for more than twenty years to demand payment; nor ought it to have the effect of extending the time necessary to complete the presumption of payment. Our statute of 1824, limits the time of prosecuting a claim or title to ten years; and in Blake v. Heyward, 1 Bailey's Eq. Rep. 208, it was held that parties residing beyond the seas were entitled to no more, as there was no saving or exception in their behalf. Twenty years, as before observed, will authorize the presumption of the payment of a legacy, and I have not found any case in which non-residents were more favored, and none have been referred to. The intestate and his co-executor sold the estate of their testator in 1804. It does not appear that any demand for this legacy was made until the filing of this bill. In the mean time the intestate has died. The defendants are utterly ignorant of the manner in which he administered the estate—no human being, as far as we know, is better informed. The absence of all documents and vouchers, leaves us in utter uncertainty as to the true state of the facts, and if presumptions are worth any thing as a rule, they must obtain in this case. For the general doctrine, particularly as applied to cases where the original parties have been long dead, and their estates,

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as here, *finally settled and closed, I refer to Barnwell v. Barnwell before cited. The defence, if possible, stands even on higher grounds. The demand is barred by the statute of limitations. The well established doctrine of this court, based on the authority of the English Chancery, is, that the statute of limitations will not bar a demand growing out of a direct trust, but will a demand arising out of a trust raised by implication of law. And whether it is in obedience to the positive enactment of the Legislature, or a rule of Court, founded on a supposed analogy to the statute, is now immaterial, as it is followed implicitly. Alexander v. Williams, 2 Hill, 522; Massey v. Massey, 2 Hill Eq. Rep. 496—Fisher v. Tucker, 1 McCord Eq. Rep. 176—Miller v. Mitchell, 1 Bailey Eq. 437. If one place money or goods into the hands of another, upon an agreement that the bailee shall keep them safely and restore them when demanded by the bailor, it is a direct trust, to which the statute will not apply. But if one receive money or goods of another, believing that they belonged to him, when in fact ex equo et bono they belonged to a stranger—that is an implied trust, and the stranger is entitled to recover—but he may be barred by the statute of limitations. To which of these classes does this demand belong? The defendants were the distributees of the intestate, and entitled to equal shares of his estate. Distribution of the estate was made twelve years before the filing of the bill, each believing he was entitled to retain what he had received, in ignorance that any one else had a higher claim, and is in strict accordance with the definition of an implied trust. It is in effect money paid and received to the use of another, which, in an action at law, would be barred by the statute—unless brought within four years after the action accrued—and according to the rule before laid down, is barred in this Court. In Alexander v. Williams, Miller v. Mitchell, and Massey v. Massey, the precise point was ruled. A distributee or legatee is protected by the statute of limitations against creditors or others claiming, unless they file their bills within four years after distribution of the estate.

It is ordered that complainant's bill be dismissed, with costs.

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*Copy of Robert Buchan's Will.

In the name of God, amen. I, Robert Buchan, clerk, do make my last will and testament, in the manner and form following, viz:

I give to the negroes that may be in my possession when I die, their freedom, after the crop on hand is finished, and the other property, which I may then possess, is all sold. It is my will also, that they should be dismissed well clothed; and that each of them shall be furnished with an axe and a hoe, at the expense of the estate. Should I die, however, before Jesse, and the boy Dudley, are twenty-five years of age, I give their services to Mr. Sidney Wishart, till they arrive at the said age of twenty-five; after which, it is my will they shall be free. I also give and bequeath to Mr. Wishart, my family bible and prayer book, because I stood sponsor for him at his baptism. I give and bequeath to Dr. John M. Daniel, my watch,

as a remembrance of me. I give and bequeath to Benjamin James, Esq. all my books in the Greek and Latin languages. I give to William Ramsay one of my horses, and should he owe me any thing at the time of my death, I acquit him of the debt. I give and bequeath to my successor in the parish of Overwharton, if a minister of the Protestant Episcopal Church, my surplice; but if the parish should not obtain one of that pursuasion, my executors may dispose of it as they think proper. I give to the negro man, Tom, my wearing apparel. It is my will, that the land and personal property, which I now possess, shall be sold, after my decease, and my executors, if they think they can sell the said property on better terms, by selling it on a credit, allow the purchasers some time for making payment.

I give and bequeath to my brothers, David and James, to be equally divided between them, the money arising from the sale of the land and other property, and from the debts due to me at the time of my death; and as they reside in Great Britain, it is my will, that my executors make remittances to them in bills of exchange, or any other mode, as soon as they can. I appoint Dr. John M. Daniel and Benjamin James, Esq., executors to this, my last will and testament.

In testimony whereof, I have set to this my name, and affixed my seal, this 12th day of July, in the year of our Lord, 1803.

Robert Buchan. [L. S.]

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*The complainant gave notice that he would move the Court of Appeals to reverse the decree, upon the following grounds:

1. Because, under the circumstances of this case, lapse of time afforded no protection to the defendants, and could not defeat the right of complainant to recover.

2. Because his Honor erred in holding that the statute of limitations applied to the case, and was a bar to complainant's recovery.

3. Because the decree of his Honor was contrary to law and equity, and the defendant, upon the facts proven, should have been decreed to account to complainant for the amount of the funds in his hands, shewn to have been received by Benjamin James, deceased, as executor of Robert Buchan, deceased.

Irby & Young for the appellant. Sullivan, contra.

Curia, per JOHNSON, Ch. The court agree that by the rule adopted by the court, in analogy to the statute of limitations, the demand of the complainant against the defendants, is barred, and on that ground, concur in the decree of the circuit court. The question as to the presumption of payment arising from the lapse of time, is not, therefore, necessary to the decision of the case, and the court have declined expressing any opinion as to its merits.

Appeal dismissed.

HARPER, DUNKIN and JOHNSTON, Chancellors, concurred.

Speers, Eq. *385

*JOHN RAINSFORD v. JAMES RAINSFORD and Others.

(Columbia. Dec. Term, 1843.)

[1-3. *Wills* ⟸525.]

Testator bequeathed to his grand-daughters, E and M., an absolute and unconditional property in certain slaves, by name; and in subsequent clauses, gave the bulk of his remaining property to trustees, for the use of his son, "T. R., for and during the term of his natural life, and after his death, in trust for the child or children of the said T. R.," &c., who, at the execution of testator's will, had no other children except E and M. In the eighth clause of his will, he directed that if his son, T. R, "should die, leaving other children besides the said E and M, that the said E and M shall have no more of the property hereinbefore devised to their father, than shall be sufficient to make their shares equal to the distributive shares of such other child or children."

Testator's son, T. R, was appointed guardian of E. and M, and was to have the use of the property devised to them, until they came of age or married, for their maintenance and education. Complainant was the only other child that testator's son, T. R, left living at the time of his death.

In making partition of the property and estate devised to the son for life, and at his death, to his issue, it was *held* that the specific legacies to the grand-daughters must be estimated at their value, not at the decease of the son, but at the time of the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1138; Dec. Dig. ⟸525.]

[4. *Wills* ⟸630.]

The grand-daughters took vested interests at the death of the testator, though the possession was postponed; and had they died before the son, that interest alone would have been transmitted to their heirs.

[Ed. Note.—Cited in Tindal v. Neal, 59 S. C. 11, 36 S. E. 1004.

For other cases, see Wills, Cent. Dig. §§ 1464–1480, 1486, 1487; Dec. Dig. ⟸630.]

[5. *Infants* ⟸30.]

Where a partition had been made, during the minority of complainant, of the property devised to testator's son for life, and at his death, to his issue, between himself and the defendants, the grand-daughters of testator, and their husbands, and it was alleged by the latter, in opposition to the bill of the former for a re-partition, that since he came of age, he had confirmed the partition so made, by continuing in possession of the property allotted to him, and by receiving the money on two notes of hand, which had been given him by defendants for equality of partition—It was *held*, as to the former ground taken for a confirmation, that as complainant, after the partition, and after coming of age, continued to live with his mother, the executrix of the tenant for life, who had removed since the filing of the bill, and as he was not bound to abandon the property and leave it derelict, it could not be sustained. And as to his act, in receiving the money secured

by the notes, it not being such as would operate any fraud or injustice to the defendants, or give any undue advantage to complainant, if the contract were set aside, it was not a confirmation.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 46; Dec. Dig. ⟸30.]

[6. *Infants* ⟸30, 57.]

In relation to the confirmation of contracts made by infants, it must distinctly appear, that the act was intended to confirm, or that it was

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of such *a nature as to operate a fraud on the other party, if the contract were not affirmed—or in other words, gives an advantage to the infant contracting party, to which he would not be entitled, but on the supposition of the validity of the contract. Vide Smith v. Lowe, 1 Atk. 589; Whaley v. Dawson, 2 Sch. & Lef. 367; Belton v. Briggs, 4 Des. 465. *Held*, that if complainant had been of full age at the time of the partition, he was entitled to relief, on the ground of mistake. To confirm such a contract, it must appear that the party was aware of the mistake, of his right to be relieved, and that he intended to confirm, of which there was no evidence in this case. Vide Gist v. Gist, 1 Bailey Eq. 343; Cocking v. Pratt, 1 Ves. 400.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 44, 140; Dec. Dig. ⟸30, 57.]

[7. *Wills* ⟸665.]

Testator bequeathed a legacy to certain persons in trust, for the benefit of a grandson, residing in England, provided, within the term of ten years from the day of his decease, he removed to and established his permanent residence and abode in this State; and in a subsequent clause, provided, that if the said grandson should not, within the said term of time, remove to this State, that the property so devised, should be held in trust for his son, T. R, "in the same manner, and subject to the same limitations, as the property hereinbefore devised to him." The contingency not having occurred, it was *held*, that the legacy to the grand-son must be included in estimating the property given to T. R. for life, and at his death, to his issue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1561–1569; Dec. Dig. ⟸665.]

[8. *Infants* ⟸30.]

The rules of this court which are commonly considered to apply to an act of confirmation, where a contract is held to be vitiated on the score of implied fraud, *held* not to apply to this case. In such case, the party is supposed to be under some disability of ignorance, weakness, or necessity, or to stand in some relation of confidence, which disqualified him from making a contract on an equal footing, and before he can confirm, it must be shewn that the disability was removed, and that he was aware of his title to relief.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 41–49, 54, 55; Dec. Dig. ⟸30.]

[9. *Descent and Distribution* ⟸112.]

The statute of distributions which prescribes the manner in which advancements are to be valued in cases of intestacy, has no application in a case of testacy.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 421; Dec. Dig. ⟸ 112.]

This was a bill for partition and relief.

The bill sets forth, that John Rainsford was the grandfather of complainant. That he duly made and executed his last will and testament, on the twenty-fourth day of March, one thousand eight hundred and eighteen, and died in July of the same year, having appointed John Tarrants and John Hollingsworth his executors, who refusing to act as such, administration, with the will annexed, was committed, by the Ordinary, to Thomas Rainsford, a son of the testator, and the fa-

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ther of the complainant. That *the testator, amongst other things, devised and bequeathed to the said Tarrants and Hollingsworth, all his lands in this State, consisting of about eight hundred acres, and certain negro slaves, by name, with all his money on hand at his death, except one thousand dollars, in trust for the use and benefit of Thomas Rainsford, during his natural life, and after his death, in trust for his children, with a further limitation, in case he should die without leaving issue living at his death.

In another clause of his will, the testator gave and bequeathed in trust, certain slaves, by name, and five hundred dollars in cash, for his grand-son, John Rainsford, son of Joseph Rainsford, then resident in England, upon the express condition that the said John should, within the term of ten years from the day of his decease, remove to, and establish his permanent residence in, this State. A similar bequest is made for the benefit of James Rainsford, another son of the said Joseph Rainsford, upon like condition. James Rainsford removed to this State, and accepted the bequest.

The testator provides, that if his said grand-sons should not remove to this State within the time limited, the property so given and bequeathed to them, should be held in trust for Thomas Rainsford, in the same manner, and subject to the same limitations, as the property devised to him.

John Rainsford, of England, not having complied with the condition upon which the legacy was bequeathed to him, it inured to the benefit of Thomas Rainsford.

The testator gave and bequeathed to his grand-daughters, Esther and Mary, daughters of his son, Thomas Rainsford, an absolute and unconditional property in certain slaves, by name, with their future increase, and appointed their father their guardian. He directed that he should have the use of the property so bequeathed to his grand-daughters, until they came of age, or married, for their maintenance and education. The testator further provides, that if Thomas Rainsford should die, leaving other children besides Esther and Mary, they should have no more of the property devised to their father, than might be sufficient to make their shares equal to the distributive shares of such other child or children.

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*Esther Rainsford married James Rainsford, formerly of England, in 1833. The oth-

er grand-daughter married Lewis C. Cantelou, the same year. The property specifically bequeathed to them, was delivered 1st January, 1834.

Thomas Rainsford died in December, 1837, leaving, besides his daughters Esther and Mary, John Rainsford, the complainant, who was born after the death of the testator, and attained his majority, 2d July, 1840. The bill alleges that the land devised to Thomas Rainsford had greatly depreciated in value during his lifetime, from use and cultivation—that no benefit enured to him from the pecuniary bequest, as the whole amount of cash on hand, at the death of his testator, was but $296, a sum insufficient to pay the specific pecuniary bequest to James Rainsford—that of the negroes bequeathed to Thomas Rainsford, one had died in his lifetime, and the others, being men grown at testator's death, had become, at the date of Thomas Rainsford's death, nearly valueless from old age. That of the negroes bequeathed to John Rainsford, of England, but ultimately enuring to the benefit of Thomas Rainsford and his children, one had died. The bill expressly charges, that the property bequeathed to either of the granddaughters, was, separately, of greater value at the death of Thomas Rainsford, than the whole of the property bequeathed in trust for the said Thomas and his children, including the portion bequeathed in the first instance to John Rainsford, of England; and that, consequently, by the just construction of the will, neither the said Esther nor Mary was entitled to any portion of said estate and property, beyond that which was specifically bequeathed to them—that the whole belonged to complainant.

The bill further states, that shortly after Thomas Rainsford's death, whilst complainant was a minor, on the 5th January, 1838, James Rainsford and Lewis C. Cantelou, as the representatives of their wives, and without any legal process or authority, procured a valuation and appraisement to be made by two gentlemen of the district, of all the estate and property bequeathed and devised in trust for Thomas Rainsford and his children, including the portion conditionally bequeathed to John Rainsford, of England. That said estate and property was estimated at

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*$10,400, rating the property bequeathed to Esther and Mary at the sums to which they had been appraised in 1818, (without any reference to the appreciation of value from the increase of the negroes, and the change of times.) That James Rainsford and L. C. Cantelou had possessed themselves of certain portions of the estate and property devised and bequeathed to the said Thomas Rainsford and children, in order to equalize their shares, according to their peculiar notions, with the share of complainant, the values being estimated according to the appraisement of 1838. Complainant alleges, that since he had attained full age, he had executed no act which was intended, or could be fairly interpreted, to confirm the partition of 1838.

The bill prays that the defendants, James Rainsford and L. C. Cantelou, may set forth the names, ages, general description and value of the slaves bequeathed to their wives, respectively, with their increase at the decease of Thomas Rainsford, or on 5th January, 1838. That they might be decreed to deliver up the property received by them under the partition of 1838, to complainant; account for their rent and hire, and renounce and release all claim to any portion of the estate and property bequeathed and devised in trust for Thomas Rainsford and children, or John Rainsford, of England; or for a writ of partition, to divide the said estate and property among the children of Thomas Rainsford, if the negroes bequeathed to Esther and Mary, by just appraisement, at the death of Thomas Rainsford, should be ascertained to be, respectively, of inferior value to the whole estate devised to Thomas Rainsford and children, and John Rainsford. That complainant's share might be adjusted and apportioned to him in severalty. That John Rainsford, of England, might be perpetually barred and restrained from setting up any claim under the conditional bequest in the will of testator, &c.

The statements of the bill were generally admitted by the defendants, but it was contended, that complainant had confirmed the partition made, since he came of age.

The cause came on to be heard before his Honor, Chancellor Harper, at Edgefield, June Term, 1842, who made the following decree.

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*Harper, Ch. As the will, upon the construction of which the decision in this case depends, has been often before the court, and is published at length, (Dud. Eq. 66.) I do not think it necessary to give any detail of its provisions. I annex, however, the brief of the bill, which gives the complainant's case. The defendants, in substance, admit the statements of the bill, but supposing the partition spoken of to be void, on account of the complainant's infancy, they allege that he has confirmed it since he came of age. Two acts or circumstances of confirmation are relied on. The first, that he continued in possession of the property allotted to him, after he came of age; and secondly, that he received the money due on two notes of hand, which were given to him by the defendants, James Rainsford and L. C. Cantelou, for equality of partition.

With respect to the first of these, it was explained, that after the partition, and after coming of age, he continued to live with his mother, the executrix of Thomas Rainsford, who had previously had possession of the property. She had removed since the fil-

ing of the bill. But independently of the explanation, there is nothing in this. He was not bound to abandon the property and leave it derelict. With respect to the second alleged act, the evidence is, that the notes were given by the defendants, Cantelou and Rainsford, at the time of the partition, and deposited in the hands of Dr. Adams. That upon his coming of age, complainant applied for and received them, and that they were paid by Cantelou on the 22d of August, 1840, and by James Rainsford, on the 30th of November, 1840.

The first question which I shall consider is, whether the persons called on to make partition adopted a correct or erroneous mode of estimating the value of the property, with a view to the equality directed by the will of the testator, John Rainsford. A question seemed to be made, with respect to the bequest to John Rainsford, of England, whether the property bequeathed is to be included, in estimating the estate given to Thomas Rainsford for life, and at his death, to his issue, or whether that is to be equally distributed, and then the specific bequests to the testator's grand-daughters made equal out of the estate given in the first instance to Thom-

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as Rainsford. But this can hardly *admit of doubt. The property was given to John Rainsford, of England, upon a contingency, and if that contingency should not happen, the direction is express, that it "should be in trust for the said Thomas Rainsford, in the same manner, and subject to the same limitations, as the property hereinbefore devised to him." And this conforms to the notion of general equality, among his grandchildren, which it is evident the testator contemplated.

I think the persons appointed to make partition were mistaken as to the manner in which they supposed the respective portions of property were to be valued—estimating those given specifically by the testator to his grand-daughters, Esther and Mary, according to the appraisement made of them after the testator's death in 1818, and that given to Thomas Rainsford for life, and at his death, to his issue, as of the time of the partition, or of Thomas Rainsford's death. They were probably misled by the direction of the Act of distributions—that in case of intestacy, advancements are to be valued as of the time of the intestate's death. But the Act has no application at all in a case of testacy.

If property be given to one for life, and at his death, to his children, to be equally divided between them, there can be no doubt but that the equality intended, is at the death of the tenant for life, when the property vests in possession, and that it must be valued as of that time. It would make no difference, if it were directed that certain of the children should take specific portions of the property, and so much of the residue as would place all upon a footing of equality. But this is understood to be the effect of the will, according to the decisions of the courts in the former case of Rainsford v. Rainsford [Rice, Eq. 343]. It is held that a beneficial interest was given to Thomas Rainsford for life, in the property bequeathed to Esther and Mary, subject only to a charge for their maintenance and education. They were not to have the possession of any beneficial interest beyond maintenance and education, until the death of Thomas Rainsford. But however this may be, it is clear that the children of Thomas Rainsford, other than Esther and Mary, were to take nothing till their father's death. It is then that the property

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given to him *is to be divided, of course it is then that Esther and Mary are to be put on a footing of equality, and then the valuation must be made. There is an analogy between the case of McDougald v. King, 1 Bail. Eq. 154, and the present, and the equity of the conclusion may be sustained by the same sort of reasoning. Esther and Mary were to be maintained and educated out of the property bequeathed to them; any other children would be maintained and educated out of the property given to their father. Up to the time of his death, advantages were equal, and equality should be preserved in making the final distribution.

The next question relates to the confirmation of the partition, after the complainant came of age. I do not suppose the rules to apply, which are commonly considered to apply in this court to an act of confirmation, when a contract is held to be vitiated on the score of implied fraud. In such case, the party is supposed to be under some disability of ignorance, weakness or necessity, or to stand in some relation of confidence, which disqualified him from making a contract on an equal footing, and before he can confirm, it must be shewn that the disability was removed, and that he was aware of his title to relief. But if there were no other disability but infancy, the party, on coming of age, is of course aware of his title to relief—he knows that he may avoid the contract made whilst he was an infant.

I have looked a good deal into the cases in relation to the confirmation of contracts made by infants, and it appears to me, either that it must directly appear that the act was intended to confirm, or that it was of such a nature as to operate a fraud on the other party, if the contract were not affirmed—or what, perhaps, amounts to the same thing, to give an advantage to the infant contracting party to which he would not be entitled, but on the supposition of the validity of the contract. Thus, where on coming of age, one had sold a horse purchased during infancy, and then pleaded infancy to the note given for the purchase money, if the plea

had been allowed to prevail, this would have been a fraud, either on the other party, or the purchaser of the horse; the infant hav-

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ing put it *out of his own power to rescind the contract. In Smith v. Low, 1 Atk. 489, where a mother, acting as guardian, leased the land of infants, and they accepted the rent for ten years after the youngest came of age, this was held to be a confirmation. But the court said it was in its power to confirm a contract beneficial to infants, and that the contract in question was beneficial to them, as the premises needed repairs, which they were unable to make, and the tenant had covenanted to make. I may add, that it would have been a fraud on the tenant, to evict him after having laid out his money in repairs. So in the case of Whaley v. Dawson, 2 Sch. & Lef. 367, which was a bill for partition, the defendants relied on a former partition, made by the plaintiff's father and guardian, during his infancy, which, it was alleged, the plaintiff had confirmed upon coming of age by leasing out the moiety in his possession, and part of it at an under value, which would render it unequal and unjust to the defendants, if there should be a re-partition. In this case, the plaintiff had acquiesced for 15 or 16 years. On the final hearing, relief was refused, on the ground of the long acquiescence, and that the defendant's tenants had laid out large sums in improvements, on the faith of their title being in severalty. In every case of lease by an infant, the tenant is encouraged to lay out monies in improvements. In Belton v. Briggs, 4 Des. 465, the infant party, three years after coming of age, joined in the conveyance of a tract of land, which was held to have been purchased in substitution for the land sold by his mother and guardian, and received his proportion of the purchase money. This was held to be a confirmation of the sale made by the mother, and certainly he would have gained a most unconscientious advantage if it had not been so held.

In the present case, there certainly does not appear any express intention to confirm. Then, was the act of the complainant, in receiving the money secured by the notes, such an one as would operate any fraud or injustice to the defendants, or give any undue advantage to the complainant, if the contract were set aside? Plainly not. If there should be a re-partition, the money received on the notes will be taken into the

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account in allotting his share. Dis*tribution of personal estate, is supposed to be made in money. Suppose the partition to be void, the complainant has received no more than he would be entitled to—he has not received so much.

But apart from the disability of infancy, I have no doubt that the complainant, if of full age at the time of the partition, would be entitled to relief, on the ground of mistake. It is not like the case of a party contracting in ignorance of the law, of which he can afford no evidence, but that he made a contract disadvantageous to himself. The source of the mistake appears. He was misled by the conduct of the persons making the partition, and acquiesced in their judgment, as to the proper method of valuing the property. The case of Gist v. Gist, 1 Bail. Eq. 343, in some of its features, bears a considerable resemblance to the present. Then, if the receiving of the money on the notes were a confirmation, so far as respects the infancy, would it confirm the contract made by mistake? To confirm such a contract, it must certainly appear that the party was aware of the mistake and his right to be relieved, and that he intended to confirm. But I have no evidence of any such knowledge or intention in the present instance. He may have been advised before filing his bill, that he was entitled to relief, but that was probably on the score of his infancy; the matter has been litigated, and it may be said that the mistake will not be fully ascertained until the final judgment of the court. In Cocking v. Pratt, 1 Ves. 400, a daughter, a short time after coming of age, entered into an agreement with her mother, for the distribution of her father's personal estate; which agreement, after the daughter's marriage, was confirmed by her husband. It turned out that she received much less than her proper share, and the court relieved. The Master of the Rolls observed, that she did not intend to take less than her full share, but was under a misapprehension as to the value of her share; it was not a case of compromise for ready money, as wanting to marry. This was not a case of compromise; the complainant did not intend to take less than his full share, and was misled as to what that share was.

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*It is ordered and decreed, that a writ of partition issue to make partition of the property and estate devised by John Rainsford to his son, Thomas Rainsford, for life, and at his death, to his issue, betwen the complainant and the defendants; and that the parties produce for the purpose, every portion of the said property in their possession; that the commissioners to the said writ of partition, value and appraise the said property and estate, and also the property bequeathed by the said John Rainsford to his grand-daughters, the defendants, Esther and Mary, as of the time of the death of the said Thomas Rainsford, and that they allot to the said Esther and Mary, and their husbands, such a proportion of the property and estate first mentioned, as being added to the value of the property bequeathed to them specifically, will leave to be allotted and assigned to the complainant, property of equal value with

the aggregate of theirs respectively, giving to each an equal provision from the entire property derived by them from the estate of John Rainsford; the money received by the complainant, on the notes of the defendants, James Rainsford and L. C. Cantelou, to be accounted as so much received on account of his share, and the defendants to account for the rents and profits of any excess of property which may have been in their possession, over and above what they may be found entitled to on the present partition, or to account for interest on the estimated value of such excess. Defendants to pay the costs.

The defendants appealed from the decree of his Honor, Chancellor Harper, and moved the Court of Appeals to reverse or modify it, on the following grounds.

1. That the partition sought to be set aside by the bill, is obligatory on the plaintiff, inasmuch as after he was of full age, he confirmed said partition, by retaining possession and exercising ownership and control over the land and negroes assigned to him, and by receiving and collecting the amount of three promissory notes given by the defendants, to equalize the portions of the parties.

2. Because the plaintiff is not entitled to relief on the ground of mistake, as no such ground is presented by the pleadings or the proof.

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*3. Because the increase of the negroes bequeathed to Esther and Mary, should not have been taken into the estimate at all, in the partition, and especially the increase of the said negroes after the marriage of the said Esther and Mary in 1833, in the lifetime of their father, Thomas Rainsford.

4. Because the legacy to John Rainsford, of England, should be equally divided between the said Esther and Mary, and the plaintiff, and should not be regarded as on the footing of the property given in trust to Thomas Rainsford, under the will of John Rainsford.

5. Because the costs should be paid either by the plaintiff or out of the estate.

6. Because the decree is, in other respects, against equity.

Griffin & Burt, for appellants.

Wardlaw & Carroll, contra.

Curia, per JOHNSON, Ch. The court concur in the decree of the Circuit Court, except in the directions to the commissioners to make partition, that the legacies to Mary and Esther, including the issue and increase of the slaves after the death of the testator, should be estimated at their value at the death of Thomas Rainsford.

We agree with the Chancellor, that the rule prescribed by the Act of distributions, has no application to the case. That applies only to cases of intestacy. The testator had the right to prescribe another; and what that is, can only be resolved by his will. In the first clause, he gives to his grand-daughter, Esther, an absolute and unconditional property in eleven slaves, by name; and in the same clause, he gives to his grand-daughter, Mary, in like manner, twelve other slaves, by name. In the third and following clauses, he gives the bulk of his remaining property to trustees, for the use of his son, "Thomas, for and during the term of his natural life, and after his death, in trust for the child or children of the said Thomas Rainsford," &c. At the time of the execution of the will, Esther and Mary were all the children he had, and in the eighth clause of his will, testator directs, that if his said son Thomas Rainsford "should die, leaving

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other child*ren, besides the said Esther and Mary, that the said Esther and Mary shall have no more of the property herein before devised to their father, than shall be sufficient to make their shares equal to the distributive share of such other child or children." And he then goes on to appoint Thomas Rainsford, guardian of Esther and Mary, and directs that he shall have the use of the property devised to them, until they come of age, or marry, for their maintenance and education.

The complainant, John Rainsford, was the only other child that Thomas Rainsford left living at the time of his death; and the question is, whether the legacies of Esther and Mary are to be estimated at their value, at the death of the testator, or at the time of their marriages, which happened before the death of Thomas Rainsford, or at the time of his death.

In the events which have happened, there is no doubt, that the rule adopted in the circuit court decree, is the best calculated to effect equality amongst the legatees; but no rule can be just, which will not lead to the same results, under every variety of circumstances.

If we were at liberty to conjecture what the testator would have done, if the matter had been distinctly presented to his mind, we should readily conclude that he intended to put all his grand-children, whether born before or after the execution of his will, on perfect equality. But we cannot travel out of the will for his intention, and judging from this, it is apparent that under different circumstances, the rule adopted by the circuit court would effect great inequality. If, for example, the estate devised to Thomas Rainsford, for life, and limited over to his children, had so much depreciated as to be greatly inferior in value to the specific legacies to Esther and Mary, the will gives complainant no right to call on them to contribute to make it equal to their portions; and so, I apprehend, if their legacies had depreciated, and the rest of the estate had

greatly appreciated in value, Esther and Mary would have no right to resort to it to repair the depreciation.

It is not questioned that Esther and Mary took a vested interest in the legacies to them, at the death of the testator, though the pos-

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session was postponed, and if they *had died before Thomas Rainsford, that interest, and that alone, would have been transmitted to their heirs; and that itself is a conclusive answer to the inquiry as to what they took under the will, and the value can only be ascertained by reference to the time of the death of the testator.

It is, therefore, ordered and decreed, that in the partition ordered by the circuit court, the specific legacies to Esther and Mary, be estimated at their value at the time of the death of the testator. In all other respects, the decree of the circuit court is affirmed.

DUNKIN, Ch., concurred. HARPER, Ch., dissented.

JOHNSTON, Ch., absent from indisposition.

CHARLESTON, JANUARY TERM, 1844.

CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
" WM. HARPER,
" J. JOHNSTON,[1]
" B. F. DUNKIN.

Speers, Eq. *399

*THE BANK OF CHARLESTON v. WILLIAM H. INGLESBY, Administrator, et al.

(Charleston. Jan. Term, 1844.)

1. A tract of land had been mortgaged by defendant's intestate, to complainant, which, under a decree of foreclosure in this case, was sold by the Master: the proceeds of sale paying off complainant's debt, and leaving in the Master's hands the bond of the purchaser, as a surplus, subject to the order of the court. Order passed, that the Master retain the surplus of the funds, subject to the further order of the court, and a rule upon him to shew cause why the bond should not be assigned to the administrator of the intestate, to be applied in due course of administration.

[2. *Executors and Administrators* ⇐39.]

The defendant, as administrator, not entitled to receive the money due on the bond. Vide, Ex-parte Foster, Rice Eq. Rep. 19. But, as the creditors were entitled to be paid out of the fund, it was ordered by the court, that the Master deliver the bond to the administrator, upon his entering into bond to him, in double the amount of the purchaser's bond, with a condition for its faithful administration. Also, ordered, upon the refusal or neglect of the administrator, within a limited time, after notice of this order, to give the bond directed, that the Master give notice to creditors to establish

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their *demands before him; that upon receipt of the money, the same be applied to the payment of the intestate's debts, in the order prescribed by law. Any balance remaining in his hands to be distributed amongst intestate's heirs, or next of kin, in the proportions prescribed by the Act for the distribution of intestate's estates.

[Ed. Note.—Cited in Mauldin v. Gossett, 15 S. C. 578; Trapier v. Waldo, 16 S. C. 288; Pendergrass v. Pendergrass, 26 S. C. 32, 1 S. E. 45.

For other cases, see Executors and Administrators, Cent. Dig. § 294; Dec. Dig. ⇐39.]

Before Dunkin, Ch., at Charleston, July Term, 1843.

This was a rule upon the Master in Equity. The facts of the case will be fully apparent from the order passed, on motion of complainant's solicitors, the rule, and return thereto.

The master's report, in this case, being read, on motion of Petigru & Lesesne, complainant's solicitors, ordered that so much of the same as relates to the sales of Bull's Island plantation, to Charles Jugnot, for five thousand seven hundred dollars, and the account of the disbursement of the funds annexed to the report, be confirmed. And it is further ordered, that the master do retain the residue or surplus of the funds arising from the said sale, consisting of Charles Jugnot's bond, conditioned for eight hundred and fifty-seven dollars and sixty-eight cents, subject to the further order of the court.

On the 19th July, 1843, Mr. DeSaussure, solicitor of Wm. H. Inglesby, administrator of Newman Kershaw, took out a rule upon the master, to shew cause why the bond of Charles Jugnot, for $857.68, in his hands, should not be assigned to Wm. H. Inglesby, administrator of Newman Kershaw, to be applied to the payment of the debts of Newman Kershaw, in due course of administration.

Upon the return of the rule, the master shewed for cause, that the bond of Charles Jugnot, in his hands, was the residue or surplus of the purchase money of Bull's Island plantation, mortgaged by Newman Kershaw, in his life-time, to complainant; that the sales of the mortgaged premises, under decree of foreclosure, in this case, had paid off the complainant's debt, and left the said bond as a surplus in his hands, subject to the further order of the court; that the estate

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of Newman Kershaw was insolvent, *and the master did not feel justified, without the order of the court, in assigning the said bond to the administrator of Kershaw, because his administration bond covered only his administration of the personal estate of the intestate.

On hearing the cause assigned the Chancellor dismissed the rule.

An appeal was taken from the order of

[1] His Honor, Chancellor Johnston, did not regularly occupy his seat on the bench during this term in consequence of indisposition.

the Chancellor dismissing the rule, to ask the directions of the Court of Appeals on the subject, and with a view to establish the future practice of the court in similar cases.

H. A. DeSaussure, Solicitor for Appellant. Petigru & Lesesne, contra.

Curia, per JOHNSON, Ch. That the defendant is not, in the character of administrator, entitled to receive the money due on the bond, is directly decided in Ex-parte Foster, Rice's Eq. Rep. 19. The power delegated to him by the Ordinary, is to administer the goods and chattels, rights and credits, which were of his intestate, at the time of his death, and his bond is conditioned to perform that duty. His lands descended immediately to his heirs, and although by law they are subject to the payment of debts, the administrator has no power over them. It is plain, therefore, that the sureties to his bond would not be liable for money received by him, arising from sales of real estate.

The creditors are, however, entitled to be paid out of the fund, and the court might, in its discretion, confide the fund to any one, to be administered. But it may well be supposed, that the administrator has already had notice of all the demands against the estate, and it is more fit that the fund should be paid to him. He must, however, give security for its faithful administration. If he refuse or neglect to do so, it will be the duty of the master to administer it.

It is, therefore, ordered and decreed, that the master do deliver to the defendant the bond of Charles Jugnot, referred to in the proceedings, on his entering into bond, to the master, in double the amount due on

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the said bond, with *a condition that he shall well and faithfully apply the proceeds thereof, in the due course of the administration of his intestate's estate; and if the defendant shall refuse or neglect to do so, for the space of thirty days after notice of this order, the said master is hereby ordered to advertise for creditors to come in and establish their demands against the intestate, within a certain time, to be prescribed by him, and that on the receipt of the money due on the said bond, he do apply the same to the payment of the debts due by the intestate, in the order prescribed by law; and if after the payment of all the debts, any balance remains in his hands, he do distribute the same amongst the intestate's heirs, or next of kin, in the proportions prescribed by the Act for the distribution of intestate's estates.

DUNKIN and HARPER, Chancellors, concurred.

JOHNSTON, Ch. absent from indisposition.

Speers, Eq. 402

LOUIS VIDAL et al. v. SIMON VERDIER.

(Charleston, Jan. Term, 1844.)

Testator devised and bequeathed as follows: "I give, devise, and bequeath, unto my beloved wife, S. B. the use of all and singular my estate, both real and personal, whatsoever, and wheresoever, during her natural life; and after the death of my beloved wife, S. B. I leave to my nephew, J. F. V. the whole of my estate, both real and personal; but in case of the death of my nephew, J. F. V. without his leaving a lawfully begotten child, or children, then, and in that case, the whole, both real and personal, be divided amongst the rest of my nephews and nieces, share and share alike. And be it further understood, that in case of the death of my nephew, J. F. V. leaving a lawfully begotten child, or children, then, and in that case, the whole property, both real and personal, shall be divided between them, share and share alike; and in case of the death of one of the said children, without his or her leaving a law-

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fully begotten child or children, his or her *portion shall be divided between the remaining child, or children; but in case of the death of each and every child, without their leaving behind them a lawfully begotten child, or children, then the estate, both real and personal, shall be divided among my other nephews and nieces, share and share alike, and if they be dead, their children."

[2. *Wills* ⟸602.]

It was *held*, that the words, "after the death of my beloved wife, S. B. I leave to my nephew, J. F. V., the whole of my estate, both real and personal," amounted to an absolute gift in remainder, after the estate for life; that the subsequent provisions amounted only to contingent limitations over, on the death of the legatee, which were to be construed as referring to the death of the legatee, prior to the period when the remainder was to take effect in possession.

[Ed. Note.—Cited in Dehay v. Mitchell, 1 Rich. Eq. 268, 269; Blum v. Evans, 10 S. C. 80, 81; Mangum v. Piester, 16 S. C. 322, 323; Marshall v. Marshall, 42 S. C. 437, 441, 444, 445, 20 S. E. 298; Bischoff v. Atlantic Realty Corp., 95 S. C. 284, 285, 286, 287, 288, 289, 290, 78 S. E. 988.

For other cases, see Wills, Cent. Dig. § 1354; Dec. Dig. ⟸602.]

Before Dunkin, Ch., at Colleton, February Term, 1843.

Dunkin, Ch. By the last will and testament of Peter Bennett, late of Wadmalaw Island, deceased, he devised and bequeathed as follows, viz: "I give, devise and bequeath unto my beloved wife, Sarah Bennett, the use of all and singular my estate, both real and personal, whatsoever and wheresoever, during her natural life; and after the death of my beloved wife, Sarah Bennett, I leave to my nephew, James Felix Vidal, the whole of my estate, both real and personal; but in case of the death of my nephew, James Felix Vidal, without his leaving a lawfully begotten child, or children, then and in that case, the whole, both real and personal, be divided among the rest of my nephews and nieces, share and share alike. And be it further understood, that in case of the death of

my nephew, James Felix Vidal, leaving a lawfully begotten child, or children, then and in that case, the whole property, both real and personal, shall be divided between them, share and share alike; and in case of the death of one of said children, without his or her leaving a lawfully begotten child, or children, his or her portion shall be divided between the remaining child, or children; but in case of the death of each and every child, without their leaving behind them a lawfully begotten child, or children, then the estate, both real and personal, shall be divided among my other nieces and nephews, share and share alike, and if they be dead, their children." The widow, Sarah Bennett,

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*and James Felix Vidal, were appointed executrix and executor of the will, both of whom qualified. Some time afterwards, the widow departed this life, leaving, surviving her, the said James Felix Vidal, who, on the 11th September, 1835, for valuable consideration, conveyed and assigned all his interest in the said estate, consisting of a plantation and fifty negroes, to the defendant, Simon Verdier. The defendant has since sold one of the negroes.

James Felix Vidal is without children, and unmarried. The bill is filed by the nephews and nieces of the testator, insisting, that in the event of the death of James F. Vidal, without leaving a lawfully begotten child, or children, they will be entitled to the estate under the will of Peter Bennett, deceased, and praying an injunction against the sale of the negroes, and that the defendant may be compelled to file an inventory or schedule, &c.

The whole question turns on the construction to be given to the terms, "but in case of the death of my nephew, James Felix Vidal," &c. It is said by Mr. Roper, that these words, when used generally, in a clause divesting, or limiting over, a bequest, have acquired no precise or definite meaning. If the testator meant to refer to the period of the death of the legatee, whenever it might take place,—that is a certain event, and the word of contingency should be rejected. On the other hand, if the testator had in his mind some contingency, as, that the legatee was then dead, or might die before him, or before the legacy was payable, then the inaccuracy consisted in not specifying the period to which the death was to be referred. 1 Rop. Leg. 406. "Courts, therefore, endeavor to collect from the nature and circumstances of the bequest, or the context of the will, in which sense it is most likely this doubtful and ambiguous expression was employed." Some settled rules have, however, been established by the concurrence of authorities, or of decided cases. If a legacy be given to A, generally, "and in case of his death," to B, these expressions, unexplained by the context, are confined to the event of the death of A, in the lifetime of the testator. See Rop. Leg., and Turner v. Moore, 6 Ves. 557. But if the gift is not immediate, but in remainder after an estate for life, with a bequest over, "in case of the death of the

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remainderman, those expressions *will be applied to the period when the remainder takes effect in possession, viz.: the death of the person taking the preceding interest." Rop. 409.

If the object of the testator, as appearing from the clause itself, or from the context, be to give an absolute estate to the legatee, with a contingent limitation over, upon the death of the legatee within, or before, a particular period, these rules of construction are applicable, and the court will not permit them to be controlled by parol testimony. Lowfield v. Stoneham, 2 Stra. 1261. Cambridge v. Rous, 8 Ves. 13, 21.

On the other hand, if the object of the testator, as collected from the will, be not to give an absolute estate to the legatee, but that the legacy should go over upon his decease, whenever it might happen, the court will reject the words denoting contingency, as "in case of," and substitute words of absolute signification, as "at," or "upon;" Billings v. Sandan, 1 Bro. C. C. 393; the effect of which will be to give to the first taker only an estate for life, and the absolute interest to the person in remainder. It is necessary, therefore, to inquire what was the object of the testator in regard to his nephew, James Felix Vidal, and to apply these principles, or rules of construction, according to the character of the legacy, or the category under which it should be classed. Was it the intention of the testator, that his nephew should, in no event, take more than a life estate, or was it his intention to vest in him the absolute estate, subject only to be defeated on the happening of a particular event, to wit, the death of the legatee, within a period contemplated by the testator? In the latter case the expressions, according to the rule stated, will be construed to apply to the event of the death of the legatee during the existence of the life estate, or before the period when the remainder was to take effect in possession—and, as the legatee has survived the life tenant, his estate, and consequently that of his vendee, is now perfect and indefeasible. In the other case, that is, supposing the intention be ascertained to give only a life estate to the nephew, with a limitation over on his death, whenever it shall take place, the court will give

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such construction as will carry this in*tention into effect, provided such intention can be accomplished without violating the rules of law.

The remark which the court would first make, in endeavoring to ascertain the intention of the testator, is, that, where he clear-

ly proposes to give only a life estate, he knows very well the proper language to express his intention, and he uses it. To his widow he gives the use of his entire estate "during her natural life," and after the death of his wife, he leaves to his nephew "the whole of my estate, both real and personal." It is impossible to use terms more appropriate to fix the qualified estate of the wife, and the entire gift of his estate to his nephew, without any qualification, to be enjoyed at the expiration of the life interest.

If his purpose had been, that, in no event, the estate of his nephew should have been longer than that of his wife, it seems incomprehensible that he should have omitted to use the words which in the preceding bequest he had deemed it necessary to use in restricting the estate given to his wife. It was upon this principle that Lord Thurlow formed his judgment in Billings v. Sandan. The will itself afforded intrinsic evidence that the testator knew how to distinguish between an absolute bequest, and the gift of a partial interest. So, in Galland v. Leonard, 1 Swanston, 161, the bequest was to the testator's wife for life, with a direction to the trustees to divide the trust fund, after the death of his wife, between his daughters, Hannah and Ann, for their own use; and, "in case of the death of his daughters, or either of them, leaving a child, or children," to apply a portion to their maintenance while minors, and on their attaining twenty-one, to distribute the capital among them per stirpes: remainder over, in the event of the death of the daughters leaving no issue which should attain twenty-one years of age. It was held, that the gift of the daughters was absolute, though defeasible in the event of their dying during the life-time of the testator's widow.

There are other points of striking resemblance between the case of Galland v. Leonard, and that before the court, besides the particular principle which it has been cited to illustrate. Both the daughters, in fact,

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died before the tes*tator's widow. It was not contended, that the expressions, "in case of the death of my daughters," could be construed in that will to mean dying at any time, but the personal representatives of the daughters insisted they should be applied to the event of their death in the life-time of the testator; but it was ruled, as is stated, that it should subsist in contingency during the life-time of the widow.

The court has already remarked, that, without more, the clause quoted would be a complete and final disposition of the testator's entire estate. A life estate is given to his widow, with a remainder in fee, or absolutely, to his nephew. The policy of the country is to unfetter estates. But where an estate is given to a parent for life, and to his issue after him, the court, in order to effect the intention, and in favor of the issue, will lay hold of words to restrict the terms to those he may leave at the time of his death. But on a careful examination of this will, it seems difficult to suppose that the testator intended gifts in succession, viz: to his nephew for life, and afterwards to his children. The estate is given to the nephew without qualification. The testator does not go on to provide, that, at the death of the nephew, the estate shall pass to the children of the nephew, or even that in case of the death of the nephew, it shall pass to his children. On the contrary, he seems to have regarded himself as having fully disposed of his estate, unless a particular contingency should occur, which he next proceeds to contemplate. "But in case of the death of my nephew, James Felix Vidal, then, and in that case," &c. This language, says the Master of the Rolls in Webster v. Hale, 8 Ves. 410, points more to alternative dispositions, than to gifts in succession, viz: to her for life, and afterwards to her children. The word, "but," says he, is disjunctive, and adversative. It opposes one case to another, and implies that the children were to take in an event different from that of the parent. The reasoning is much stronger, when, after using this language, provision immediately follows, not that the estate should go to the children of the first taker, but to strangers to him.

Again, if the testator had intended only a life estate for his nephew, the natural obvious course would have been, so soon as this was carried out, then to provide for the

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suc*cessor of the nephew's children. The omission to do this, is a strong argument that the testator did not contemplate that they were to take in succession from their father. On the hypothesis that a life estate only was intended to the nephew, it is neither usual, nor natural, that he should next provide for the limitation to collateral. On the other hand, if the nephew should die during the continuance of the widow's life estate, the proximate contingency would be, that he would die without children, and he proceeds first to provide for that contingency.

In case of the death of James Felix Vidal, without children, the whole estate, both real and personal, is "to be divided among the rest of his nephews and nieces, share and share alike." There is not an apology for saying, that the estate of the other nephews and nieces is, in any manner, restricted or qualified. Why should the particular object of his bounty, his haeres factus, be cut down to a life estate, when those who occupied, manifestly, a secondary place in his regard, take an absolute interest? On the other hand, if the favorite nephew should not be alive at the period fixed for the enjoyment of his estate, "but, in case of the death of his nephew, without his leaving a lawfully begotten child, then, and in that case," it was very natural, and in harmony with the previous

provisions, that the whole estate should be divided among the rest of his nephews and nieces standing on the same platform with James F. Vidal, and it is so accordingly provided.

But this contingency, although the most likely in the event of the death of James Felix, prior to that of the widow, might not occur. James might live to have children, and still die before the period arrived when he was to enjoy the estate. In that state of things, the testator would not have it left to implication, or doubtful interpretation, that the children should stand in the place of their parents; "and be it further understood, that in case of the death of my nephew, James Felix Vidal, leaving a lawfully begotten child, or children, then, and in that case, the whole property, both real and personal, shall be divided between them, share and share alike." All this language points to the conclusion, not that the children were to take in succession from the parent, but that they were to take in

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case the fa*ther could not take—and, it may be added, that they were to take, in that event, the same estate which the father himself would have taken. The testator manifests no desire to perpetuate the estate through a long series of descendents. He looks only to the period of his widow's death. If his nephew, James Felix Vidal, is then alive, he gives him the whole estate absolutely. If James has died, without leaving a child, the estate is to be divided among his other nephews and nieces. If James has died, leaving a child, or children, the estate is to be divided among them absolutely. On reviewing the whole will, although other and more precise language might have been used, it is not very clear that the testator has not used the most natural expressions which unskilled men would employ in order to express their intentions.

When the testator declares, "after the death of my beloved wife, Sarah Bennett, I leave to my nephew James Felix Vidal, the whole of my estate, both real and personal," it is an absolute gift in remainder after the estate for life. The subsequent provisions amount only to contingent limitations over, on the death of the legatee; and on the authorities cited, these expressions must be construed to refer to the death of the legatee prior to the period when the remainder takes effect in possession. It is an absolute estate, subject to defeasance on the happening of a particular event. This contingency has now become impossible, and in the judgment of the court, the complainants have no rights.

It is ordered and decreed, that the bill be dismissed.

The complainants appealed from the decree of his Honor Chancellor Dunkin, in the above case, and prayed that the same may be reversed, for the following reasons.

1. Because, by the will of Peter Bennett, although an absolute estate is given in remainder to his nephew, James Felix Vidal, it is, nevertheless, subject to defeasance on his dying at any time either before or after the death of the tenant for life, leaving no lawfully begotten child, or children, alive.

2. Because there is nothing in the will which will warrant the construction, that

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the contingency on which the *limitation over to the complainants was intended to take effect must happen before the period appointed for the remainder to take effect in possession.

3. Because his Honor's construction of the will is contrary to the meaning and intention of the testator.

Treville & Petigru, for the appellants.

Bailey & Henderson, contra.

Curia, per HARPER, Ch. I have examined this case with all the attention in my power, and though not without some degree of doubt and hesitation, have come to the conclusion that the decree ought to be affirmed. There is some difficulty in reconciling the various cases on the subject. In the case of Lowfield v. Stoneham, cited from 2 Strange, 1261, it seems to be taken for granted that if there be a devise to A, and in case of his death to B, this imports if A shall die without issue, in the life-time of the testator; and by parity of reason, indeed, in stronger reason—if it were to A, for life, at his death to B, and in case of B's death to C, this must mean if B shall die in the life-time of the tenant for life. In Billings v. Sandom, 1 Br. C. C. 393; Nowland v. Nelligan, id. 488, and Douglass v. Chalmer, 2 Ves. jr. 501, where the devise was to one, indefinitely, and in case of his death to another, this means his death at whatever time, and the limitation over is good. It struck me, at first, that these decisions rested on the effect of the words alone, without any qualification from circumstances. In Billings v. Sandom, however, the bequest was £1000, to the defendant's sister, to whom the testator gave the residue of his estate, to be disposed of as she shall think proper; and in Douglass v. Chalmer, where the bequest was to the testatrix's daughter, and in case of her death, to the children, equally to be divided, it apeared that the daughter was married to a husband who had children by a former marriage, and the effect of giving to the daughter, absolutely, would have been to vest the whole in the husband, and defeat the intention expressed in favor of the daughter's own children; and in Cambridge v. Rous, 8 Ves. 12, where Sir William Grant expresses the opinion that the bequest

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to one, indefinitely, *and in case of his death, to another, these words standing alone, import death in the life-time of the testator; he says, that "in Billings v. Sandom, the mode of giving the residue, contrasted with the mode of giving the particular legacy, af-

forded evidence that the one was given absolutely, and only a limited interest in the other;" and that in Douglass v. Chalmer, "Lord Roslyn thought that from the whole will, he was able to collect an intention in favor of the children." In that case, (Cambridge v. Rous,) the bequest was to two sisters, and in case of the death of either, to devolve on the other. They were held to take an absolute estate, on the absurdity which would follow, that otherwise, if they left children, the property would be given away from their children. Similar was the decision in Hinckley v. Simmons, 4 Ves. 160, though it was a hard case, and defeating an intention in the highest degree probable. In Turner v. Moore, 6 Ves. 557, quoted by the Chancellor, there were circumstances on the face of the will, to put it out of doubt, that death in the lifetime of the tenant was meant. In Smart v. Clark, 3 Cond. Eng. Ch. Rep. 437, the estate was given expressly for life, and the construction was upon the whole will. But all these cases do not touch the present. The cases, certainly, which come the nearest the present, are those of Galland v. Leonard, 1 Swanst. 161, cited by the Chancellor, and DaCosta v. Keir, 3 Cond. Eng. Ch. Rep. 435. The former of these cases was decided on the repugnancy of the bequest to the daughters, "for their own use and benefit absolutely," with the bequest to their children in case of their death, leaving children, which would only be reconciled by the construction—if the daughters should die without issue during the life-time of the previous tenant for life.

The direction of the trustees to vest until the children should attain twenty-one, has no effect on the decision. So in DaCosta v. Keir, the legacy was to Catharine DaCosta, "for her own use and benefit, to be at her own disposal;" but, in case she should die, leaving children, to be equally divided between the children. There was, in that case, the further circumstance, that if the legatees over should die in the life-time of the wife, the wife was to take, absolutely. But the

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Master of the Rolls seems to have *been clear, independently of this. So in the case before us. After a life estate to another, the testator gives to James Felix Vidal the whole of his estate, both real and personal. These words, though sometimes regarded only as descriptive of the subject matter of the gift, are commonly and appropriately used to signify the quantity of the estate; that it is absolute. They are not, perhaps, so strong as the words in Galland v. Leonard, "to her use and benefit, absolutely;" but there are circumstances to strengthen them. The gift to James Felix Vidal is after a previous life estate. Where the testator intends a life estate, he expresses it distinctly. The whole form and order of expression are different from what they would have been, if the testator had intended a remainder to children who, next to parents, must have been the principal object of his care. The natural order of expression would have been, "to James Felix Vidal, for life, or at least, indefinitely; and, at his death, to his children; but if he should die, leaving no children, or if his children should die," &c. I do not doubt but that in truth, and in fact, the testator did intend an absolute estate to his nephew. Then, according to the cases quoted, this can only be rendered consistent with the direction to divide the estate among his children at his death, by restricting the death to the life-time of the tenant for life. The limitation over, in the event of all the children dying without children, is a void and very unusual limitation. We should rather give such construction as to render a will operative, than to defeat it; and by supposing it to mean, if they should die without children in the life-time of the tenant for life, the disposition is rendered valid and sensible. If we suppose an absolute estate to his nephew, it is not possible to imagine a reason for the limitation over, in this event, of the children's dying without children. On the construction contended for, if James Felix Vidal had died in the life-time of the widow, leaving children, and those children had died before the limitation of the life estate, the devise to the other nephews and nieces must have failed, though on the happening of the event Vidal were dead without children.

The case of Nowlan v. Nelligan, has no application to the present, though the devise

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was of the whole real and *personal estate. There was no limitation over, on the event of the daughter's death. The testator expresses his confidence that his wife will see his daughter comfortably provided for out of the property, so that it was impossible to understand the words "in case of death happening to my said wife," to mean death in the testator's life-time. Nothing would be plainer than that the testator did not intend to leave his daughters entirely unprovided for. Sir William Grant, in Cambridge v. Rous, says, in reference to this case, "it was evident that some benefit was intended for the daughter, but it was doubtful, as the interest was not clearly expressed, whether it could be made effectual by imposing a trust upon the will. Some benefit, however, was evidently intended for the daughter, and none could be assured to her except by limiting her mother to an interest for life." The decree is affirmed.

JOHNSON and DUNKIN, Chancellors, concurred.

Speers, Eq. 413

JONATHAN DOW et al. v. J. C. KER, WILLIAM CARTER, et al.

(Charleston. Jan. Term, 1844.)

1. Defendant, K., was indebted to his co-defendant, C., in several bonds, dated 17th January, 1838, payable in equal annual instalments, and secured by the mortgage of a plantation called Woodstock.

2. The debt due on the bonds being wholly unpaid, on the 7th April, 1840, the parties agreed, in writing, that K., in consideration that C. would give him until 7th April, 1843, for the payment of the whole sum, should apply the income and profits of the plantation and negroes employed on it, with those of a house of entertainment kept there, towards the payment of the debt. K. assigned, and set over, the income and profits to C., and agreed further, should the debt be not fully paid on or before the time specified, to mortgage to C. twenty-nine slaves, the household furniture, and property of every other description on said

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plantation. K. was also indebted to com*plainant, to whom, in 1841, he confessed judgment; execution issued, and entered in the sheriff's office, at the same time.

3. No account being rendered of the income and profits of the plantation and other property, C. filed his bill 16th April, 1841, for a specific performance of the agreement. Decree obtained 21st January, 1842, for foreclosure against the plantation, providing, if the sale was insufficient to pay the debt, the negroes mentioned in the agreement should be sold by the master, and the proceeds applied to that purpose. Complainants levied their execution on the negroes, 10th January, 1842, but the master interposed his right under the decree.

4. Complainants filed their bill, 12th February, 1842, insisting that the agreement between K. and C. was not a lien on the negroes; that as their execution was lodged before the decree, they were entitled to the proceeds of the sales.

5. Order passed 5th March, 1842, directing the master to retain the proceeds of sale, for the further order of the court.

[6. *Liens* ⟸3.]

It was *held* that the agreement between K. and C. operated as a lien on the negroes from the time of its execution. Vide, Massey v. McIlwain, 2 Hill Eq. Rep. 428; Read v. Gailliard, 2 Des. 552 [2 Am. Dec. 696].

[Ed. Note.—Cited in Bank of the State of South Carolina v. Campbell, 2 Rich. Eq. 191; Maybin v. Kirby, 4 Rich. Eq. 113; D. C. Roddy & Co. v. Elam, 12 Rich. Eq. 346; Parker & Co. v. Jacobs, 14 S. C. 116, 37 Am. Rep. 724; Davis v. Childers, 45 S. C. 144, 22 S. E. 784, 55 Am. St. Rep. 757; Avery & Son v. Wilson, 47 S. C. 100, 25 S. E. 286; Creech v. Long, 72 S. C. 32, 51 S. E. 614.

For other cases, see Liens, Cent. Dig. § 24; Dec. Dig. ⟸3.]

[7. *Contracts* ⟸259.]

The party's ignorance of the legal effect of his agreement could not absolve him from his contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1156; Dec. Dig. ⟸259.]

Before Johnson, Ch., at Charleston, February Term, 1843.

Johnson, Ch. The defendant, Ker, being indebted to his co-defendant, Wm. Carter, $13,416, in several bonds, originally given to James Hamilton, dated 17th January, 1838, and payable in five equal annual instalments, secured by a mortgage on a plantation called Woodstock; on 7th April, 1840, the debt due on the bonds being wholly unpaid, they entered into a written agreement, whereby it was stipulated that Ker, in consideration that Carter would give him further time for the money, the whole sum, until the 7th April, 1843, agreed to appropriate the income and profits of the plantation, and the negroes employed thereon, and of a house of entertainment kept there, towards the payment of the said debt; and for that purpose he assigned and set over the said income and profits to the said Ker, and the said Ker thereby further agreed, that if the said sum was not fully paid on or before the said 7th April, 1843, he would, as a further security, mortgage to the said Carter, certain slaves,

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twenty-nine in num*ber, and the household furniture, and the property of every other description on the said plantation.[1] Defendant, Ker, was also indebted to the complainant, and on the ——— day of ———, 1841, he confessed a judgment to them for $20,000, and an execution (fi. fa.) was issued and entered in the sheriff's office, on the same day. No account having been rendered to Carter, of the income and profits arising from Woodstock, and the other property, and no money having been paid, he filed his bill, in this court, on the 16th April, 1841, against Ker, for the specific performance of the agreement; and at January term of 1842, (21st January,) obtained a decree of foreclosure against the plantation, which provided, that if the sales of Woodstock should be insufficient to pay the debt, the negroes mentioned in the agreement should also be sold by Mr. Gray, one of the masters of the court, and the proceeds applied to that purpose. In the mean time, viz: on the 10th Jan. 1842, the complainants had caused their execution

[1] Agreement made and entered into, this 7th day of April, in the year of our Lord, one thousand eight hundred and forty, between William Carter, of the one part, and J. C. Ker, of the other part. Whereas the said J. C. Ker, in and by his thirteen bonds, bearing date the 30th day of January, in the year 1838, became bound to James Hamilton, in the penal sum of $26,833 54, conditioned for the payment of 13,416 dollars and sixty-seven cents, in five equal annual instalments, with legal interest from the date of the said bonds, payable annually; and to secure the payment of said debt, mortgaged to the said James Hamilton, a plantation called Woodstock, in the district of Charleston, now in the occupation of the said J. C. Ker, who has the negro slaves, hereinafter named, employed in the cultivation thereof, and as servants in the establishment or house of entertainment therein; which said bonds and mortgage has been assigned to the said William Carter. And whereas the said debt being wholly unpaid, it has been agreed between the said William Carter and J. C. Ker, that he, the said William Carter, shall extend the time for the payment of the said debt, as

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to be *levied on the negroes, but Mr. Gray interposed his right to take possession of, and sell them, under the decree of this court, before mentioned. In this state of things, on the 12th February, 1842, the complainants filed the present bill, in which they insist that the agreement between Ker and Carter, of the 7th April, 1842, was not a lien on the negroes, and as their execution was lodged before the decree of the 21st January, 1842, they were entitled to the proceeds of the sales; and on the 5th of March, 1842, an order was made in which is recited the contest between the parties, as to priority, and directing Mr. Gray, who had been directed to make the sales, to retain the proceeds in his hands to await the further order of the court. The sales of the Woodstock plantation fell far short of the debt due to Carter, and the question is, which of the parties are entitled to the proceeds of the sales of the negroes.

"It is a general rule," says Mr. Powel, in his treatise on the Law of Mortgages, pages

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459, 460, "that whenever a *right in equity attaches against a person, that equitable right binds all persons claiming under or against that person who have not special liens on any of the property. From hence, it follows, that general creditors are, in all cases, bound by a particular equity;" and, in illustration of the rule, put the case of money being lent on a contract for a mortgage, when the party dies without having executed the mortgage, and the estate descended to the heir as assets for the payment of specialty debts, and remarks that that contract is superior to the specialty debts. The language of all the books is, that an agreement to mortgage, is an equitable lien, and has precedence of subsequent judgments, and all general creditors. In Massey v. McIlwain, 2 Hill's Eq. Rep. 428, it was so held. In that case there was an agreement, on sufficient consideration, to convey land at a subsequent day, and the court decided that it was a lien on the land, and prevailed over a judgment subsequently obtained, but before conveyance actually made. So in Read

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v. Gaillard, 2 DeSaussure Eq. *Rep. 552, [2 Am. Dec. 696,] where one, by letter, requested his friend to endorse for him a note to be used in the bank, and as an inducement, promised to give him a bill of sale of particular property, and it was held that the letter was a lien on the property, and was entitled to preference over other creditors. I did not understand, indeed, that either the rule or its application was intended to be controverted in the argument. The principal ground of defence was, that Ker did not intend, by the agreement, to give Carter any present lien on the negroes, and entered into it in perfect ignorance that it would, in law, have that effect; and Ker states, positively, in his answer, that such was the fact. Carter, in his answer, admits that Ker positively refused, in the treaty about the agreement, to give him a mortgage on the negroes, but he professed to believe, and as this defendant does not deny that he did believe, that he would be able to pay the debt within the time limited by the agreement, and that he entered into it after mature deliberation.

Mr. Petigru, the solicitor of Carter, was examined for complainant. He stated that he negotiated the terms of agreement with Ker,

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hereinafter mentioned, and that the said J. C. Ker shall, in consideration thereof, appropriate the income and profits of the said plantation and negro slaves, and the said house of enter-

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tainment, towards the payment of the *said debt, and perform the other agreements hereinafter mentioned. Now these presents witness, that the said William Carter hath agreed, and doth hereby agree, to and with the said J. C. Ker, that he will extend the time of payment of the said debt, until the 7th day of April, in the year 1843; but should the said J. C. Ker desire to pay any part of the said debt, in addition to the income and profits, hereinafter mentioned, before that time, the said William Carter agrees to take and accept such payments as the said J. C. Ker may think fit to make. In consideration whereof, the said J. C. Ker hath agreed, and doth hereby agree, to and with the said William Carter, to continue and employ the following slaves on the said plantation, and in the said house of entertainment, to wit, (29 slaves.)

And shall and will appropriate and apply the whole nett income and profits arising from the said plantation, negro slaves, and house of entertainment, towards the payment of the said bonds, to be paid to the said William Carter, half yearly; and the said J. C. Ker doth hereby assign and set over the said income and profits to the said William Carter; it being particularly stipulated and agreed, that the said J. C. Ker shall be authorized to retain from the said income and profits, the sum of $150 per annum, to hire the services of a white man to

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superintend *the said plantation, slaves, and house of entertainment; and the said J. C. Ker hath further agreed, and doth hereby agree, to and with the said William Carter, that in case the said bonds shall not be fully paid and discharged, on or before the 7th day of April, 1843, that then, and in that case, the said J. C. Ker shall and will mortgage the said negroes and their issue, together with the household furniture, and property of every description on the said plantation, to the said William Carter, to secure the payment thereof; and, further, that the said J. C. Ker, his executors and administrators, shall and will, at all times hereafter, upon the reasonable request of the said William Carter, his executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, all and every such further and other lawful and reasonable act and acts, deed, and assurances, in the law whatsoever, for the further, better, and perfect securing the said income and profits, and assuring and confirming the said negro slaves unto the said William Carter, his executors, administrators, or assigns, for the purposes aforesaid, as by the said William Carter, his executors or assigns, or his or their counsel, learned in the law, shall be reasonably advised, devised or required.

for Carter. That he first proposed to Ker, that he should mortgage the negroes, which he refused. He afterwards wrote to Ker, proposing that he should give some other security. He, afterwards, had an interview with him. He was exceedingly desirous to get time for payment, and himself proposed to assign to Carter the income from the Woodstock property, and expressed great confidence that it would be sufficient to pay the debt. Witness took time to consult with Carter. At a subsequent interview, Ker agreed to the terms expressed in the agreement. He understood them perfectly, but witness does not know that he understood their legal effect. It is probable enough that Ker did not understand at the time that the agreement would operate as a lien on the negroes from the time of its execution, but he could hardly mistake that good faith required that he should employ them on the Woodstock plantation, and that he was bound to pay to Carter the income from that and the house of entertainment, or that his disposition of them in any other manner, would be a violation of the agreement. And the

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*defence rests upon the ground alone, that he was ignorant that the agreement created a present lien on the negroes, and of that there is no other evidence than his own answer. If that was sufficient for absolving a man from his contract, the lawyers alone would be capable of making a binding contract, and without intending to disparage their learning, it might safely be said that even they might often be mistaken. Sometimes the legal effects of contracts present the most puzzling questions, dependent on the most nice and subtle distinctions, calling forth all the power of the most learned of the profession, and if for that reason a contract should be declared void, there must be an end of all contracts.

In the case of Lawrence v. Beaubien [2 Bailey, 623, 23 Am. Dec. 155.] and the cases which followed, which, I think, pushed the doctrine as far as it would bear, it was held that mere ignorance of law was not, of itself, sufficient to avoid a contract, because it was incapable of proof, but that a mistake in law, as where the party had been advised by counsel learned in the law, would be sufficient; and if Ker, a resident of the city, had any distrust of, or desired to know the legal effect of the agreement in all its results, he could have readily obtained the advice of counsel.

The question here is presented in rather a novel aspect. It is not Ker who is seeking to avoid this agreement; he could derive no benefit from it; the proceeds of the sale must go to pay one creditor or another; but the complainant, whose claim is founded upon the allegation that Ker was ignorant, and did not know the effect of the agreement he entered into with Carter, and, therefore, claim that the lien of their execution should be preferred. Now, I do not perceive on what ground the complainants have a right to complain, for Ker, who was in debt to Carter, might think proper to give him a lien on his property; and what right have they to complain? It is exactly the right which they set up now—they desire that their execution should be preferred to his lien. If the mesmeriser, (for this is the age of mesmerism,) fraudulently cut off the right arm of his subject, by way of experiment, and he acquiesced in it, has the state, who is entitled to

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the use of that *arm in the defence of its rights, a remedy against the offender?

It is ordered and decreed, that the bill be dismissed with costs. I am not informed whether the proceeds of the sale is, or is not, more than sufficient to pay the amount of the bonds due to Carter. If they are, the balance must be paid to complainants.

The complainants appealed from the decree of the Chancellor, in this case, on the following grounds:

1. That the agreement between Ker and Carter was not an equitable mortgage at the time the execution of the complainants was lodged.

2. That if it was an equitable mortgage, it was obtained from Ker against equity and good conscience, through his ignorance of law, and his ignorance of law cannot be made the ground of Carter's rights by Carter himself.

3. That the money being in court, to be applied to the party entitled to it, the complainant, who has the prior legal, as also an equitable lien, ought to be paid before Carter, who has only an equitable claim.

4. That the defendant, Carter, had broken his contract with Ker, before the commencement of this suit, and is, therefore, not entitled to set it up in his defence.

Mr. Walker, for the appellant. Mr. Petigru, contra.

Curia, per JOHNSTON, Ch. The court concur in the decree of the circuit court.

Appeal dismissed.

DUNKIN, Ch., having an interest in the result, did not sit in this cause.

Speers, Eq. *421

*P. J. LABATUT v. JOHN W. SCHMIDT.

(Charleston. Jan. Term, 1844.)

[1, 2. *Dower* ⟸34.]

1. Complainant, a denizen citizen under the laws of this State, sold and conveyed, in fee simple, to defendant, a tract of land, with the usual covenant of warranty; but as doubts were entertained, whether complainant's wife, who had never been naturalized, or become a denizen, under the laws of this State, and who was living and resident in France, might not,

in the event of her surviving her husband, be entitled to dower in the land, it was agreed upon, between the parties, that defendant should retain in his hands five hundred dollars of the purchase money, and that complainant should assign to him five hundred dollars of the amount due him on the French indemnity. The balance of the purchase money was paid, and a covenant entered into, in which, after reciting the particulars of the agreement, it is provided that in case of the death of complainant's wife, before her husband, or a lawful release of her claims being delivered to defendant, he would return the sum retained, with interest from the date of the agreement, and any amount received on account of the assignment. The prayer of complainant's bill was, that defendant might be decreed to pay him the sum retained, and re-assign the French indemnity, as they were intended to indemnify defendant against a claim which did not then, and never could, exist.

But neither fraud nor mistake appearing in the case, and the stipulations having been entered into with a full comprehension of the facts, the court refused to set aside the contract.

[Ed. Note.—For other cases, see Dower, Dec. Dig. ⟸34.]

[3. *Wills* ⟸790.]

Complainant's wife could not be called on to elect between her right of dower, and such other rights as the law might cast on her, until her husband's death, nor could she be concluded, either as to law or facts, unless she were a party.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1785–1792; Dec. Dig. ⟸790.]

[4. *Aliens* ⟸70.]

The wife being an alien at the time of alienation, would her naturalization now entitle her to dower? *Held*, per Johnson, Ch. that it would not.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 158; Dec. Dig. ⟸70.]

Johnson, Ch. In 1797, the complainant intermarried with his present wife, Charlotte, both being aliens, and subjects of the king of France. They separated by agreement, and she returned to France, where she has continued to reside ever since, and has never been naturalized, or become a denizen of this State. He remained and has resided here ever since, and in January, 1826, he was admitted as a denizen citizen, according to the laws of this State. Being possessed of a farm described in the pleadings, in 1836, he entered into a treaty to sell to the defendant, and it was ultimately agreed that he should make to the defendant a good and indefeasi-

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ble title, and that the defendant *should pay him, in consideration thereof, the sum of $3000. But in closing the contract, a doubt was raised, whether the complainant's wife, who is still living, would not be entitled to dower in the lands, in the event of her surviving him. To quiet the apprehension of the defendant, and to secure him against any loss he might sustain, it was agreed between them, that the defendant should retain in his hands $500 of the purchase money, and the complainant should also assign to him $500 of the amount due to him on the French indemnity. In pursuance of this agreement, the complainant executed to the defendant a conveyance in fee of the land, with the usual covenant of warranty, and the defendant paid him $2500 of the purchase money. At the same time they entered into a covenant, wherein is recited the bargain and sale of the land, the agreement that the defendant should retain in his hands $500 of the purchase money, and that the complainant should assign to him $500 of the French indemnity, as a security against any claim of his wife; and the defendant covenants on his part, "that in case of the death of his (complainant's) wife before her husband, or in case of a lawful release of her claims being delivered to me, I will return the said sum of five hundred dollars, with interest from this date, and any sum which I may receive on account of the assignment above mentioned, to the said P. J. Labatut," &c.[1] The complainant insists that his wife cannot, on account of her being an alien at the time he purchased and sold the lands, by a possibility entitle herself to dower on them, and that the money retained by the defendant, and the assignment of the French indemnity, is a deposite as indemnity against a claim which did not then, and never can, exist. He, therefore, prays that the defendant may be decreed to pay him the sum retained in his hands, and to re-assign the French indemnity. There is no question, that Mrs. Labatut might yet become a citizen of the United States, or a denizen of the State, and the only question raised is, whether, in that event, she would or would not be entitled to dower in land so

[1] Copy of Agreement Referred to in Above Decree.

State of South Carolina:

Whereas, Pierre J. Labatut has sold me a lot of land at the corner of Line and Meeting-streets, for the sum of three thousand dollars; and it appearing that he hath a wife living in France, it hath been agreed that five hundred dollars of the said purchase money shall be retained in my hands, and also, that the said P. J. Labatut shall assign to me the right to receive five hundred dollars from the amount of the indemnity due him by the French government, as a security against any claim on the part of his wife, upon the said lands and appurtenances. Now know ye, that I, John W. Schmidt, do declare, that I hold the said sum of five hundred dollars, and also the said assignment, as an indemnity to secure me against all claims on the part of the wife of the said P. J. Labatut, made, or to be made, for dower, thirds, or otherwise; and that in case of the death of the said wife before her husband, or in case of a lawful release of her claims being delivered to me, I will return the said sum of five hundred dollars, with interest from this date, and any sum which I may have received on account of the assignment above mentioned, to the said P. J. Labatut, or his legal representatives.

Witness my hand and seal, at Charleston, this 22d November, 1836.

J. W. Schmidt, [L. S.]

Signed and sealed in presence of

Wm. Jervey.

acquired and alienated by her husband whilst she was an alien.

The Act of 1799, 2 Faust, 273, provides, that denizens are entitled to purchase and

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hold real property in this *State, and in all other respects are entitled to like protection of law, as citizens are. He, therefore, was entitled to purchase and convey these lands to the defendant, and the authorities all agree, that his wife could not entitle herself to dower on them, by becoming a denizen of this State, because denization operates prospectively, and cannot affect lands acquired and aliened by the husband before she became a denizen, although she would be entitled to dower in lands of which he was seized at the time. Co. Litt. 33. Cruise, Tit. 6,

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Dower, chap. 2, sec. 27—32. *Park on Dower, 228-9. But, possibly, she may become a citizen by naturalization. Will that entitle her to dower? Lord Coke, in laying down the rule above referred to, adds, it is otherwise, if the wife were naturalized by Act of Parliament: and in Priest v. Cummins, 16 Wendal, 628, et seq., Mr. Justice Nelson, of New York, has very fully examined this remark of Lord Coke's in reference to the question now under consideration, and he concludes it is founded on the wording of the particular statutes of naturalization, and not on any principle of the common law, and shews, I think, very clearly, that it has no analogy to the cases in which the wife has been held to be dowable, although she was under a legal disability at the time of alienation by the husband, as where the wife is not of age to be dowable, or during her elopement was an adulterer, or had been attainted of felony or treason; for, as he remarks, there is not any incapacity or disability on the person, but only a temporary bar, until the wife shall attain the proper age, reconcilement to the husband, or pardon by the king, the incipient rights having commenced before. In the case in hand, the wife, being an alien at the time of alienation, she had not even the incipient right of dower—it was altogether prospective and contingent, on the event of her becoming a citizen, and surviving her husband. At the time of alienation, the whole interest, the absolute right in the property, was in the complainant, and if, by naturalization, the wife could entitle herself to dower, it would have a retrospective operation, contrary to the universally received opinions of right. It is said that the court ought not to enforce the payment of the money, as any judgment it can give will not be a bar to the wife's remedy at law, and especially in a doubtful matter, as the law courts would not be bound by a decision here. This court, it is true, is bound to follow the law courts, but I will not anticipate that they will decide against what I take to be the law, nor ought this court to be deterred from the discharge of its duties, in the anticipation that it may not meet with the approbation of the law courts in a matter which, as in this case, has not been adjudicated there.

The risk against which the contract set

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out in the *pleadings was intended to provide, has not, and never can arise, and it is, therefore, ordered and decreed, that the defendant do pay to the complainant five hundred dollars, with interest from 22d November, 1836, and that he account to the complainant for any money that he may have received on account of the assignment of the indemnity due to him by the French Government, set out in the said contract, and if none, he re-assign the same to complainant. The parties, each, to pay their own costs.

The defendant appealed from the decree of the Chancellor in this case, and moved to reverse the same, upon the following grounds.

1. Because the parties having entered into an express contract of indemnity against the claims of dower, which, by possibility, might be set up by the wife of the complainant, this court will not undertake to abrogate the same except upon full proof of fraud or mistake; much less, where there is, as in the present case, not even an allegation of such fraud or mistake.

2. Because, even should the court undertake to interfere, it would be manifest injustice to the defendant, to take away his indemnity, by a decree in the present case, in which the wife is not a party, and which would, therefore, not be conclusive against her.

3. Because the wife of the complainant may, by possibility, acquire a right or claim of dower to the lands sold, and the defendant has a right to his indemnity against even a doubtful claim.

4. Because the decree is, in other respects, erroneous, and ought to be reversed.

Memminger & Jervey, for appellant.

Petigru & Lesesne, contra.

Curia, per JOHNSTON, Ch. It is impossible to sustain this bill, without abrogating the express and well understood contract of the parties. There is no fraud or mistake in the case. The stipulations were entered into, with a full comprehension of the facts. It was understood that Madame Labatut was

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living, and might, by possibility, set *up a claim for dower in case she should survive her husband; and the contract was made to secure Dr. Schmidt against all danger from that claim.

It is a very doubtful question, whether she may not hereafter entitle herself to dower, by becoming a naturalized citizen. The question is very well discussed in the case of Priest v. Cummings, referred to by the Chancellor. It may be, that the uniform current

of authorities, asserting the retro-active efficacy of naturalization in England, refers to the express terms of the Acts of Parliament; and that naturalization by judicial proceedings under the Acts of Congress, may have a different effect. On this point, it is not necessary to give any opinion here.

It is impossible to determine this point so as to conclude Madame Labatut, without making her a party. That cannot be done. Her's is yet a merely contingent interest. No right of dower has yet accrued, or may ever accrue, to her. Nor can she be called on to elect between that right, and such other rights as the law may cast upon her, until her husband's death; when she can exercise her discretion most beneficially to herself, under the circumstances which will then actually present themselves to her consideration.

She cannot be concluded, either as to law or facts, unless she were a party here, and as she cannot be effectually made a party or concluded, we have no right to strip Dr. Schmidt of the indemnity, for which he has expressly stipulated. We cannot set aside the express contract, nor change its terms, nor take away the security which it confers on the purchaser, unless we had it in our power to give him an equal security, by a decree, protecting him against the claim of the supposed dowress.

It is ordered that the decree be reversed, and the bill dismissed with costs.

HARPER and DUNKIN, Chancellors, concurred.

JOHNSON, Ch. I still entertain the opinion expressed in the Circuit Court decree, and dissent from this opinion.

Speers, Eq. *427

*KINLOCH & PHILLIPS v. JACOB MEYER, Administrator of Luder Meyer, and MAURIS MEYER.

(Charleston. Jan. Term, 1844.)

1. Petition filed against the administrator of an intestate, for an account of his estate, and for a statement of the amount to which a brother of the deceased would be entitled, who, before the intestate's death, had left the State indebted to the petitioners, for the purpose of making the same liable for their demand. It was stated in the petition, and admitted in the answer, that the party absent left no attorney, nor property of any description whatever. But it was further stated, that the intestate left a considerable personal, and some real, estate, to a distributive share of which the absent debtor was entitled, and admitted by the administrator that he did leave personal estate, subject to distribution between the absent debtor, himself, and others, but no real estate whatever.

[2. *Attachment* ⇐72.]

Plea to the jurisdiction, that petitioners had plain and adequate remedy at law, and were not entitled to the aid of this court; but as the debtor was without the jurisdiction of the law courts, and had left no property on which an attachment could operate, the plea was not sustained.

[Ed. Note.—Cited in Howard v. Cannon, 11 Rich. Eq. 25, 75 Am. Dec. 736.

For other cases, see Attachment, Cent. Dig. § 199; Dec. Dig. ⇐72.]

3. The case of Kennedy v. Simmons, [Dud. Eq. 141,] decided in 1837, in which the bill was filed to charge the wife's separate estate with the payment of a bond entered into by her before coverture, the husband being charged to be insolvent, to be distinguished from this, as in that case, there was a person primarily liable, who could have been made a party at law.

[4. *Equity* ⇐186.]

Complainants having stated, that intestate died seized of real estate, it was insisted for defendant, that this made a case for the law court. This might have been good cause for demurrer, but as defendant denied that he did die so seized, the deficit in the petition was thus removed, and made a case for the jurisdiction of this court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 426; Dec. Dig. ⇐186.]

[5. *Executors and Administrators* ⇐438.]

None but the administrator and absent party being made defendants, it was urged that the other distributees ought to have been so made—but *held* unnecessary.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765–1785, 1790; Dec. Dig. ⇐438.]

[6. *Descent and Distribution* ⇐157.]

A distributive share of an intestate's personal estate, in the hands of an administrator, cannot be levied on by an attachment for the debt of one of the distributees. Vide Young v. Young, 2 Hill Rep. 425, and [Murrell v. Johnson] 3 Hill, 12. But a bill may be entertained in this court, to subject the funds of an absent debtor, not the subject of attachment at law, to the payment of his debts. Vide Bowden v. Schatzell, 1 Bail. Eq. Rep. 360, [23 Am. Dec. 170.]

[Ed. Note.—Cited in McKinne v. City Council of Augusta, 5 Rich. Eq. 75; Nelson Carlton & Co. v. Felder, 6 Rich. Eq. 69, 70; Hurt v. Hurt, 6 Rich. Eq. 118; S. S. Farrar & Bros. v. Haselden, 9 Rich. Eq. 336.

For other cases, see Descent and Distribution, Cent. Dig. § 530; Dec. Dig. ⇐157.]

Before Johnson, Ch., at Charleston, February Term, 1843.

Johnson, Ch. The complainants state in their petition, that defendant, Mauris Meyer,

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became indebted to them in *the sum of $325, on account, and that he suddenly and clandestinely migrated from the State, to parts unknown to them, and that he did not leave behind him any attorney, or property of any kind or description whatever, out of which their demand could be satisfied. That since his departure, his brother, the intestate, Luder Meyer, died intestate, leaving a considerable personal, and some real, estate, to a distributive share of which the said Mauris will be entitled; and that administration has been granted to the defendant, Jacob Meyer. The prayer is, that defendant, Jacob Meyer, may account for the estate of his intestate, and state the amount to which

Mauris Meyer is entitled, and that he may be decreed to pay complainants so much of it as will satisfy their demand.

Mauris Meyer has not answered. Defendant, Jacob Meyer, in his answer, admits that Mauris Meyer left the State in 1839, for Bremen, in Germany, where he still resides, and that he left no attorney, or property of any kind or description whatever. He admits the death and intestacy of Luder Meyer, in 1841, and states that he was not, at the time of his death, seized or possessed of any real estate whatever, as far as he knows or believes, and he believes that the personal estate, after paying all demands, will leave a balance of about $1100, which is distributable between his mother and his brother, John H., the said Mauris, and himself. He denies all knowledge of Complainants's demand, and prays strict proof. He insists, by way of plea to the jurisdiction of the court, that complainants have a plain and adequate remedy at law, or at least, were bound to establish their claim and exhaust their remedy at law, before they could come here for relief.

The case has been argued, on the objection to the jurisdiction of the court, founded on the universally acknowledged principle, that this court will not entertain any cause, when the complainant has, as it is usually expressed, a plain and adequate remedy at law. The very foundation of social order would be broken up, if the law did not furnish a remedy for every wrong done, or right withheld; hence the courts of chancery have assumed jurisdiction in all cases in which the courts

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of law, on ac*count of their peculiar organization, or the defects of their mode of proceeding, are incompetent to supply suitable relief. The defendant, Mauris Meyer, was without the jurisdiction of the law court, and none of its process could reach his person, and the only remedy known in that court, is the process of attachment against his goods and effects. Now, the complainants state in their petition, and the defendant admits in his answer, that Mauris Meyer did not leave in this State, property of any kind or description whatever, so that there was nothing on which an attachment could operate. If it had issued, the sheriff must have returned that there was nothing on which it could be levied, and there must have been an end of the remedy at law. The only purpose which such a proceeding could have answered, would have been to show that there was nothing on which to levy, and I should reasonably conclude that the defendant would not require other proof of that fact, than his own admission on oath. The case of Kennedy v. Simons, decided in 1837, is relied on, as showing the necessity of proceeding first at law; but I am not able to see any analogy between the cases. That was a bill to charge the wife's separate estate with the payment of a bond entered into by her, before coverture, the husband being charged to be insolvent; and the court held that the complainant was bound first to sue the husband, and exhaust his remedy at law against him, before he could come here for relief. In that case, there was a person primarily liable, who could have been made a party at law—not so here.

It is conceded, that if Mauris Meyer inherited real estate from his brother, it would have been subject to an attachment at law. And it is insisted for the defendant, that the complainants, by stating that Luder Meyer did die seized of real estate, made a case of which the law court had jurisdiction, and were not, therefore, entitled to come here. That would undoubtedly have been a good cause of demurrer. But the defendant, in his answer, denies that he did die seized of any real estate, and has, himself, supplied the deficit in the petition, so that, looking through all the pleadings, it makes a case in which the court has jurisdiction. If the

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plea was allowed, the court might, in *its discretion, allow the complainant to amend, by striking out that statement, or if the petition was dismissed, the complainant might file a new petition omitting it, the effect of which would be, to state precisely the case now made by the pleadings, and admitted by the defendant.

It is said also, that the other distributees of the estate of Luder Meyer, ought to have been made parties, but I cannot see the necessity for it. The complainant cannot be supposed to know that the defendant has not already paid them their distributive shares, or that they desire any account from him; all that complainants are interested in is, to ascertain the amount to which Mauris Meyer is entitled, and to do that, there is no necessity for making any other parties.

The case of Young v. Young, 2 Hill's Rep. 425, and 3 Hill, 12, establish very clearly, that the distributive share of an intestate's personal estate, in the hands of an administrator, cannot be levied on by an attachment, for the debt of one of the distributees; and in Bowden v. Schatzell, 1 Bailey's Eq. Rep. 360 [23 Am. Dec. 170], a bill was entertained to subject funds of an absent debtor, which were not the subject of attachment at law, to the payment of his debts.

It is, therefore, ordered and decreed, that the defendant, Jacob Meyer, do account before one of the Masters of this Court, for the estate of his intestate, and that he, (the Master) do ascertain and report, to what amount Mauris Meyer is entitled.

The defendants appealed from this decree, on the following grounds.

1. That the complainants had a plain and adequate remedy at law, or, at least, had not exhausted their remedy at law, and their demand being purely a legal one, this court has no jurisdiction of the case.

2. That the complainants have no right to call the administrator of an estate, to which they are strangers, to an account; nor, although they may be creditors of one of the distributees, have they any specific claim or lien on his distributive share.

3. That the other distributees of the intestate should have been made parties defendant to the suit.

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*4. That the defendant, Mauris Meyer, has never been regularly made a party to the suit.

Yeadon & Macbeth, for the appeal.

————, contra.

Curia, per JOHNSON, Ch. The court concur in the decree of the circuit court. The appeal is, therefore, dismissed.

DUNKIN and HARPER, Chancellors, concurred.

JOHNSTON, Ch., absent from indisposition.

Speers, Eq. 431

TRUEMAN OSBORN and ELIZA, His Wife, v. ALEXANDER BLACK and ELIZA, His Wife, THADDEUS STREET and DANIEL BOINEST, Administrators of Timothy Street, GEORGE W. LOGAN, Assignee, and ED. P. STARR, Agent of the Creditors of Alex. Black.

(Charleston. Jan. Term, 1844.)

1. Defendant, A. B. mortgaged to the wife of complainant, certain real estate, on the 20th May, 1829; the mortgage being duly recorded the 8th June following. He had mortgaged the same premises to one T. S., as executor of W. D. S. deceased, on the 28th September, 1825, but this mortgage was not recorded until the 11th January, 1834. W. D. S. appointed his widow, T. S. deceased, to whom the older mortgage had been given, with defendant A. B. and another, who did not qualify, his executrix and executors. A. B. intermarried with the executrix, afterwards giving the mortgage to T. S. Mrs. B. had an interest under the will, independent of the control of her husband for life only; the bulk of the property after her decease, being directed to go to others, not parties to the suit. A. B. became a certified bankrupt after the filing of this bill, and before, had assigned all his property for the benefit of his creditors, having also renounced his executorship before the ordinary.

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[2. *Witnesses* ⇐112.]

*On a bill filed by complainants to foreclose their mortgage against the administrators of T. S. deceased, together with the assignee and agent of A. B's. creditors, A. B. was offered by his co-defendants to prove notice to them of the elder mortgage, but the court held that as executor of testator and a party to the suit, he was incompetent, whether a bankrupt or not.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 463; Dec. Dig. ⇐112.]

[3. *Witnesses* ⇐112.]

Also, that his renunciation before, and discharge by the ordinary, was not sufficient, as the ordinary had no authority to discharge from liabilities incurred, or to deprive him of rights which he had acquired, in the discharge of his duties as executor.

[Ed. Note.—Cited in Campbell v. Bank of Charleston, 3 S. C. 394; Tillman v. Walkup, 7 S. C. 62.

For other cases, see Witnesses, Cent. Dig. § 472; Dec. Dig. ⇐112.]

[4. *Witnesses* ⇐52.]

Also, that he was incompetent, because the interest of the wife was directly involved in the suit, and he was called on to testify in behalf of her interest.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 124; Dec. Dig. ⇐52.]

[5. *Witnesses* ⇐52.]

The fact that the interest of the wife in the subject matter of the suit, was independent of her husband, and not under his control, did not remove his incompetency. Vide Davis v. Dinwoody, 4 T. R. 678. 21 Eng. Com. Law Rep. 416.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124, 126–136, 165, 415–417, 419, 424; Dec. Dig. ⇐52.]

Johnson, Ch. The bill in this case seeks a foreclosure of mortgage of Alexander Black, one of the defendants, to Eliza Osborn, one of the complainants, dated 20th May, 1829, and duly recorded on the 8th June next following, and states that the said Alexander Black had executed another mortgage of the same premises, to Timothy Street, deceased, as Executor of Wm. D. Shaw, deceased, bearing date the 28th September, 1825, prior to the date of the mortgage to complainants, but not recorded until 11th Jan. 1834, long after their mortgage was on record, and averring that they, the complainants, were ignorant of the existence of the mortgage to Timothy Street, at the time they took their mortgage as a security, and for a long time after, until just before filing their bill. Claim to be first paid out of the mortgaged premises. The bill also states, that Wm. D. Shaw, for the benefit of whose estate the said mortgage to Timothy Street, his executor, was given, by his will appointed Eliza, his wife, his executrix, and Timothy Street, deceased, Alexander Black, and Thomas Blackwood, also deceased, his executors, all of whom had qualified as such, except the last named, and that sometime after the death of the said Wm. D. Shaw, the said Alexander Black, and the widow of the said Wm. D. Shaw, intermarried with each

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other, and are the parties *really interested in the said mortgage, under the will of the said Wm. D. Shaw, deceased, or under some settlement made between them, upon or after their marriage. The bill then states the assignment of the said Alexander Black, to George W. Logan, one of the defendants, for the benefit of his creditors, and that Ed. P. Starr was appointed agent, under the Act of Assembly.

Alexander Black, by his answer, admits his liability upon his bond and mortgage.

The administrators of Timothy Street say, by their answer, that the existence of their mortgage may have been communicated to complainants at the date of their mortgage, as it was well known to Alexander Black; which fact, they insist, will entitle them to be first paid from the proceeds of the mortgaged premises; and they aver that the said mortgage to their intestate, was given for a full and valuable consideration, and that the sum thereby secured to be paid, is still unpaid; that by the will of the said Wm. D. Shaw, he did, as stated in the bill, constitute Timothy Street, Alexander Black and Thomas Blackwood, his executors, and his wife, Eliza, his executrix and admit that Thomas Blackwood did not qualify on said will.

That Alexander Black, and Eliza, the widow of Wm. D. Shaw intermarried and by the terms of the said will of the said Wm. D. Shaw, the said Eliza is only entitled to a life interest in his estate; and the said Alexander Black, being indebted to the estate of the said Wm. D. Shaw, duly executed his said bond therefor, and the same is now due to these defendants, for the uses of the will of the said Wm. D. Shaw.

The answer of George W. Logan, and Ed. P. Starr, is formal.

At the trial the administrators of Timothy Street offered their co-defendant, Alexander Black, as a witness, to prove notice of their mortgage to complainants, averring that he had no interest, having assigned all his property for the benefit of his creditors, before the filing of this bill, and having his certificate of discharge as bankrupt, granted after the filing of the bill; and also, having renounced his executorship under the will of Shaw. As to his wife's interest, the

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will of Shaw was produced to shew *that she had an interest independent of the control of her husband, for her life only, and after her death, the bulk of the property went to others, not parties to this suit.

Major Black's testimony taken subject to the objection of complainants, as to his competency, is as follows:—

Maj. Black, sworn, says Mrs. Osburn, complainant, offered to loan witness money, if he would secure it by mortgage. Witness said he had no other property, except this lot, which would suit her. He told her at the time, that he had before mortgaged it to the estate of Shaw, to secure between four or five thousand dollars, but thought it was sufficient to secure both. She accepted the terms, and he took the money and gave her the mortgage. She spoke of it as a familiar thing, when she asked him for the interest, as a fact well remembered.

As this is the only evidence of notice to the complainants, and I do not think Major Black a competent witness in the case, I must give priority to the mortgage first on record. It is, therefore, ordered and decreed, that the Master's report be confirmed, and that the mortgaged premises be sold by him, upon the following terms. One fourth cash, the balance, in one, two, three and four years, to be secured by bond and mortgage of the premises and an assignment of the policy of insurance upon the buildings, to be effected by the purchaser, and to be continued during the term of credit, at his expense. And that out of the proceeds of sale, the Master do pay in the first place to the complainants, the amount reported by him to be due on the fourth instant, to wit:— nineteen hundred and forty-three dollars forty cents, with interest after accruing, and their costs; then the amount due on the bond to Timothy Street, executor of Wm. D. Shaw, which is secured by mortgage of the same property, with costs and that the surplus if any, be retained, subject to the further order of this court.

The decree of the court in this case, respecting the testimony of Alexander Black, a co-defendant, offered as a witness on behalf of the representatives of Wm. D. Shaw, will be appealed from, on the grounds—

1. That Mr. Black, in his answer, having

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admitted *himself to be primarily liable for the debt of complainant, he is a good witness for his co-defendants.

2. Because, being a certified bankrupt, he has no interest in the event of the suit.

3. Because the executors of Shaw, and the residuary legatees under his will, are entitled to the testimony of the witness, and any separate and temporary interest of the wife of the witness cannot deprive them of that right.

4. Because the interest of the wife of the witness being sole and separate, she is, as to the witness, a third person, and the interest of the estate of Shaw, being represented by the co-defendants, Street & Boinest, they are entitled to the testimony of Mr. Black.

Hunt, for appellants.

McCready, contra.

Curia, per JOHNSON, Ch. The court concur with the circuit court, in the rejection of Alexander Black's evidence in the cause. As the executor of Shaw, and a party to the suit, he was an incompetent witness, and that, whether he is a bankrupt or not. This rule is too familiar to require illustration. As to his having renounced the executorship, that is out of the question. He states, in his answer that he renounced before and was discharged by, the Ordinary. Neither the Ordinary nor any other tribunal, has any such power. The courts of equity do exercise the power of taking the assets out of the hands of an executor, where they are in danger of being wasted, but it has no authority to discharge him from liabilities incurred, or to deprive him of rights which he has

acquired, in the discharge of the duties of executor.

I think also, that he was incompetent, because his wife's interest is directly involved in the suit, and he is called on to testify in her behalf, or rather, in behalf of her interest. The interest of Mrs. Black, in the subject matter of the suit, is independent of her husband, and not under his control, and this, it is said, removes all interest which he might otherwise have had in the matter.

In contemplation of law the husband and wife are one and the same, and whilst they

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live together in harmony, *their interests are, in truth and in fact identical. The wife could not sit at the table, and refuse to share with her husband the loaf which she had purchased with her separate funds. I say, could not, but suppose she did, (and the world of mankind is made of a strange compound) and selfishly appropriate the whole of her separate property to her undivided use—it would relieve him, to that extent, from the necessity of providing for her wants. By the policy of the law, husband and wife are excluded from being witnesses for or against each other, in civil, as well as in criminal, cases. In that relation, each is entitled to the unlimited confidence of the other. Withholding it, is well calculated to mar their happiness, and confidence must be destroyed, if an inquisitorial power was established to extort from either the bosom secrets of the other. Intimate as the union between husband and wife is supposed to be in law, and is often in fact, the will of one must prevail over the other, and I can readily suppose that cases might occur, in which it would be felt, even in the solemn act of giving testimony. Would a weak, timid, and submissive wife, feel no restraint when she was called to give evidence for or against a brutal and tyrannical husband? Is it not to be feared that her moral sense, however well sustained under other circumstances, would waiver under this influence? It was wise and humane, therefore, to remove the temptation altogether, by excluding them from being witnesses for or against each other. It is on this principle, that parties are excluded from giving evidence in their own causes, and if husband and wife are unit, and their interests identical, they ought not to be allowed to testify for or against each other.

Lord Coke lays it down as a rule well established in his day, that the husband or wife of a party, is incompetent to give evidence for or against each other, as it might be the means of implacable discord and dissention between them, and of great inconvenience: Co. Lit. 60. And in the application of the rule, it has been held, that in an action by the trustee of a marriage settlement to recover property settled to the separate use of the wife, the husband was an incompetent witness to prove the identity of the property. (And that is exactly this case.) And Lord

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*Kenyon remarks, that independently of the question of interest, husbands and wives are not admitted as witnesses for or against each other. From their being so nearly connected, they are supposed to have such a bias on their minds, they are not to be permitted to give evidence. And Buller, J., says, it is now considered as a settled principle of law, that husbands and wives cannot, in any case, be admitted as witnesses for or against each other; Davis v. Dinwoody, 4 Term Rep. 678. So in Daker v. Halsey, 21 Eng. Com. Law Rep. 416, where the widow was called to testify, as to a conversation between her deceased husband and herself, Best, Ch., held that she was incompetent, remarking, that the happiness of the married state requires that the confidence between man and wife should be kept forever inviolate. And so in Munroe v. Twisleton, reported in the appendix to Peake's Evidence, 84, Lord Alvanly held, that a wife divorced from her husband by Act of Parliament, was incompetent to testify as to what he had said during their coverture. So in Terry v. Belcher, 1 Bail. Rep. 568, where the husband and wife lived separately, and were under mutual bonds not to interfere with any property which either had or might acquire, the husband was held an incompetent witness, in a suit brought by the administrator, to recover the property of an estate, of which the wife was entitled to a distributive share, although she was no party to the suit, and that on the ground of interest.

The case of Fitch v. Hill, 11 Mass. Rep. 286, and Richardson v. Learned, 10 Pickering, 268, have been relied on as establishing a different rule. In the first, a promissory note had been given to the wife dum sola, and after her marriage, her husband had endorsed it to the plaintiff, and guaranteed the payment. In an action by the endorsee against the maker, the wife was admitted to testify that the maker had paid her the money before her marriage, and that the note was not delivered, on account of its being then lost or mislaid. A verdict was found for the defendant, and upon a motion for a new trial, the court go on to say, that the evidence was admissible according to the rules of law, but that as the husband had been released, the question had ceased to be of importance,

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*and supposing it inadmissible, it was questionable whether a new trial would be granted. In the latter case, the husband was admitted as a witness in a suit brought by the trustee of the wife, in relation to a separate property in which she had an interest, without the control of her husband, over which she had the uncontroled power of appointment, and the ground relied on is, that the interest of the husband was altogether con-

tingent, and dependent on the wife's making an appointment in his favor; and the case of Fitch v. Hill, is referred to as authority.

It would, perhaps, be enough to say of these cases, that they are put on the ground of interest entirely, and not on the general policy of the law, and can hardly be regarded as authority upon it, but the Acts of our Legislature have prescribed the English Common Law as our guide, in all matters where it is not altered by positive enactment, and not inconsistent with our peculiar institutions and customs, and we know of no higher authority for the Common Law, than those before referred to. I have the very highest respect for the decisions of the able men who preside over the courts of our sister States, but we know from our own experience, that a court having once established a rule at variance with the common law, either from inadvertence, or in the confidence that it is injurious, it is followed for the sake of consistency, even after we are satisfied of its fallacy. Besides, that in looking through the decisions of the courts of the different States of the Union, we find so many contradictions and qualifications, as to be unable to abstract any settled rule from them, and, without any want of ability or learning in the judges, all are, more or less, influenced by usage and local circumstances, which do not operate to the same extent in England; and where there is a diversity of opinions, I should confide more in the judgment of the English court, as to a rule or principle of the Common Law, than in that of any one of the States. Appeal dismissed.

DUNKIN and HARPER, Chancellors, concurred.

JOHNSTON, Ch., absent from sickness.

Speers, Eq. *439

*THE BANK OF THE STATE OF SOUTH CAROLINA and JAMES LEGARE, Complainants, v. PETER GOURDIN, ISAAC EDWARD HOLMES, JAMES GADSDEN HOLMES, THE SOUTH WESTERN RAIL ROAD BANK, THE BANK OF CHARLESTON, SOUTH CAROLINA, ALEXANDER H. BROWN, and THE SOCIETY FOR THE RELIEF OF ELDERLY AND DISABLED MINISTERS OF THE CLERGY OF THE INDEPENDENT OR CONGREGATIONAL CHURCH IN THE CITY OF CHARLESTON, Defendants.

CHRISTOPHER G. MORRIS, Trustee of Mrs. Charlotte M. H. Holmes, v. THE BANK OF CHARLESTON, SO. CA.

(Charleston. Jan. Term, 1844.)

[1, 2. *Mortgages* ⇐245.]

I. Defendant, I. E. H. sold and conveyed, on the 1st March, 1838, to P. G. an undivided moiety of a plantation and slaves employed thereon, for which the latter paid, in cash $10,000, in part, executing for the residue seven several bonds, and a mortgage of the property. I. E. H. being indebted to the Bank of the State of South Carolina, in June, 1838, assigned to the Bank, as collateral security, four of said bonds, one of which the bank assigned to L. with the knowledge and consent of I. E. H. for full consideration, on account of the debt due by the latter. For like valuable consideration, I. E. H. assigned a fifth bond, to L. the 7th January, 1839. He also assigned and delivered to the Society for the Relief of Elderly and Disabled Ministers &c., the sixth bond to secure the payment of a loan; and it was understood and proved, that in all the assignments of P. G's. bonds, the mortgage should stand as a security for payment of them in the hands of the assignees. I. E. H. was also indebted to the Rail Road Bank, and on the 5th June 1839, to secure the debt, executed a mortgage to the Bank, of an undivided moiety of the plantation and slaves retained by him in his sale to P. G., with twenty-five others, by name. When these mortgages were executed, I. E. H. said to the President of the Bank, that there was no necessity to record them, as the debts intended to be secured would be punctually paid, who made no reply, but handed them to the cashier. He stated, on examination, that he understood the silence of the President as an acquiescence in the proposition not to record, and that then the solvency of the mortgagor was not doubted. These mortgages were recorded in the Secretary of State's office, on the 27th Nov. 1841. I. E. H. being also indebted to the Bank of Charleston, confessed judgment to them on the 27th November, 1839; fi. fa. lodged in the sheriff's office to bind the same day. Defendant, J. G. H. was endorser for I. E. H. to the Bank, against whom they also entered up judgments, and afterward assigned them to C. G. M., trustee of the separate estate of the wife of J. G. H., in consideration of $5,000, about one third of the judgments. In

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1840, I. E. H., and P. G. agreed to *rescind their contract, but no formal reconveyance was made; but the fact of the agreement was stated in a writing between them of the 16th Dec. 1841, by which the former released the latter from liability on the several bonds, saving the rights of those to whom they had been assigned. I. E. H., by bill of sale of the 18th Dec. 1840, and recorded in the Secretary of State's office, the 10th Nov. 1841, conveyed to P. G., in pursuance of the agreement to rescind, twenty-five slaves by name, in consideration of the $10,000 paid him at the purchase; these slaves being embraced in the mortgage of the 5th June, 1839, to the Rail Road Bank. To indemnify P. G. against the assigned bonds, I. E. H. mortgaged to him all the interest he had in the negroes which were included in P. G's. mortgage to himself. Recorded 10th Dec. 1841. P. G. denied that when this mortgage was executed he had any knowledge of the mortgage to the Rail Road Bank. P. G. jointly with I. E. H. remained in possession of the plantation and slaves till February, 1842, when all the slaves were delivered to the agent of the Rail Road Bank, to be sold in satisfaction of their mortgage, except the twenty-five claimed by P. G. under the bill of sale from I. E. H. After the execution of the bill of sale by I. E. H. to P. G. the former assigned to defendant, J. G. H. all his estate and effects, for the benefit of his creditors. As to the claims of the Bank of the State of South Carolina, the Society for the Relief of Elderly and Disabled Ministers, &c., and complainant, L., they were entitled to all the security which the mortgage from G. to I. E. H. afforded for the payment of their demands.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 605; Dec. Dig. ⇐245.]

[3. *Mortgages* ⟸245.]
Independent of the agreement when the bonds were assigned, that the mortgage should stand as a security, they were entitled to it without such agreement. Vide Green v. Hart, 1 J. Rep. 591; Story's Eq. 308–11.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 605; Dec. Dig. ⟸245.]

[4. *Chattel Mortgages* ⟸187.]
The permitting of the mortgagor of an unregistered mortgage of personal property, to retain possession of the mortgaged property, is not conclusive evidence of fraud, and may be explained.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 372–392; Dec. Dig. ⟸187.]

[5. *Chattel Mortgages* ⟸136.]
The mortgagee of personal property, having neglected to register his mortgage, is not bound to seize the property, the day the condition is broken, or lose his lien.

[Ed. Note.—Cited in Fishburne v. Kunhardt, 2 Speers, 564; Ryan v. Clanton, 3 Strob. 423; Hirshkind & Co. v. Israel, 18 S. C. 167.

For other cases, see Chattel Mortgages, Cent. Dig. §§ 220–226; Dec. Dig. ⟸136.]

[6. *Fraudulent Conveyances* ⟸298.]
Regarding the circumstances of failing to register a mortgage of personal property, and take possession, as badges of fraud, the actual fraudulent intention must be established; it must appear that some one would be injured, if the deed or transaction were permitted to stand.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 892–895; Dec. Dig. ⟸298.]

[7. *Fraudulent Conveyances* ⟸298.]
The acquiescence on the part of the R. R. Bank, in the request of the morgtagor not to record, coupled with the failure to take possession, not enough to make out a case of fraud, as, from the testimony, it seemed most probable that the request was made by the mortgagor, rather for the purpose of gaining time to extricate himself from his difficulties, than to gain credit on the faith of the mortgaged property in his possession.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 892–895; Dec. Dig. ⟸298.]

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[8. *Chattel Mortgages* ⟸152.]
*As between the R. R. Bank and the Bank of Charleston, the nonregistration of the mortgage to the former, could not have prejudiced the latter, having given credit before the execution of the mortgage.

[Ed. Note,—For other cases, see Chattel Mortgages, Cent. Dig. §§ 254, 266; Dec. Dig. ⟸152.]

[9. *Chattel Mortgages* ⟸256.]
This court, regarding the mortgage merely as a security, would have restrained the mortgagee from enforcing his security, until he was entitled to have his debt, and as the debt of the R. R. Bank was not due till after the judgment and execution of the Bank of Charleston, it was immaterial to the latter bank, whether or not the former took possession of the slaves.

[Ed. Note.—Cited in Wingo v. Parker, 19 S. C. 16.

For other cases, see Chattel Mortgages, Cent. Dig. § 528; Dec. Dig. ⟸256.]

[10. *Chattel Mortgages* ⟸159.]
The legal title to the moiety of the slaves mortgaged to the R. R. Bank being in them, nothing remaining in the mortgagor, but a mere equity, there was nothing on which the lien of the execution of the Bank of Charleston could attach.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 281; Dec. Dig. ⟸159.]

[11, 12. *Attachment* ⟸53.]
The Bank of Charleston obtained judgment against I. E. H., the principal, on certain promissory notes due them; the one entered up on the 27th November, 1839, and the other, on the 11th June, 1842. They also entered up judgments against the endorser on the notes, on the last mentioned date, and about the 20th June following, assigned, by deed, to one M, in consideration of a certain sum to be paid them, the said two judgments, against the indorser, "and all sum and sums of money, and benefit whatsoever, that may be obtained by means of the same, or any execution or executions, issued thereupon, and all the estate, right, title, and interest whatsoever, of the said bank in the same," and constituted him their attorney irrevocable, to prosecute the said executions. Prior to the 20th June, the Bank had levied on the property of the principal.

On a bill filed by the assignee, to enjoin the Bank from enforcing their judgments and executions against the principal, it was *held*, that their claim against him was not extinguished by the assignment of their judgments against the indorser.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 139; Dec. Dig. ⟸53.]

[13. *Chattel Mortgages* ⟸144.]
As between P. G, the R. R. Bank, and the Bank of Charleston, P. G. held entitled to retain the slaves mortgaged by him to I. E. H, in his bill of sale of December 18, 1840.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 241; Dec. Dig. ⟸144.]

The cases of Maples v. Maples, Rice Eq. 300, and Gist v. Pressley, 2 Hill Eq. 318, cited and approved.

[15. *Judgment* ⟸844.]
[Separate judgments having been recovered against principal and surety for the same debt, the plaintiff assigned the judgment against the surety, and all sums of money and benefit which might be obtained therefrom, and all interest therein. *Held*, that the assignee was entitled to so much only as could not be recovered against the principal debtor.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1542; Dec. Dig. ⟸844.]

[16. *Mortgages* ⟸95½.]
[Cited in Youngblood v. Keadle, 1 Strob. 123, to the point that an unregistered mortgage is not void.]

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 206; Dec. Dig. ⟸95½.]

[This case is also cited in McKnight v. Gordon, 13 Rich. Eq. 247, 94 Am. Dec. 164, without specific application.]

The complainants filed this bill on the 1st March, 1842, for an injunction against the Bank of Charleston, who had taken in execution certain negroes of Isaac Edward Holmes and Peter Gourdin, and for an account of the amount due on the various liens claimed by the complainants, the Bank of Charleston and the other parties. On the 5th March, 1842, the following order was made in the cause:

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*"It is Ordered, That the Bank of Charleston be restrained from proceeding

under their execution against the negro slaves mortgaged by Peter Gourdin to Isaac Edward Holmes, or against the negroes mortgaged by Isaac Edward Holmes to the Rail Road Bank, or against the negroes included in the bill of sale of Isaac Edward Holmes to Peter Gourdin, dated 18th December, 1840. And by consent of the Bank of Charleston, and of each and every of the said mortgagees, and of Mr. Gourdin, it is ordered that Mr. Gray, one of the Masters of this Court, be authorized to sell, and do sell, all the said slaves, at as early a day as can be fixed, after giving eight days notice, upon the following terms, &c., &c., &c. And that the amount of the proceeds of sale be retained, subject to the same liens as the property to be sold, and to the further order of this court; the sale being made without prejudice to the rights of parties; and Mr. Gray, in his account of sales, to discriminate between the proceeds of the property subject to the several liens."

The above order has been executed. James G. Holmes is a party, as assignee of Isaac Edward Holmes, and has no interest, and put in no answer to the bill. Alexander H. Brown was made a party as sheriff only, and has no interest. The bill was taken pro confesso against Isaac Edward Holmes. The other parties put in their answers, laying claim to the fund in court, according to their several rights. The Bank of the State of South Carolina, James Legare, and the Society for the Relief of the Clergy, &c., &c., claim under a mortgage from Peter Gourdin to Isaac E. Holmes, dated 1st March, 1838, of an undivided part of 151 negroes, and an undivided part of two plantations. The South-Western Rail Road Bank claims under a mortgage from Isaac Edward Holmes to the South-Western Rail Road Bank, dated 5th June, 1839, of the residue of the same negroes and others, and an undivided moiety of the same plantations. Peter Gourdin claims 25 negroes, parcel of those mortgaged in moieties to the two banks, by a bill of sale dated 18th December, 1840. The Bank of Charleston, as execution creditors, having judgment against Isaac Edward Holmes, and

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execution enter*ed in the sheriff's office, on the 27th November, 1839, claim payment of the balance due them, prior to the mortgage of the Rail Road Bank against Mr. Gourdin. Their priority to the Rail Road Bank is asserted because the mortgage of the Rail Road Bank, though dated 5th June, 1839, was not recorded till 27th November, 1841, and was then altered by erasing the names of the witnesses and substituting others. Their claim to satisfaction out of the negroes conveyed to Mr. Gourdin is asserted, because his purchase was not made till 20th December, 1841, which was subsequent to their execution. Mr. Gourdin claims to hold the 25 negroes discharged from the mortgage of the Rail Road Bank, as well as from the execution of the Charleston Bank, because he is a purchaser for valuable consideration, without notice of the prior unregistered mortgage of the Rail Road Bank.

At the hearing it was proved that after the execution of the mortgage to the Rail Road Bank, Mr. Holmes said to the President, there was no need of recording it, and the President handed it to the cashier without remark, who locked it up for safe-keeping. That the mortgaged property remained in the possession of Holmes and Gourdin. That the alteration of the deed, by erasing one set of witnesses and inserting another, was made by the deputy register, when the paper was carried to him to be recorded. That the witnesses to the deed were then absent, and their names were erased by the deputy, and at his suggestion Isaac Edward Holmes acknowledged the execution of the deed before two other witnesses, who subscribed their names; and one of them made an affidavit to comply with the requisite proof, in order that the mortgage might be recorded. Neither the Bank of Charleston nor Mr. Gourdin had notice of the mortgage to the Rail Road Bank.

It was proved at the hearing, that the judgment of the Bank of Charleston against Isaac Edward Holmes is grounded on a note of Isaac Edward Holmes, endorsed by James G. Holmes; and that, prior to the 20th June, 1842, the Bank of Charleston had obtained a judgment against James G. Holmes, on the same note, and on that day, in consideration of five thousand dollars,

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assigned the judg*ment against James G. Holmes to C. G. Morris. James G. Holmes gave evidence that the Bank of Charleston pressed him for payment, and that he represented to them that he was unable to pay, and that his wife was entitled to some separate estate, under the will of her mother, of which C. G. Morris was trustee, and offered 5,000 dollars, to be paid by Mr. Morris, for an assignment of the judgment against him, which offer was accepted. That Mr. Morris has, since the assignment, given instruction to his attorney to sell all his (J. G. Holmes's) property; and that he considers the assignment as transferring the whole debt to his wife's trustee, and meant by his negotiation to get for the trustee the benefit of both judgments, but that nothing was said in the treaty with the Bank, about such intention, or the extinguishment or transfer of the judgment against Isaac E. Holmes.

Mr. Rose, the Cashier of the Bank, proved that they gave credit on their judgment against Isaac E. Holmes, for $5,000, paid on account of James G. Holmes, as the indorser; that the amount still due on the judgment to the Bank is upwards of $7,000; that there was no intention of releasing the debt, but that the amount received on account of

James G. Holmes, was treated by the Bank as a payment pro tanto.

The cause came on to be heard at Charleston, at the sitting of the court in February, 1843, before his Honor Chancellor Johnson, who delivered the following decree:

Johnson, Ch. On the 1st March, 1838, defendant, Isaac Edward Holmes, sold and conveyed to the defendant, Peter Gourdin, an undivided moiety of a plantation on Cooper River, called Cotebas, and an undivided moiety of one hundred and fifty-one slaves employed thereon, at the price of $45,000. Gourdin paid in cash $10,000, and gave to Holmes seven several bonds, each conditioned for the payment of $5,000, at subsequent days, making, with the amount paid, the amount of the purchase money; and to secure the payment of the bonds, he mortgaged to Holmes the said undivided moiety of the plantation and slaves so conveyed to him.

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*The defendant, Isaac Edward Holmes, being largely indebted to the complainant, the Bank of the State of South Carolina, by promissory notes, in June, 1838, assigned and delivered to the said Bank, as collateral security for the payment of the said notes, four of the bonds of defendant Gourdin, above referred to; one of these bonds the Bank afterwards, with the knowledge and consent of the said Isaac Edward Holmes, assigned and delivered to the complainant Legare, for full and valuable consideration, paid to the Bank on account of the debt due by the said Isaac Edward Holmes; and the said Isaac Edward Holmes, on the 7th January, 1839, for a like valuable consideration, assigned and delivered to the said complainant, Legare, another of the said bonds, being the fifth bond. And it is charged in the bill, and sustained by the proof, that in all these assignments and transfers of the said bonds, it was understood and agreed by the said Isaac Edward Holmes, that the mortgage given by defendant, Gourdin, to secure their payment to the said Isaac Edward Holmes, should remain as a security for their payment in the hands of the assignees.

On the 7th July, 1838, defendant, the said Isaac Edward Holmes, borrowed of the defendant, the Society for the Relief of Elderly and the Disabled Ministers, &c., $2000, for which he gave bond, and to secure the payment thereof, assigned and delivered to the said Society another bond of Gourdin's, being the sixth bond, and agreed that Gourdin's mortgage should also stand as a security for the payment of that bond.

The defendant, Isaac Edward Holmes, being also largely indebted to the South-Western Rail Road Bank, on the 5th June, 1839, to secure the payment of their debt, mortgaged to the said Bank, the one undivided moiety of the plantation Cotebas, and a moiety of the one hundred and fifty-one slaves retained by him in his sale to defendant Gourdin, and also twenty-five other slaves, by name. This mortgage was not recorded in the office of Secretary of State, as required by law, until the 27th day of November, 1841. At the time these mortgages were executed, the defendant, Isaac Edward Holmes, said to the late Col. Blanding, who was then

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President and Solicitor of the *Bank, that there was no necessity to record them, as the debts which they were intended to secure, would be punctually paid. Blanding made no reply, but handed them to the defendant, James G. Holmes, who was the Cashier of the Bank. James G. Holmes, who was examined as a witness, stated that he understood the silence of Col. Blanding as an acquiescence in Isaac Edward Holmes's proposition, not to record the mortgages, and he did not, therefore, have it done—at the time, no one entertained any doubt about Isaac Edward Holmes's ability to pay all his liabilities, and save to himself a large estate. He, James G. Holmes, who knew all his affairs, had perfect confidence in it, and he has no doubt Col. Blanding entertained the same opinion, and was probably influenced by that consideration, in the matter of recording the mortgages. The subsequent failure of Isaac Edward Holmes, was the consequence of the rapid and unprecedented depreciation in the value of property, particularly in stocks, of which he owned a large amount.

The defendant, Isaac Edward Holmes, being also indebted to the Bank of Charleston in a large sum of money, confessed a judgment therefor, in the Common Pleas. The judgment was signed on the 27th November, 1839, and a fi. fa. to bind, was lodged in the Sheriff's office on the same day. The defendant, James G. Holmes, was also bound, as the endorser of Isaac Edward Holmes, for the payment of the debt for which this judgment was confessed; and the bank also obtained and signed judgment against him for the amount. This judgment the Bank afterwards assigned to one C. G. Morris, the trustee of the separate estate of Mrs. Holmes, the wife of James G. Holmes, in consideration of $5000, being about one-third of the amount of the judgment.

Some time in 1840, Isaac Edward Holmes and Gourdin, agreed, verbally, to rescind the contract made between them for the sale of the undivided moiety of Cotebas, and the one hundred and fifty slaves, but no formal reconveyance by Gourdin to Isaac Edward Holmes has ever been made. The fact of such an agreement is, however, distinctly stated in an agreement in writing, entered into between them on the 16th December,

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1841, by which the *said Isaac Edward Holmes releases Gourdin from all liability on the said several bonds, saving the rights of

those to whom they had been assigned and delivered as collateral security for the payment of the debts of the said Isaac Edward Holmes, as above mentioned. In pursuance of the agreement to rescind, the said Isaac Edward Holmes, on the 18th December, 1840, conveyed to Gourdin, by an absolute bill of sale, twenty-five slaves, by name, in consideration of the 10,000 which he had paid in cash at the time he purchased. This bill of sale was recorded in the office of Secretary of State 10th November, 1841. These slaves are stated in the answer to be a part of the one hundred and fifty-one, named in the mortgage of 5th June, 1839. The said Isaac Edward Holmes, in the further execution of the agreement to rescind, and to indemnify Gourdin against his liability on the assigned bonds, by an informal deed mortgaged to him all the interest which he had in "the negroes specified in the mortgage of the said Peter Gourdin, to me (him) at the purchase of Cotebas plantation and negroes." This deed was carried to the office of the Secretary of State to be recorded, on the 19th November, 1841, but the Secretary declined recording it, as it had not been proved in the manner required by law. It was then withdrawn, and returned again on the 10th December following, properly proved, and was recorded as of that day. Gourdin denies that he had, at the time of the execution of this mortgage, any knowledge of the existence of the mortgage to the Rail Road Bank.

Notwithstanding the rescission of the contract for the sale of the moiety of the plantation and slaves to Gourdin, he remained in possession of them jointly with Isaac Edward Holmes, until February, 1843, when he delivered to the agent of the Rail Road Bank, to be sold in satisfaction of their mortgage, all the slaves except the twenty-five in number which he claimed the right to retain, under the bill of sale by the said Isaac Edward Holmes.

Some time after the execution of the bill of sale of Isaac Edward Holmes to Gourdin, he (Holmes,) made and executed to the defendant, James G. Holmes, a general assignment of all his estates and effects, for the benefit of his creditors. But James G.

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Holmes has not answered the bill, *and I do not understand that any claim is intended to be interposed in that behalf.

The claims of the Bank of the State of South Carolina, of the Society for the Relief of Elderly and Disabled Ministers, &c., and of the complainant, James Legare, to priority over the claims of the other parties, have not been seriously questioned. Their demands, it will be recollected, are all founded on bonds given by Gourdin to Isaac Edward Holmes, secured by a mortgage of a moiety of Cotebas, and one-hundred and fifty-one slaves, to the validity of which no objection has been raised. Independent of the agreement made by Isaac Edward Holmes, with these parties, at the time he assigned the bonds that the mortgage should remain as a security for their payment, which would, of itself, be binding, the assignees would, as a matter of law, be entitled to that security, without any such agreement. It is so laid down by Spencer, J. in Green v. Hart, in Error, 1 Johns. Rep. 591, affirming the decree of Chancellor Kent, on circuit. See also Story's Eq. 308, 311.

The conflicting claims of the Rail Road Bank, of the Bank of Charleston, and of Peter Gourdin, give rise to some novel and perplexing questions The mortgage to the Rail Road Bank was, it will be seen by referring to the dates, the first lien on the property, but it was not recorded until long after the bill of sale to Gourdin for the twenty-five slaves was executed, nor until eight days after it had been recorded, and the Act of 1698, Pub. Law, 3. 2 Stat. at Large 132, entitled "An Act to prevent deceits by double mortgages and conveyances of lands, negroes," &c., declares expressly "that sale, conveyance, or mortgage of negroes, goods or chattels, which shall be first recorded in the Secretary's office, in Charleston, shall be taken, deemed, adjudged, allowed of, and held to be the first mortgage, and good firm, substantial and lawful, in all the courts of judicature within South Carolina, any former sale or mortgage for the same negroes, goods and chattels, not recorded in the said office, notwithstanding." This Act strikes me as giving in terms the preference to the recorded bill of sale over the unrecorded mortgage. I attach no importance to the mortgage to

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Gourdin, of the 18th De*cember, 1840, because that was not recorded until after the mortgage to the Rail Road Bank was recorded. But if the mortgage to the Rail Road Bank is entirely out of the way, it is equally clear that the judgment and execution of the Bank of Charleston was a lien upon the twenty-five negroes, as well as on the other property of Isaac Edward Holmes, and would be preferred to the subsequent bill of sale to Gourdin. Here, however, we are met with the rule of law, which however questionable the foundation may have been, I must regard as settled, that a bona fide unrecorded mortgage has precedence to judgment and other general creditors. (See Barnwell v. Porteus, 2 Hill Eq. Rep. 219, where all the cases are reviewed.) From this general view of the matter, it follows that Gourdin's claim ought to be preferred to that of the Rail Road Bank, that of the Bank of Charleston to Gourdin's and that of the Rail Road Bank to the Bank of Charleston; so that it is impossible to designate any one of them who ought not to be postponed to some other. To solve this difficulty, it will be nec-

essary to examine more particularly into the nature of these claims.

I will begin with that of the Bank of Charleston. If, as I suppose, the mortgage to the Rail Road Bank was fair and bona fide, the legal estate in the slaves was vested in that Bank. All that remained to Isaac Edward Holmes was a mere equity, the right to redeem a chose in action, on which the lien of the execution of the Bank of Charleston could not attach. Isaac Edward Holmes might have released or assigned it, and the Bank of Charleston would have been without a remedy. The sale to Gourdin, of the twenty-five slaves, was, to that extent, an assignment of his right to redeem, and must be preferred.

For the Bank of Charleston, it is insisted, and ample authorities have been referred to in support of the position, that retaining possession of chattels sold or mortgaged by the vendor or mortgagor, is evidence of fraud, and that the sale or mortgage is void as to creditors and purchasers without notice. Such is unquestionably the general doctrine; but I need not refer to the numerous cases decided in our own courts, to show that it

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is only prima facie evi*dence of fraud, and may be rebutted. That if such possession be rightful and fair, it will not vitiate the sale or mortgage: as in Terry v. Belcher, [1 Bailey 568,] where the purchaser of a slave hired it to the seller, at reasonable wages; and I have had occasion before to remark, in some case that has escaped my recollection, that the presumption of fraud ought not to attach to the mortgagor's remaining in possession of slaves mortgaged, although there should be no such covenant in the mortgage, because it was the common usage of the country. The wages of grown negroes ordinarily are much greater than the interest on their value; and no one who could, by any possibility avoid it, would be willing to give the use of such slaves for the loan of their money value, and few would be found to lend money on such security who would be willing to pay the ordinary hire of slaves whose services they might not need.

There is another objection opposed to the claims of the Bank of Charleston, which deserves consideration. It had, as before stated, obtained judgments against Isaac E. Holmes, and his endorser, James G. Holmes, for the same debt, and, for a valuable consideration, assigned the judgment against James G. Holmes to C. G. Morris. That is attempted to be put on the ground of a release to James G. Holmes, which could only be regarded as payment pro tanto of the judgment against Isaac Edward Holmes. But that is expressly negatived by the evidence of James G. Holmes, who states that it was intended as a bona fide purchase, and that C. G. Morris has instructed his solicitor to proceed forthwith to make the money out of his effects. From the relations between James G. Holmes and the trustee of his wife's estate, one would be led to conclude that this purchase of the judgment against him was intended to relieve him from the danger of an arrest on a ca. sa., or his property from a sale under a fi. fa.; but in law, and in equity too, Morris has a clear right to enforce the judgment against him, and it may be that the duties of the trust may require it of the trustee, in discharge of his own liability. Now, it is obvious that every dollar which the Bank of Charleston receives or recovers from Isaac Edward Holmes, is pro tanto a discharge and satisfaction of the judgment against James G.

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Holmes, and in direct violation of the *contract by which they assigned that judgment to C. G. Morris. The conclusion is palpable, the Bank of Charleston and C. G. Morris cannot be both entitled to the same debt. The Bank has assigned it to C. G. Morris, and it is bound. C. G. Morris is not a party to this bill, and I can make no decree for him. It may be that he will waive his right in favor of the Bank; but I can make no decree affecting his rights, until he is made a party, which may be done if it is thought necessary.

There is another view of the claim of Gourdin, which strikes me as superseding those of the other parties, both with regard to his right to be protected against his bonds, which had been transferred and assigned by Isaac Edward Holmes, and in his claim to the twenty-five negroes conveyed to him by the said Isaac Edward Holmes.

There was no incumbrance on the property of Isaac Edward Holmes, at the time he sold and conveyed the undivided moiety of Cotebas, and of the one hundred and fifty-one slaves, to Gourdin; and no one questions that the legal estate in that moiety vested in him. He has never formally re-conveyed to Isaac Edward Holmes. He agreed to rescind the contract, but it was upon the terms that Isaac Edward Holmes should reimburse him the $10,000 he had paid in cash, and indemnify him against his liability on the bonds which the said Isaac Edward Holmes had transferred and assigned, as is clearly indicated by the bill of sale of the twenty-five slaves, and the mortgage of the 18th December, 1840. It was, in effect, an agreement on the part of Gourdin to retain only a part of what he had purchased from Isaac Edward Holmes, and could not be affected by any mortgage made by Isaac Edward Holmes, or judgments obtained against him. Such is the effect of the contract to rescind, if that be valid: if not, the contract to purchase is still in force, and entitles Gourdin to the moiety of Cotebas, and the one hundred and fifty-one slaves.

From these views it follows that the Bank of the State of South Carolina, the Society

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Edward Holmes affords for *the payment of their several demands. That as between Gourdin, the Rail Road Bank, and the Bank of Charleston, Gourdin is entitled to retain the twenty-five slaves conveyed to him by Isaac Edward Holmes's bill of sale of the 18th December, 1840. That as between the Rail Road Bank and the Bank of Charleston, the claim of the latter is extinguished by the assignment of the judgment against James G. Holmes to C. G. Morris, if that should be insisted on when Morris shall have been made a party; and again, that the mortgage to the Rail Road Bank, taken as fair and bona fide, although unrecorded, has priority over the judgment of the Bank of Charleston.

The solicitors of the parties will be at liberty to move for the necessary orders to carry this order into effect.

From this decree the Bank of Charleston appealed, and insisted that so much of the decree as declares that the unregistered mortgage of the Rail Road Bank is entitled to payment out of the fund in court, before the execution of the Bank of Charleston, and that the negroes conveyed by Isaac E. Holmes to Peter Gourdin, are not subject to the execution of the Bank of Charleston, should be reversed, for the following, among other reasons:

1. That an unregistered mortgage of personal property, of which the mortgagor retains possession, is void against bona fide creditors without notice, and more especially against creditors acquiring a lien on the property.

2. That the assignment of the judgment against James G. Holmes, the surety, does not at law release or impair the right of the creditor to enforce his judgment against the principal, for the residue of his debt; and that such assignment ought not, in equity, to have an effect beyond what it has at law, against the true intent and meaning of the parties to the agreement out of which the assignment grew.

3. That the negroes conveyed by Mr. Holmes to Mr. Gourdin, were bound in his hands by the execution of the Bank of Charleston, and not by the mortgage of the Rail Road Bank; and that the Bank of Charleston has equal equity with the other party. That the Rail Road Bank, and the Bank of Charleston, were severally actors,

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and the *question was between them severally and Mr. Gourdin; and that, as the Bank of Charleston has the right at law, this court should not interfere to divest them of it.

Petigru & Lesesne, for appellants.

Mr. Bailey, for the Bank of the State and Mr. Legare.

Mr. DeSaussure, for the Society for the Relief of Elderly and Disabled Ministers.

Mr. Mazyck, for Mr. Gourdin.

Mr. Campbell and Mr. Memminger, for Rail Road Bank.

In the second case stated, which was a bill for an injunction, the facts will be fully understood from the decree of his Honor, Chancellor Dunkin, before whom the case was tried, at Charleston, June Term, 1843.

Dunkin, Ch. Isaac Edward Holmes was debtor to the Bank of Charleston, on certain promissory notes, endorsed by James Gadsden Holmes. On the 27th November, 1839, judgment was entered against the maker for $32,162, and on 11th June, 1842, for $1,622. On the day last mentioned, judgments were entered against the indorser, one for $16,736, the other for $1,622.

Prior to the 20th June, 1842, the Bank had levied on the estate of I. E. Holmes, and at the time of instituting these proceedings, his property was advertised for sale by the sheriff of Charleston district.

The allegation of this bill is, that on the day last mentioned, the Bank, in consideration of $5000, paid by the complainant, assigned to him the judgments thus obtained against the endorser, James G. Holmes; that he "had frequently applied to the Bank, and requested them to desist from attempting to enforce their aforesaid judgments against the said Isaac E. Holmes, as such an act was in direct violation of their contract with him, (the complainant) upon the assignment to him of the judgments against the said James G. Holmes."

This comprises the facts of the case. All the other statements of the bill are only arguments arising out of the construction of

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the deed of assignment, or deduced *from the judgment pronounced by the Chancellor in another cause.

On these facts and allegations, a motion has been submitted, on the part of the complainant, for an injunction to restrain the defendants from enforcing or collecting the judgments against I. E. Holmes, on the ground, that the complainant having, by the assignment, become the purchaser of the right to demand and receive the whole amount of the judgments against James G. Holmes, the collection by the Bank of the whole or any part of the judgments against Isaac E. Holmes, would either totally defeat, or to that extent diminish, the right of the complainant on the judgment against James G. Holmes; that the Bank could, rightfully, do no act impairing the effect of their contract with the complainant, and that they should, therefore, be perpetually enjoined from enforcing their judgments against Isaac

E. Holmes, inasmuch as by the true construction and effect of the assignment of the judgments against James G. Holmes, their judgments against Isaac E. Holmes were extinguished.

Whatever may be the rights of the complainant, they are derived entirely from the deed of assignment, and must depend on the interpretation to be given to that instrument. It is due to this court, not less than to the Chancellor who heard the case of the Bank of the State against Gourdin and others, to premise that the testimony as to the previous negotiation with the Bank of Charleston, which is recited in the Chancellor's decree, forms no part of this case. Whatever may be the effect of the matters therein detailed, they constitute no portion of the complainant's allegations, and cannot now be considered.

The only inquiry is, as to the effect of the deed of the 20th June, 1842.

That instrument, after reciting that the Bank had, on the 11th of June, obtained two judgments against James G. Holmes, for the several sums of $16,736, and $1,622, in consideration of $5000, paid by the complainant, assigns to him, without recourse, "the said two judgments, and all sum and sums of money, and benefit whatever, that may be obtained by means of the same, or any execution or executions, issued thereupon, and all

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the *estate, right, title, and interest whatever, of the said Bank in the same," concluding with the usual authority, in the name of the Bank, but at the cost of the assignee, to prosecute executions to recover or enforce the same.

Gathering the meaning of this instrument from the language used, the object would seem to be, to transfer to the complainant all the rights, legal or equitable, which the Bank enjoyed by virtue of the judgments against James G. Holmes. It is difficult to illustrate the proposition, if it required illustration. After the execution of the assignment, the Bank could be permitted to do no act which would, in any manner, restrict or impair the rights which they had thus transferred to another. What then were the rights of the Bank?

At law, they were at liberty to proceed at the same time on the judgments, both against the maker and endorser. Against the maker, they had already exercised this right, by levying on his estate, and they were about to proceed on the judgments against the endorser, when this assignment was executed. At law, the complainant now enjoys the same right. The levy by the Bank, under the execution against Isaac E. Holmes, in no way interferes with the complainant's right to recover satisfaction of the judgments against James G. Holmes, which have been assigned by the defendants. In that form, the transactions themselves are regarded as distinct, and there is no necessary connection in the modes of enforcing the judgments pronounced on them. The complainant's legal rights, as well as his legal remedies, remain unaffected by the proceedings of the Bank.

But in this court it is different. Equity looks not only to the character of the original transaction, but also to the effect of the assignment to the complainant, in reference to that original transaction. Here, James G. Holmes is regarded merely as a surety. He was bound for the default of his principal—no more, and no further. Under the judgments against him, the bank were authorized to receive all that should not be collected from Isaac E. Holmes. If, in the enforcement of their legal remedies against both, it should appear that satisfaction had been received from the principal, this court would

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restrain further proceedings against *the surety. It might restrain proceedings under other circumstances, to which it is not necessary now to advert. Such was the relative position of the bank and James G. Holmes, in this court. These equitable rights of the bank passed to the complainant under the assignment of the 20th June. Whatever amount of their debt the bank should fail to recover from Isaac E. Holmes, they had a right to demand and receive from James G. Holmes. If they made the money at law, under both executions, they could receive but one satisfaction, and the complainant will have bought nothing. But whatever the bank fails to collect from Isaac E. Holmes, the complainant will be entitled to recover from James G. Holmes, and in proportion to the amount of the deficiency of Isaac E. Holmes, and the ability of James G. Holmes to make up that deficiency, will the contract of the complainant be more or less advantageous. But with this the court has nothing to do. It is the province of the court to construe and enforce, but not to make, contracts.

The court has looked to nothing but the instrument exhibited with the bill. If the original agreement of the parties was for a transfer of the whole debt, or to get for the trustee the benefit of both judgments, it would be quite competent for this court, and would be its duty, on a proper case made and established, to reform the instrument so as to carry into effect the intention of the parties. To use the language of Judge Washington, in Hunt v. Rousmanier, 1 Peters, 1, [7 L. Ed. 27.] "The insufficiency of this instrument, to effect that object, would furnish a ground for the interposition of a court of equity, which the defendants could not easily have resisted." But it is not alleged, that the original agreement was for any thing more than an assignment of the judgment against James G. Holmes. Of this the complainant has the benefit, with whatever rights, legal or equitable, attached to them in the hands of the defendants.

These are the conclusions to which the court arrived on the argument of this motion, and which subsequent consideration has served only to confirm. But the embarrassment of the court, as to the course to be adopted, is not removed. In the case of the Bank of

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the State v. Gourdin *et al.*, the Chancellor has expressed an opinion, that the effect of the assignment to the present complainant was to extinguish the judgments against Isaac E. Holmes. It is true, that case is not only res inter alios acta, but testimony was heard in regard to this very transaction, which cannot be now considered. It cannot, however, be disguised, after a careful perusal of the decree, that the Chancellor would have probably come to the same result, without reference to this testimony. That judgment is subject to the revision of a higher tribunal, and, if erroneous, will be corrected. Certainly this court would do no act—would have no authority to do any act, founded on any doubts it might entertain of the correctness of that adjudication. But is this court at liberty, in another case, and at the instance of another party, to interpose its authority, and restrain proceedings in the ordinary tribunals against a defendant who is confessedly not to be injured, contrary to the convictions of its judgment, and in deference to the opinion of a magistrate of co-ordinate power, whose opinions are always entitled to the profoundest respect and consideration? If it were a matter of inclination, or discretion, this court would not hesitate. Having adopted, reluctantly, a different opinion as to the duty of the court, it remains only to say, that in the judgment of this court, the complainant has not presented a case for the interference of this court, and that the motion for injunction must be discharged.

In July, 1843, the following decree on the plenary hearing, was pronounced by Chancellor Dunkin.

Dunkin, Ch. On hearing the application for an injunction, the views of the court were fully expressed in the interlocutory order dismissing the motion. Since that time the answer of the defendants was filed, and the cause submitted for adjudication.

It is not perceived that the matters set forth in the answer can affect the result. Whether the contract with the complainant be regarded as a payment on I. E. Holmes's debt, and a release of the surety from fur-

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ther liability, or as a *purchase by the complainant of the right to recover from James G. Holmes, all that the defendants could recover, to wit, whatever they should fail to recover from the principal, the result is the same. In either aspect, the conduct of the defendants is no violation of their contract with the complainant, or in derogation of his rights under the assignment.

It is ordered and decreed, that the bill be dismissed.

The complainant, C. G. Morris, trustee, appealed from these decrees, upon the following grounds, viz:

1. That the claim of the Bank of Charleston against I. E. Holmes, on their judgment, was extinguished by their assignment to the complainant of their judgment against James G. Holmes; and that the said bank has no further right to enforce their judgment against Isaac E. Holmes.

2. That his Honor ought to have granted a writ of perpetual injunction, to restrain the Bank of Charleston from enforcing the judgment and execution against the said Isaac E. Holmes.

H. A. DeSaussure, for the appellants.

Petigru & Lesesne, contra.

Curia, per HARPER, Ch. The first ground of appeal relates to the validity of the mortgage to the South Western Rail Road Bank. The ground taken is, that "an unregistered mortgage of personal property, of which the mortgagor retained possession, is void against bona fide creditors, without notice, and more especially against creditors acquiring a lien on the property." I understand from this, and the course of the argument, that it is contended on behalf of the Bank of Charleston, that if the mortgagee of an unregistered mortgage of personal property permits the property to remain in the hands of the mortgagor, the mortgage is absolutely void; and this not by virtue of the enactment of any statute; for it is admitted that the Act of Assembly of 1698, (the only statute relating to mortgages or conveyances of personalty,) does not render them void for want of registration. Nor does the

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argument rest *on any rule of law, apart from the question of fraud. It must mean, then, that the permitting of the mortgagor of an unregistered mortgage to retain possession of the mortgaged property, is such conclusive evidence of fraud as can neither be explained nor rebutted; that it is an artificial rule of evidence, by which certain conclusions are drawn from certain appearances; as in the instance of a voluntary conveyance by a person indebted at the time, and who afterwards becomes insolvent. This is concluded to be fraudulent, without any enquiry into the actual fraudulent intention. In the absence of any such artificial rule, it is necessary that the actual fraudulent intention should appear, in order to vitiate the instrument: as in the instance of a voluntary conveyance alleged to have been made with a view to future indebtedness.

I am not aware of any such artificial and positive rule. The cases quoted to establish it, of Ryall v. Rolle, 1 Atk. 165; of Worseley and DeMattos, 1 Burr. 467, and others, were determined on the positive terms of the Eng-

lish statute of Bankruptcy, 21 Jac. 1, C. 19, which provided that if a person having conveyed his goods shall, at the time of his bankruptcy, be found in possession of such goods, by permission of the owner, he shall be reputed and adjudged the true owner. It is true that the subject is fully considered with reference to the common law, and the statute of 13 Eliz.; but with reference to these, it is not said that there is any such positive rule. It is said in Ryall v. Rolle, after a review of the cases—"from all these cases, it appears that upon the construction of the statute 13 Eliz., there is no ground to make a distinction between conditional and absolute sales of goods, if made with intent to defraud creditors; but a court or jury are left to consider this from the circumstances of the case."

It is certainly established by the case of Maples v. Maples, Rice Eq. 300, that the retaining possession of mortgaged property, even after condition broken, is no conclusive evidence of fraud. It is true that, in that case, the mortgage was recorded very soon after its execution, but this is only mentioned incidentally, as one of the circumstances in deciding on the bona fide or fraud-

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ulent charac*ter of the transaction. The case of Gist v. Pressley, 2 Hill Eq. 318, was to the same effect, though the decision in that case may be somewhat modified; and I am inclined to think rightly, in case of a mortgage—with respect to the distinction between the mortgage for a previously existing debt, and for one created at the time. It does not appear from the report, whether the mortgage was registered or not, nor was the case considered or decided with any reference to that circumstance. It is said, however, that the retaining of mortgaged property, even after condition broken, is different from the case of an absolute sale. "In the latter case, it is the common course that possession shall be transferred with the title, and the departure from the common course is to be accounted for. But it is not the common course that mortgaged property should be seized the moment the condition is broken." It is said that such retaining of possession may be a badge of fraud, though not so strong as in the case of an absolute sale. We have no authority to establish a rule, as that the holder of a mortgage of personal property, which he has neglected to register, must seize the property on the day the condition is broken, or lose his lien.

Then regarding these circumstances of failing to register, and to take possession of the property, as badges of fraud, it remains to enquire if these badges have been stripped off, or if there was actual fraud. Secret liens, though they are always regarded with suspicion, and are indicative of fraud, are not conclusive evidence of it. A contract to sell, though there is no office for its registration, and it is necessarily kept private, will prevail against a subsequent creditor, even a judgment creditor. Then the actual fraudulent intention must be established, and it must appear that some one would be injured if the deed or transaction was permitted to stand. For if no one is injured, no one has a right to complain. Fraud is inferred, from the circumstance of Isaac E. Holmes's request not to have the mortgage recorded, and the acquiescence in that request, connected with the subsequent failure to take possession. That request may have been made with one of two motives; either, that apprehending

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insolvency, he *wished to obtain credit, and get hold of the property of others, on the faith of the property in his possession, or he may only have wished to avoid alarming his creditors, and bringing them upon him at once; so that he might have time to extricate himself from his difficulties. The former I should regard as a fraudulent purpose, but not the latter.

From the testimony of James G. Holmes, as to the circumstances of Isaac E. Holmes, the latter is most probable; and it does not appear that after this transaction, Issac E. Holmes, in fact, ever gained, or attempted to gain, any new credit on the faith of the property in his possession. But whatever may have been the intention, it is certain that the Bank of Charleston has suffered no injury. It does not appear precisely when the debt to that bank was contracted; but from the date of their judgment, little more than six months after the date of the mortgage, it is probable. I might almost say certain, that it was before the execution of the mortgage. The registration, or the taking of possession at the time of the mortgage executed, would have done them no good in respect of putting them on their guard against giving that credit. I apprehend, however, that the Rail Road Bank could not have seized the property before condition broken. For though there may have been no covenant for retaining possession, and the legal title may have been in the bank, yet this court regards the mortgage merely as a security, and would restrain the mortgagee from enforcing his security until he was entitled to have his debt. The debt, in this case, was due in 1840, after the judgment and execution of the Bank of Charleston, and it was a matter perfectly immaterial to that bank, whether the Rail Road Bank should, or should not, take possession of the slaves. If they had been seized, the former bank would have been in no better condition. Whatever may have been intended, there was no fraud on them, nor, as I said, does it appear that there is any other person who was, or can be, injured by the neglect to register, or to take possession.

The reasoning of the Chancellor is entirely conclusive, so far as regards the lien of the

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execution on the moiety of *the slaves mortgaged to the Rail Road Bank. The legal title of this moiety was in the Rail Road Bank, and it is not necessary to argue that the lien of an execution will not attach on a mere equity. If the negroes were sold by the sheriff, no doubt the mortgagee might recover them at law. The equity of redemption in land may be sold under execution, but it is because that is the legal estate. As to the other moiety, it is unnecessary to enquire, as the priority of title of the Bank of the State is admitted.

We are next to enquire as to the effect of of the assignment of the judgment against James G. Holmes by the Bank of Charleston. The bank assigns to C. C. Morris, the complainant in the second case stated, "the said two judgments, and all sum and sums of money, and benefit whatsoever, that may be obtained by means of the same, or any execution or executions issued thereupon, and all the estate, right, title, and interest whatsoever, of the said bank, in the same," and constitute him their attorney irrevocable, to prosecute the said executions. There is no doubt but that the assignee has all the rights of the bank, and may prosecute the executions to any extent that the bank could have done. What, then were those rights? Originally, and before the courts of law had assumed an equity jurisdiction, the plaintiff, who had obtained separate judgments against the principal and surety, might have enforced his execution, at law, against both, to the full amount of both judgments, and it would have been necessary to come into this court, to restrain him from a double satisfaction of his debt. What, then, would have been the equities as between the bank and James G. Holmes, if he had came into court for such purpose? No doubt, according to the authority of Hayes v. Ward, 4 Johns. C. C. 190, and King v. Baldwin, 2 Johns. C. C. 562, a surety may come into this court to compel the creditor to collect his debt of the principal; or, as stated by Sir William Grant, 3 Meriv. 579, to compel the principal to relieve him by paying off the debt. To such a suit by James G. Holmes, Isaac E. Holmes must have been a party, and the equity of the former would have been to restrain the bank from having a double satisfaction, and to

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compel them to apply *the assets of Isaac E. Holmes, so far as they would go, to the satisfaction of their demand; he, James G. Holmes, being liable for any balance that, by a return of nulla bona, or any other sufficient evidence of insolvency, might be ascertained to remain due after the assets exhausted; which balance would be decreed against him.

Such would have been the rights of the bank in this court: and such, and no other, are the rights of the assignee. But it is familiar that the courts of law having assumed an equity jurisdiction, does not deprive this court of its well established jurisdiction. And it is plain, moreover, that the equities are very inadequately administered by the courts of law; for, though they restrain a double satisfaction, they do not recognize the distinction of principal and surety.

It is ordered that the decree in the first stated case be modified according to the views herein expressed, and the decree in the second case affirmed.

DUNKIN, Ch., concurred.

JOHNSON, Ch. I concur in the case of the Bank v. Gourdin.

JOHNSTON, Ch., absent from indisposition.

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*GEORGE KINLOCH and THOMAS W. MORDECAI ads. SARAH H. SAVAGE.

(Charleston, Jan. Term, 1844.)

1. K. and M. partners in trade, being indebted to one F. gave him their penal bond, on the 23d, of April 1836, conditioned to pay the debt in two years, and also a mortgage of certain real estate to secure the payment. The mortgagee, on the 27th of the same month and year, assigned the bond and mortgage to the complainant. Partnership dissolved on the 1st of January, 1839, and by consent, all the real estate of the firm was sold on the 1st of May following, including the property mortgaged and purchased by defendant M; who becoming embarrassed, on the sixth of May, assigned to T. his whole estate, for the benefit of his creditors, one W. being appointed agent for the benefit of creditors, under the Act of the Legislature. In July, 1839, E. who was the general agent of complainant, and the assignee and agent, agreed to sell the mortgaged property to satisfy the bond and mortgage, and employed a Master in Equity to make the sale: but before the sale, complainant's agent addressed a note to the Master in the following terms. "In the sale of K. & M's house on Chisholm's Wharf, mortgaged to Miss Savage, for $3500, with interest due thereon from April 1838, I will thank you not to let it go for a less amount than will cover her claim." On the 30th of July 1839, the property was offered by the Master, and a bona fide bid made of $3600, but at the request of the Master, a person present bid $3700, in pursuance of the instructions in the note of complainant's agent; and no one bidding more the sale was closed. The Master did not regard it as a sale, nor did he suppose the parties did. He made no memorandum in writing of the sale. At the request of complainant the property was again advertised for sale, but the assignee of M. insisting on the sale already made, the property was not offered. No titles were demanded or tendered, and the property remained unoccupied. A release of the equity of redemption was tendered to complainant and refused.

[2. *Frauds, Statute of* ⇐78, 103.]

There being no memorandum in writing of the sale made at the time by the auctioneer,

nor signed by either of the parties, the contract, if one was made, was within the statute of frauds, and not binding:—and as to the letter from complainant's agent to the auctioneer, held not a sufficient compliance with the statute.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 134, 192; Dec. Dig. ⟸78, 103.]

[3. *Bankruptcy* ⟸433.]

Defendant M having been discharged both under the insolvent debtors Act of this State, and under the bankrupt law of the United States, pled it in bar to any money decree against him; plea allowed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 812; Dec. Dig. ⟸433.]

[4. *Mortgages* ⟸362.]

[On a sale, by consent, of real property mortgaged, for payment of the mortgage debt, the mortgagee directed the auctioneer not to sell for less than the sum due on the mortgage. *Held*, that this was not an authority to purchase the property at that price.]

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1080; Dec. Dig. ⟸362.]

[5. *Mortgages* ⟸418.]

[A mortgagor cannot compel the mortgagee to foreclose the mortgage, especially where the mortgage is the only security for the debt.]

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1238; Dec. Dig. ⟸418.]

Bill for Foreclosure of Mortgage.

The bill stated, that George Kinloch and Thomas W. Mordecai executed to James Fife

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their joint and several *bond, bearing date 23d April, 1836, in the penal sum of $7000, conditioned to pay $3500, with interest from the date, in two equal instalments; and in order to secure the payment of the said bond, mortgaged to him a lot of land and store, on North Commercial Wharf, in Charleston; which bond and mortgage were assigned by James Fife, on the 27th April, 1836, to the complainant, for valuable consideration. That Thomas W. Mordecai, being afterwards in failing circumstances, and intending to apply the sales of his estate to the payment of his debts, did, on the 6th May, 1839, assign all his estate, real and personal, including the above mentioned lot of land and store, to Abraham Tobias, in trust, for the payment of his debts. The prayer of the bill is for foreclosure of the mortgage, and a sale of the premises, to pay the above stated bond of George Kinloch and T. W. Mordecai; and for the payment of any deficiency by George Kinloch.

The joint and several answer of the defendants admits the bond and mortgage and the assignment thereof to complainant. The answer further stated that,—

On 1st January, 1839, the copartnership of Kinloch & Mordecai was dissolved.

On 1st May, 1839, all the real estate which Kinloch & Mordecai held, as tenants in common, was offered, by their joint consent, for sale, at public auction; at which sale, T. W. Mordecai became the purchaser of the lot and store described in the bill, assumed upon himself the payment of complainant's bond, and took possession of the premises.

On 6th May, 1839, T. W. Mordecai became suddenly embarrassed in his circumstances, by unexpected events, and made an assignment of all his estate, real and personal, including his interest in the said lot and store, to Abraham Tobias, (as stated in the bill,) in trust, for his creditors, subject, nevertheless, to complainant's mortgage. At a meeting of Mordecai's creditors, soon afterwards, John Williams was appointed agent of the creditors, to act in concurrence with the assignee, conformably to the Act of Assembly.

That William S. Elliott was the agent and

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attorney of *the complainant, as appears by his receipts for interest indorsed on the bond, and transacted all her business.

In July 1839, William S. Elliott, the agent and attorney of complainant, and A. Tobias and John Williams, assignee and agent of creditors of T. W. Mordecai, entered into an agreement, by which it was mutually agreed that the said lot and store on Commercial Wharf, (mortgaged by defendants to James Fife, assigned to complainant, purchased by T. W. Mordecai at auction, taken into his possession, and assigned in trust for his creditors,) should be put up at public auction, as the property of T. W. Mordecai, in order to pay the bond of Kinloch & Mordecai to the complainant; and that the sale should be made by Edward R. Laurens, as their mutual agent. According to this agreement, the mortgaged lot was advertised by E. R. Laurens, for public sale, on 30th July, 1839, as appears by the advertisement, Exhibit A.

On 13th July, 1839, William S. Elliott, agent and attorney of complainant, wrote to E. R. Laurens, the auctioneer, the following instructions, viz:

Charleston, July 13, 1839.

"Dear Sir—In the sale of Kinloch & Mordecai's house on Chisolm's Wharf, mortgaged to Miss Savage, for $3500, with interest due thereon from April, 1838, I will thank you not to let it go for a less amount than will cover her claim.

Yours, Wm. S. Elliott.

To Edward R. Laurens."

On 30th July, 1839, the day of sale, the mortgaged premises were offered at public outcry, many persons were present, many bidders competed for the property, and a bona fide bid of $3600 was made by an independent purchaser; but under the above letter of instructions from complainant's agent, the premises were knocked down to complainant, for the amount of her debt, say $3700, as the highest and last bidder for the same. The complainant, as mortgagee, having thus purchased the equity of redemption in the premises, the whole estate became vested in her, and according to the adjudica-

tions of this court, the mortgaged debt was extinguished, and the bond of Kinloch & Mordecai thereby cancelled.

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*If any injury has accrued to complainant, her own course of conduct has created it, and she has no right to visit on defendants her own acts. A bona fide purchaser had bid $3600, at the auction, for the property, which at that time, was about equal to complainant's debt; but by bidding $3700, she defeated a bona fide sale, which the offerer would willingly have complied with. If, therefore, she could have had her debt paid, if she had not overbid the bona fide bid of $3600, she cannot justly complain; and if she comes to this court to seek equity, she ought to lay a foundation for her claim by doing equity to others, and by complying with her contract, and paying the amount of her own bid at the sale. The defendants submit to the court, whether the complainant ought to be supported in the course adopted by her agent, in offering property for public sale to the highest bidder, and then by private instructions to the auctioneer, restricting the price to the amount of her own debt, without notice to the public of such instructions. Notice of an intended sale by auction, seems to be a contract with all the world, and the party who varies that contract, by private instructions, must bear its consequences. The defendants being thus legally and equitably discharged from the bond, paid no further attention to the subject, and at a long subsequent day, were greatly surprised to hear that complainant entertained the intention of endeavoring to make them further liable for any part thereof. Defendants infer, that the depreciation of the value of property could alone have suggested this idea to her; for if property had risen, or even been stationary, probably this pretension would never have been set up. Defendants contend that they are discharged from the bond by complainant's acts. After the sale, defendants never had possession of the premises, nor did the assignee and agent of creditors of T. W. Mordecai ever pretend to have any claim in the same; all parties deeming the mortgaged premises to be the property of complainant, by virtue of her purchase at the sale.

Shortly afterwards, William S. Elliott died, without demanding titles; but these defendants, together with Tobias and Williams, the assignee and agent of creditors of T. W. Mordecai, tendered to complainant a deed

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of the re*lease of the equity of redemption, which she refused to accept. The complainant could have taken possession of the premises at any moment she pleased, from the time of sale to the present time.

At October term, 1840, complainant brought an action at law against T. W. Mordecai, on the bond; and at January term, 1841, he took the benefit of the insolvent debtors Act.

In January, 1842, T. W. Mordecai applied for the benefit of the bankrupt Act, and obtained his discharge as a bankrupt from the district Court of the United States, according to the Act of Congress; and he now pleads his discharge as a bankrupt, in bar of all further claim and demand of the complainant upon him.

The case was tried before Chancellor Johnson, in March, 1843.

In substance, Mr. Laurens proved that he was applied to by William S. Elliott, the acknowledged agent of complainant, and by George Kinloch, A. Tobias and John Williams, assignee and agent of creditors of T. W. Mordecai, to sell the premises at auction, as mutual agent for all parties. That W. S. Elliott wrote him the note stated in the answer. That at the sale, Tobias, on his own account, bid $3600 for the property, but under the instructions from W. S. Elliott, he bid $3700, and the property was knocked down to complainant. He made no entry of the sale in his books, as the parties seemed to understand each other perfectly well. The price of $3700 was cheap for the lot and store, at that time, but property has since greatly depreciated. States something of an indefinite general conversation with John Williams, at Norfolk, Virginia, about the sale. The property was re-advertised for sale in January, 1840, but stopped by Tobias. Did not consider it a sale.

A. Tobias proved the mutual agreement, that Laurens should sell the property. He attended the sale, and bid $3600 for the property, on his own account, as a speculation. Thinks he could have sold it for more immediately afterwards. The property was bid up for complainant to $3700; and he stopped bidding. Complainant could have taken possession when she pleased; no other

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person pre*tended to have a claim or right to it. Unoccupied ever since.

John Williams proved the mutual agreement to sell between William S. Elliott, complainant's agent, and Kinloch, Tobias, and himself, and that Laurens was to be their mutual agent and auctioneer. Does not recollect any conversation with Laurens, at Norfolk, on the subject.

Deed of release of equity of redemption from Kinloch, Mordecai, Tobias, and Williams, to complainant, tendered, and refused.

Johnson, Ch. The defendants being indebted to one James Fife, in the sum of $3,500, on the 23d April, 1836, gave him their penal bond, conditioned for the payment of that sum in two years, with interest, and to secure the payment thereof, mortgaged the lot and buildings described in the pleadings; and the said James Fife, on the 27th of the same month of April, 1836, for full and valuable consideration, assigned the said bond and mortgage to the complainant. The de-

fendants were, at the time, partners in trade, under the style of Kinloch & Mordecai. That partnership was dissolved on the 1st of January, 1839, and on the 1st day of May, of the same year, all the real estate belonging to the said firm was sold by consent, and at that sale, the defendant, Mordecai, purchased the lot and buildings in question. Mordecai, finding himself much embarrassed by debt, on the 6th day of the same month of May, made an assignment to Abraham Tobias, of his whole estate and effects, for the benefit of his creditors, and Mr. John Williams was appointed agent of the creditors, in pursuance of the Act of the Legislature. Some time in the month of July, of the same year, one William S. Elliott, the general agent of complainant, and the said Abraham Tobias and Williams, entered into an agreement, that the lot and buildings should be sold, to satisfy the said bond and mortgage, and for that purpose, employed E. R. Laurens, Esq., one of the masters of the court, to sell them at public sale. Mr. Laurens accordingly advertised the sale. Before the sale took place, W. S. Elliott addressed a note, in writing, to Mr. Laurens, in which he requested him not

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to let the property go for less than *would cover the amount due to the complainant, (then something over $3700.) On the 30th of July, of the same year, the property was offered at public sale by Mr. Laurens, and Abraham Tobias bid for it $3,600, as he stated in his examination in court, in good faith, and with the intention of purchasing on his own account, at that price. In pursuance of the instructions contained in Mr. Elliott's note, Mr. Laurens procured a friend, who happened to be present, to bid $3,700, and no one bidding more, the sale was closed. Mr. Tobias stated, in his examination, that he had before heard that Elliott had authorized Mr. Laurens to bid for the property, the amount due to complainant, and he regarded this as a fair sale to Elliott, and that the business was finally closed. Mr. Laurens, on the contrary, testified that he did not himself regard it as a sale, nor did he suppose the parties did. He thought so, especially as he supposed the property went at too great a sacrifice; for that reason he made no memorandum in writing of the sale. Mr. Laurens subsequently advertised the property for another sale, at the request of complainant, but was given to understand by Tobias, that the first would be insisted on, and it was not persisted in. No titles were demanded or tendered at the time, and the buildings have remained unoccupied ever since, neither party having interfered with it. Some time after, but at what precise time does not appear, a release of the equity of redemption was tendered to the complainant, which she refused to accept.

The bill prays, that the mortgaged premises may be sold, and that the equity of redemption be foreclosed; and that if the sale should not amount to the sum of the debt, and interest due on the bond, the defendants may be decreed to pay any balance that remains. The defendant, Mordecai, pleads his discharge, both under the insolvent debtors Act of this State, and under the bankrupt law of the United States, as a bar to any money decree against himself; and that plea must be allowed. The opinion of Mr. Laurens, as to the fact of the sale, is relied on as conclusive that there was no sale. The rule, that the auctioneer is the agent of both the buyer and seller, to make the sale, is relied on to sustain this position,

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and, therefore, *his views and opinions are conclusive as to the fact of the sale. As the salesman, all the authority he had was, to offer the property for sale, and receive the bids; but whether the sale was valid or not, was a matter of law, of which he had no authority to judge. There was, however, no memorandum in writing of the sale made at the time by Mr. Laurens, nor signed by either of the parties, and it is conceded, on all hands, that the contract, if one was made, is within the statute of frauds, and not binding, unless it is saved by the letter of instructions from Mr. Elliott, the acknowledged agent of the complainant, to Mr. Laurens, authorizing him to bid the amount of the sum due to complainant. The fourth section of the statute of frauds provides, among other things, that no action shall be brought, whereby to charge any one "upon any contract or sale of lands, tenements, &c., or any interest concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto to be by him properly authorized." And in the construction of it, it has been settled, that a letter signed by even one of the parties proposing the terms of a contract, is binding on him, if accepted by the other party, although he, the party accepting may not be bound. Clayson v. Bailey, 14 Johns. Rep. 488. But it is essential, if the letter itself is relied on as containing the contract, that it should so define the terms, that nothing more than the simple acceptance by the party to whom it is addressed, will be required to complete it. Nor will evidence aliunde be admitted, to supply terms that are indefinite in themselves, or entirely wanting. Boys v. Ayerst, 6 Mad. 316; Bryce v. Bletchley, 6 Mad. 19. In the language of the Lord Chancellor, in Kennedy v. Lee, 3 Meriv. 451, "when there has been on the one hand a general proposal, and on the other an acceptance of that proposal, expressly leaving some particulars essential to the subject matter of the agreement, to be afterwards settled, there is no evidence be-

fore the court of such a contract as the court can enforce, upon the ground of the cardinal points having been agreed to by the parties."

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The following are the essential *terms of the letter, or note, addressed by William S. Elliott to Mr. Laurens. "In the sale of Kinloch & Mordecai's house, on Chisholm's wharf, mortgaged to Miss Savage, for $3,500, with interest due thereon from April, 1838, I will thank you not to let it go for a less amount than will cover her claim." And it would seem to import, that it was intended to offer the precise amount of that debt for the property, but the language, which is in general use, is universally interpreted as an authority to buy within that price, for it is rarely seen that purchasers at public sales are unwilling to buy at the lowest price they can, and the writing would have been equally binding on Elliott, if the property had been bid off at one dollar, as at the whole sum due to complainant. The want of certainty in the price to be paid, would be fatal to the operation of this letter, as a contract, if there was no other objection to it. But there is still another more conclusive. It was not intended by the writer as proposing the terms of a purchase. It was not addressed to Tobias and Williams, or shewn to them, the only persons authorized to treat about the sale, but to Mr. Laurens, the auctioneer, and contains nothing more than instructions to him to purchase on account of Elliott; in other words, to make a contract for the purchase. Mr. Laurens, himself, regards the circumstances attending the setting up the property for sale, as not amounting even to a parol agreement to purchase. However that may be, it was the only evidence that there was any sale at all, and as there was no memorandum in writing made, either by the auctioneer, or signed by any of the parties, it is not binding, but void under the statute of frauds.

It is, therefore, ordered and decreed, that unless the defendants shall, on or before the ——— day of ——— next, pay to the complainant the amount of principal and interest due on the mortgage set out in the pleadings, and the costs of this suit, the equity of redemption of the said Thomas W. Mordecai, and all other parties hereto, shall be, and is, hereby forever barred and foreclosed, and that one of the masters of this court do proceed to advertise and sell the premises, and pay to the complainant out of the proceeds of the sales, if they are sufficient, the amount

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of *the said principal and interest, and the costs of this suit, to the officers of the court entitled thereto, and retain the remainder, if any, subject to the order of the court. And if the proceeds of the sales should be insufficient to pay the said principal, interest and costs, the defendant, George Kinloch, is hereby ordered and decreed to pay any balance thereof.

The defendant, George Kinloch, appealed—

1. Because Mr. Laurens was the actual, and not the constructive, agent of complainant; and his act, by her authority, was obligatory upon her.

2. That the letter of William S. Elliott was a sufficient compliance with the statute, inasmuch as the complainant, who was to be charged with the contract, was bound thereby.

3. That the contract of purchase was sufficiently certain to comply with the requisition of the statute.

4. To allow the complainant to get rid of her purchase, was to allow her to avail herself of her own wrong, to the prejudice of the defendant.

5. That by bidding $3700, complainant thereby defeated a bona fide sale for $3600, to the manifest injury of the defendant: and the consequences of her bid should not be allowed to work an injury to the defendant.

6. That the omission of Mr. Laurens to enter the sale in his book, (of which fact the defendant was not aware till the trial of the case,) he being her actual agent, was an act for which the defendant should not be solely responsible.

7. That the decree is, in other respects, contrary to law and evidence.

DeSaussure & Petigru, for appellants.
Elliott, contra.

Curia, per JOHNSON, Ch. The court concur in the decree of the Circuit Court. A more correct view of the matter, probably is, that the letter of instructions addressed by Elliott to Laurens, was not an authority to buy, but directions not to sell, unless the

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property brought the *amount of the debt due to the complainant. The probability is, that it would not now bring as much as the sum bid by Tobias, and withdrawing it from sale is complained of as an injury done to the defendants, for which indemnity is now claimed. But surely, the mortgagor cannot compel the mortgagee to foreclose his mortgage, and especially when, as in this case, the property mortaged was the only certain security. That, indeed, would be reversing the order of things, by putting the mortgagee in the power of the mortgagor. The court might, and probably would, have entertained a bill against the complainant, at the instance of Kinloch, the security, to compel her to proceed against his principal, but without this, the defendants had no right to compel her to sell whether she would or not. If they had wished to accept Tobias's bid, and had paid her the balance due on the bond, that would have put an end to all

cause of complaint, and that they might have done.

Appeal dismissed.

DUNKIN and HARPER, Chancellors, concurred.

JOHNSTON, Chancellor, absent from sickness.

Speers, Eq. *475

*THOMAS DAWSON, Executor, v. JOSIAH DAWSON, RICHARD P. DAWSON, et al.

(Charleston. Jan. Term, 1844.)

1. By a codicil to his will, a testator devised to his son several tracts of land, and also bequeathed to him as follows: "six negroes, to be designated by my executors, of a fair average value with my other negroes, (including in this number, two now in his possession, named Adeline and Maria,) to him and his heirs forever."

2. One at least of the slaves indicated by name in his bequest, had been held to pass to other persons, under a deed previously executed by the testator, and had been taken from the legatee.[1]

[3. *Wills* ⟸756.]

The legacy of the slaves *held* to be demonstrative; that the two named were only referred to as a convenient and proper mode of satisfying the bequest in part; and that the legatee was entitled to a full satisfaction of the legacy out of the residue of the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1949; Dec. Dig. ⟸756.]

[For subsequent opinion, see 2 Strob. Eq. 36.]

This case came up on an appeal from an order made by his Hon. Chancellor Dunkin. Richard Dawson, by a codicil to his will, devised two tracts of land to his son Richard P. Dawson, and also bequeathed to him, "six negroes, to be designated by my executors, of a fair average value with my other negroes, (including in this number, two now in his possession, named Adeline and Maria,) to him and his heirs forever."

The following order was made at Chambers, in June, 1843.

"On motion of E. and A. Rhett, solicitors for Richard P. Dawson, it is ordered, that a writ of partition do issue, directed to five commissioners, two to be named by the complainant, two by the applicant, Richard P. Dawson, and one by the commissioner; and in the event of their not agreeing, all to be named by the commissioner; authorizing and requiring them to allot and set apart to Richard P. Dawson, of the negroes of the testator, Richard Dawson, the elder, six negroes of an average value with those that pass under the will and codicil of the said testator. And that it be referred to the com-

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missioner to as*certain and report the value of the services of such negroes as may be set apart, from the first day of January, 1837."

From this order the complainant, Thomas Dawson, appealed, and moved the Court of Appeals to reverse the same, and to remand the cause to the Circuit Court for a further hearing, on the following grounds:

1. Because the order was made without any report from the commissioner, or other sufficient evidence of the facts of the case having been brought to the view of his Honor, the Chancellor.

2. Because the order is manifestly erroneous, inasmuch as it directs the commissioners in partition to allot to Richard P. Dawson, six negroes; whereas the codicil of the 9th August, 1836, gives him six negroes, "including in this number two now in his possession, named Adeline and Maria."

3. Because the negro, "Adeline," being a specific legacy, and Richard P. Dawson having been evicted of his title to her, by those claiming under the deed of the 3d June, 1821, he cannot claim to be reimbursed for her by the other legatees.

4. Because the complainant, Thomas Dawson, claims to be entitled to all the negroes which came into his possession as specific legacies, under the two codicils of the 5th July, 1836, and the 9th August, 1836.

5. Because Richard P. Dawson has already received two negroes, (besides Adeline,) to wit: "Maria and Harry," and under no circumstances is he entitled to more than three others.

6. Because the order directs commissioners in partition to allot the negroes to Richard P. Dawson, whereas the will directs that they shall be "designated by the executors."

7. Because the "after acquired" property is not sufficient to make up the legacies, and Richard P. Dawson's legacy ought to abate rateably.

Colcock, for the appellant. E. Rhett, for R. P. Dawson.

DUNKIN, Ch. By a codicil to Richard

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Dawson's will, he *devised to Richard P. Dawson, two tracts of land, situate in Beaufort district, and he also bequeathed to him as follows: "six negroes, to be designated by my executors, of a fair average value with my other negroes, (including in this number, two now in his possession, named Adeline and Maria,) to him and his heirs forever."

The testator devised to his son Thomas Dawson, several tracts of land, which he described; "also, the following negro slaves, Barnes, Charlotte, (&c. naming thirty-seven negroes,) to have and to hold the said property, real and personal, unto him the said Thomas Dawson and his heirs, forever."

At the sitting of the court for Beaufort district, the following order was proposed

[1] Rice Eq. 244.

to be entered on the part of Messrs. E. & A. Rhett, solicitors for Richard P. Dawson:

"Ordered, that a writ of partition do issue, directed to five commissioners, two to be named by the complainant, two by the applicant, Richard P. Dawson, and one by the commissioner, and in the event of their not agreeing, all to be named by the commissioner, authorizing and requiring them to allot and set apart to Richard P. Dawson, of the negroes of the testator, Richard Dawson, the elder, six negroes, of an average value with those that pass under the will and codicil of the said testator; and that it be referred to the commissioner to ascertain and report the value of the services of such negroes as may be set apart, from the first day of January, 1837."

The consideration of the order was postponed, and it was taken up at Columbia, by consent, at Chambers, on the 26th May, 1843.

It was stated, both at the sitting of court, and at Columbia, that the slaves, Adeline and Maria, mentioned in the bequest to Richard P. Dawson, had been held to pass to other persons, under a deed previously executed by the testator, and had been delivered up. It was also stated at Columbia, that several of the negroes bequeathed to Thos. Dawson, had been delivered up by him, under the same circumstances.

The grounds assumed in opposition to the motion, and the only grounds then taken, were, that the legacies to Richard P. Dawson

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and Thomas Dawson, were both spe*cific, and were, therefore, partially adeemed, or that they were both demonstrative, and the deficiency must be made up to both, from the after acquired property of the testator. It was furthermore insisted that the after acquired property was insufficient for this purpose, and that the legacies must abate in proportion. The cause was argued by the counsel, but it was agreed that a statement of the after acquired property should be submitted to the Chancellor before the decision was made. This was accordingly furnished by the counsel shortly afterwards.

The Chancellor granted the order submitted on the part of Richard P. Dawson, and this is an appeal from that decision.

It may be well first to consider the character of the bequest to Richard P. Dawson. The distinction between specific and demonstrative legacies, is sometimes very nice, although the difference in the consequences is well established. Where a debt, or specific chattel, is bequeathed, the specific legacy is extinguished in the life-time of the testator by the extinguishment of the thing itself, as by payment of the debt, or by the sale, or conversion, or destruction, of the chattel. The legatee can have only the thing bequeathed, and nothing else; if that cannot be found the legacy is gone, or must remain unsatisfied. Such is plainly the bequest to Thomas Dawson. But this consequence does not apply to a pecuniary or demonstrative legacy, which is general in its nature, though a particular fund, or means, be pointed out by the will to satisfy it. The distinction is illustrated, and the cases reviewed, in Walton v. Walton, 7 J. C. R. 258. Chancellor Kent refers to the civil law for an example of the sound principle on which the distinction is founded. The testator gave to Pamphela, 400 aurei or pieces of gold, and referred to a debt which Julian, his agent, owed him, and to his property in the army, and to his cash. He died without altering his will, but after he had converted all that property to other uses. The answer of the civilian was, that the testator intended only to point out to his heirs the funds from which the legacy could most easily be drawn, without intending to annex a condition to a pure gift, and that the legacy was, consequently, to be

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paid. In Paulet's case, *Lord Raym. 335, testator gave his niece 500 pounds, which Lady C. owed him, by bond; the legacy was held not to be specific, but demonstrative. So, in Gillaume v. Adderly, 15 Ves. 384, a legacy of "£5000 sterling, or 50,000 current rupees," afterwards described "as now vested in the East India Company's bonds," was held, by Lord Eldon, to be not specific, but general, as a demonstrative legacy, "being no more," (in his own language,) "than a bequest of a sum of money, pointing out a particular mode of payment, by a fund provided in the first instance." In all these cases the receipt of the debt by the testator, was held to be no ademption, because the legacy was considered pecuniary, and not specific, notwithstanding a reference was made to a particular part of the estate, as the part out of which the testator thought it most convenient they should be paid. "The courts," says Chancellor Kent, "are so desirous of construing the bequest to be general, (or demonstrative,) that if there be the least opening to imagine the testator meant to give a sum of money, and referred to a particular fund only, as that out of which he meant it to be paid, it shall be construed pecuniary, so that the legacy may not be defeated by the destruction of the security."

The legacy here, is of "six negroes, to be designated by my executors, of a fair average value with my other negroes." If the bequest had ended here, no doubt could exist, that if six negroes could be found belonging to the testator's estate, of a fair average value with his other negroes, the legacy must be satisfied. The plain object was to give to Richard P. Dawson, six negroes, of a particular value. The testator adds, however, in a parenthesis, "including in this number, two now in his possession, named Adeline and Maria." But one of these negroes certainly, to wit, Adeline, was (as is set forth in the third ground of appeal,) taken from Richard

P. Dawson, under a deed executed by the testator in June, 1821, and which the court held not to be revocable by his subsequent will. The inquiry, then, is presented, whether it was the object of the testator to give to Richard P. Dawson, six negroes of a fair average value with his other negroes, referring only to Adeline and Maria as a particular portion of his estate, out of which it would be most convenient, in part, to satis-

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*fy the legacy. If so, the legacy must be satisfied, although the testator may have erred in supposing that those negroes could be appropriated for that purpose. If the testator had bequeathed to Richard P. Dawson, one thousand dollars, (including in that sum the note of one hundred dollars which he owed the testator,) it would be quite clear, from analogy to the cases cited, that the subsequent receipt of the payment of the note by the testator, would not adeem the legacy. But if it had appeared that the note was already paid at the date of the will, or that the note had been passed by the testator to a third person, and did not, in fact, belong to the testator, it would seem hardly open for argument that the legacy must be satisfied in full. So if the language of the bequest had been, "I give to my grand-son, Richard P. Dawson, $10,000, of my 6 per cent. State stock, (including therein, or taking to make up the amount, the $3,000, of the Fire loan, 6 per cents., which I recently purchased,") and it appeared that he had previously given the Fire loan stock to the brothers of the legatee, there could be no doubt, on the decided cases, that the legacy was demonstrative; that he only referred to the Fire loan stock, as a convenient mode of contributing to the satisfaction of the legacy, and that if this could not be so appropriated, the legacy would be made up from the testator's other 6 per cent. State stocks. That is this case. The testator bequeaths to the legatee, "six negroes, of a fair average value, to be designated by his executors." As a convenient and proper mode of making up the number, or, in part, satisfying the bequest, he indicates two, which were already in possession of the legatee; but these two, or one, at least, of them, prove to be no part of his estate. This mode of satisfying the legacy then fails, or proves unavailable. But it appears, from the statement submitted, that the legacy may, nevertheless, be satisfied; that "six negroes of a fair average value," may be allotted to the legatee, from the residue of the estate; and the court is of opinion, that there was no error in ruling that the legacy should be satisfied in full, although the mode indicated of satisfying it in part, proved unavailable. But it has been said here, that it was a misapprehension to suppose that Maria, as well as Ade-

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line, had been taken from the *legatee. The argument at the circuit, certainly proceeded on this assumption. But it may have been an error, and an enquiry on this point will be directed. In the mean time, the order must be so far modified, as to direct an allotment to the legatee of five negroes in the mode therein specified, and enlarging the order of reference already made by instructing the commissioner to examine, and report, all the facts in relation to the slave Maria, reserving any final order, in that respect, until the hearing of the report; and it is so ordered and decreed.

HARPER and JOHNSON, Chancellors, concurred.

JOHNSTON, Ch., absent from indisposition.

Speers, Eq. 481

In re R. W. SEYMOUR v. JAMES PRESTON.

(Charleston. Jan. Term, 1844.)

1. Land sold by the sheriff, and purchased by the assignee of the oldest judgment against the defendant in the execution, there being other judgments against him. The purchaser claimed the proceeds of the sale. Afterwards a bill was filed by a judgment creditor of the defendant in execution, making the purchaser at the sheriff's sale, with the plaintiff and defendant in the oldest execution parties, praying that this judgment might be set aside as fraudulent, and the money applied to the payment of the other judgment creditors. This was done, but between the filing of the bill and the decree, a mortgagee of the land, the mortgage being prior, in point of time, to any of the judgments, filed a bill praying a foreclosure of the equity of redemption. The property was ordered to be sold to foreclose the mortgage. The master made the sale, but declined making titles to the purchaser; and in his return to a rule to show cause why he had not done so, he states that the purchaser failed to pay the money on the day of sale; that he had apprized him that the mortgagee was urging the payment; and that nearly two months after the sale, he was notified by the solicitors of the mortgagee, that they had received the amount of the decree,

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with interest *and costs, from the purchaser at the sheriff's sale, and declined looking further to the purchaser under the decree of foreclosure; that on the same day, he gave notice to the purchaser under the decree, who then tendered the money, which he received without prejudice to the parties, but declined giving a title, without the further order of the court.

2. In reply, the purchaser made an affidavit, and stated therein, that on the day of sale, and before he had time to pay the money, he received a written notice not to do so; that he was importuned to relinquish the purchase, but declined doing so; that he insured the property, and directed the tenant to pay him the rent from the day of sale; and that on the day before his making the payment, one of the solicitors of the mortgagee offered him $500 to abandon his purchase, which he declined.

[3. *Execution* ⟸268.]

All that was sold by the sheriff, was the equity of redemption, which was vested in the purchaser at that sale, and as the purchaser under the decree to foreclose, had notice of it while the money paid by him was still under the master's control, he having executed no conveyance, it was sufficient, and the purchaser could not be protected.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 762–767; Dec. Dig. ⟸268.]

[4. *Execution* ⟸268.]

It was not necessary that he should have had notice at the time of the sale. It would have been in time, if the conveyance from the master had been actually delivered, if he had not actually paid the money, or if he had actually paid the money, and the titles had not been executed. Vide Sugden on Vendors, 530.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 763; Dec. Dig. ⟸268.]

[5. *Judicial Sales* ⟸25.]

As the sale by the master was for cash, and the purchaser had neglected to offer him the money for nearly two months afterwards, the seller was not bound to perform his part of the contract.

[Ed. Note.—Cited in Yates v. Gridley, 16 S. C. 502.

For other cases, see Judicial Sales, Cent. Dig. § 49; Dec. Dig. ⟸25.]

[This case is also cited in Davis v. McDuffie, 18 S. C. 500, without specific application.]

This was a rule on J. W. Gray, Esq. Master in Equity, before his Honor, Chancellor Johnson, Charleston, February Term, 1843, who made the following decree:

Johnson, Ch. On the 5th April, 1841, the sheriff of Charleston district offered at public sale a lot in this city, as the property of Christopher Kane, under an execution against him, and it was bid off by James Preston, at $7000, who claimed to be entitled to the proceeds, under judgment, at the suit of Edward Harvey against Kane, which had been assigned to him, that being the oldest judgment, of which there were several. On the 24th May, 1841, J. W. Sineath, also a judgment creditor of Kane, filed his bill in this court against Kane, Harvey, and Preston, charging that the judgment obtained by

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Harvey against Kane was *fraudulent, and praying that it might be set aside, and that the proceeds of the sale of the lot should be paid to the other judgment creditors of Kane; and on the 9th June, 1842, the court decreed Harvey's judgment to be void, and that the proceeds of the sale should be paid to Kane's judgment creditors. In the mean time, (to wit,) on the 25th January, 1842, one Richard Lord, who had a mortgage on the lot to secure the payment of a debt of about $2000, due to him by Kane, prior, in point of time, to any of the judgments, filed his bill in this court, praying the foreclosure of the equity of redemption. On the 5th of February, of the same year, an answer was put in, purporting to be in the name of Kane, the only party named in the bill as a defendant, but was signed by R. W. Seymour, as attorney and solicitor for him; and on the 9th June following, a sale of the lot was ordered, to foreclose the mortgage. On the 29th September following, Mr. Gray, one of the masters of the court, offered the lot for sale, and it was bid off by R. W. Seymour, at $2000. The master, for reasons that will hereafter be stated, declined making titles to Seymour; and this is a rule against him to shew cause why he has not made the titles. In return to this rule, the master shews for cause, that Seymour did not pay the purchase money at the time of the sale, and that he had several times afterwards apprised him that the complainant, Lord, was urging the payment of the amount due to him, and that on the 25th November, a little less than two months after the sale he received the following note from Messrs. Lee & Pressley, the solicitors of the complainant, viz:

"To J. W. Gray, Master in Equity:

Sir—In case of Richard Lord, Trustee, &c., v. Christopher Kane, the purchaser not having complied with the terms of the sale of the lot sold by you under the decree, although the sale occurred so long ago as the 29th of September last, we have received from Mr. James Preston the full amount of the principal, interest, and costs, of the decree, and decline looking further to the purchaser.

(Signed) Lee & Pressley,
Plaintiff's Solicitors."

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*That, on the same day, he gave notice of it to Seymour, who, immediately after, tendered to him $2000, the amount of his bid, which he agreed to receive, without prejudice to the rights of the parties, but declined giving a title to the lot, which had been long ago prepared, without the further order of the court.

In reply to this, Mr. Seymour states, in an affidavit, sworn to by him, that on the day of the sale, and before he had time to pay the money, he received a written notice from A. G. Magrath and E. Magrath, Esq'rs., not to pay over the money; and a day or two after, was entreated by Mr. Elliot, and Mr. Lee, and Mr. Magrath, to relinquish his purchase. That at first he was disposed to do so, but finally made up his mind not to do it, of which he gave notice to Pressley and Elliott, and insured the property, directing the tenant to pay the rent to him from the day of sale; that on the day before the payment by Seymour, Mr. Pressley offered him $500, if he would abandon the purchase, which he declined to accept; and that the only reason why he did not pay the money "at an earlier day, was the fact that he was importuned by gentlemen not to do so," and not from any design or intention to abandon the purchase.

Of the many grounds relied upon, in opposition to the rule, I shall only notice two.

either of which strikes me as decisive of the case:

1st. All the interest which Kane had in the property at the time of the sale by the sheriff, was the equity of redemption, and by the sale, that was vested in Preston, and if Seymour had notice of it, he will not be protected in his purchase. It was not necessary that he should have had notice at the time of the sale. It would be in time, if the conveyance from Gray had been actually delivered, if he had not actually paid the money, or if he had actually paid the money, and the titles had not been executed. See Sugden on Vendors, 530. Now, it is not directly stated, either in the master's return to the rule, or in Mr. Seymour's affidavit, that express notice was given him of the claim of Preston, but I can hardly be mistaken in supposing that the importunities referred to in the affidavit of Mr. Seymour, were in behalf of Preston, or that Mr. Gray, the

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*master, did not give that as a reason for not making the titles: however that may be, he has notice now; the conveyance has not been executed, and the money paid by him to Mr. Gray is yet under his control, and that is sufficient notice.

2d. This sale was for cash, and although a sale by the master is under the decree of the court, it is governed by the same general rules as private contracts between party and party. The courts of equity, I know, are indulgent with regard to time in the execution of contracts, but no one will be found hardy enough to contend, that if one agree to sell property to another for cash, and the purchaser offer him the money two months after, the seller would be bound to perform his part of the contract; and that is this case. By the law and usage regulating sheriff's, and other official sales, a purchaser at a sale for cash, must pay the money on the day of sale. I know, and it is no doubt an advantage and a convenience, that it frequently happens that the officer making the sales takes upon himself to allow the purchaser a short time to pay the money, and there is no impropriety in it, when it is done with the assent of the creditor and the debtor; but any, the least, indulgence given without their consent, is a violation of the duty of the officer selling. The debtor is always interested, that the property should bring the greatest amount; and so too of the creditor, especially if the debtor has not the means of paying the whole debt; and it might often happen, that the same property would bring a greater sum a day, or a week, or a month, after the sale, and if the purchaser has neglected to pay the purchase money, he has forfeited his right under the contract of sale; certainly he is not entitled to favor.

The only reason given by Mr. Seymour for not paying the money is, that he was importuned to abandon the purchase, and yet Mr. Gray informed him, from time to time, that Lord, the person entitled to it, was constantly pressing for the payment. The importunity of Preston, himself, furnished no reason for his not paying Lord. The hardship of the case is another reason why the court ought not to aid Mr. Seymour in com-

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pleting his title. Preston *has already paid or is bound to pay, the amount of his bid, at the sheriff's sale, and Lord's debt, amounting together to $9,000, and that would be an entire loss. Seymour, on the contrary, loses nothing, unless indeed the anticipated profits on his purchase be regarded as a loss. If, in strict law, he was entitled to it, this court would not deprive him of it, but will not aid him in inflicting so heavy a loss on Preston.

It is, therefore, ordered and decreed, that the rule against Mr. Gray, the master, be dismissed.

Grounds of Appeal.

1. That the bill of Richard Lord was properly filed against Christopher Kane alone, as defendant; Preston, at that time, not having become the owner of the equity of redemption, nor was he up to the day of the decree of foreclosure against Kane, his position having been, until then, that of a purchaser at sheriff's sale, who had not complied with the terms of sale, but had set up a right to the proceeds of sale under a fraudulent judgment, subsequently declared fraudulent and void by the Court of Equity; and up to the day of the hearing of this rule, he had not received, nor entitled himself to receive, nor has he yet received, the sheriff's title to the property in question; and it was, therefore, right to treat him as a stranger, and he was a stranger to the transaction, and no notice of his claim, express or implied, could impair the right of a bona fide purchaser, under the decree of foreclosure and sale.

2. That Preston had due and full notice of the sale under the foreclosure of mortgage, he having moved for, and failed to obtain, an injunction against the said sale; and his suffering another, under such circumstances, to buy the property at public sale, was an acquiescence therein, which disentitles him to equitable protection.

3. That the delay of Seymour to complete the purchase, ought not to prejudice him, as it arose from importunities and negotiations on behalf of Preston, and for his benefit, and the advantage taken of the delay, thus procured, to trick Seymour out of the purchase, ought not to avail Preston any thing.

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*4. That the master, especially as the purchase money exceeded the amount of Lord's mortgage, had no right to withhold the title from Seymour, on receipt of the purchase money, even on notice that Lord had been satisfied by Preston, this amount-

ing to nothing more than a purchase of the decree by Preston, and his subrogation to the rights of Lord, and furnishing no warrant to the master to consider the decree as satisfied, the rights of a bona fide purchaser, for valuable consideration, having intervened.

5. That this was no application to the Court of Equity to obtain a title to land, but merely for a rule to compel an officer of the court to do his duty, by giving to one the paper evidence of a title, already substantially in him, by purchase at the master's sale, and payment of the purchase money.

6. That Preston was a mere stranger to this proceeding, and the master should have been ordered to give the title to Seymour, and leave other claimants to their remedies, in law or equity, in proper form.

7. Because the sale by the master, and entry of the sales in his book, was sufficient under the decree to pass the estate from the parties to the suit, and the purchaser was bound to comply with the terms of sale; so that the payment of the debt, subsequently, was extra judicial, and could not affect the rights of the purchaser.

8. Because after the biddings, and until a re-sale, the purchaser was entitled, on payment of the purchase money, to demand his titles.

9. Because no person, entitled to be heard, need shew any cause why the master should not, as he had received the amount of the bid, make the titles, which only relate to the bid, and are not effected by any intermediate act of the parties to the suit, and no stranger can shew cause for the master.

10. Because the court is bound by its own decree, until reversed, and by it, the equity of redemption was foreclosed, and the estate ordered to be sold; and after the bid, the money was in place of the bond.

11. That the decree of the Chancellor was, in other respects, and for other reasons, contrary to equity.

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*Yeadon & McBeth and B. F. Hunt, solicitors for Seymour.

Petigru & Magrath, contra.

Curia, per JOHNSON, Ch. The court concur in the decree of the circuit court. Appeal dismissed.

HARPER and DUNKIN, Chancellors, concurred.

Speers, Eq. 488

WOTHERSPOON et al. v. THE BANK OF THE STATE OF SOUTH CAROLINA.

(Charleston. Jan. Term, 1844.)

[1, 2. *Mortgages* ⇐159.]

Complainant, W., and others, were the managing committee of certain persons, who had subscribed to the building of a Theatre, to whom a site for the purpose had been conveyed, by deed, but the amount of subscriptions proving insufficient, the Trustees, on the 24th of May, 1837, executed a note for a loan of $6000, to the Bank of the State of South Carolina, endorsed by the Treasurer of the Company, and at the same time mortgaged the Theatre to the Bank, to secure the payment, as well of that note, as of any other notes which might be discounted by the Bank, for the use of the Charleston New Theatre Company. On the 26th of June, 1837, it was resolved, by the subscribers, "that the Trustees are fully authorized to adopt all such measures as may be deemed by them requisite to put the building under roof, and advance the construction of the same." Subsequent loans were obtained from the Bank, and on the 20th of December, 1837, the subscribers were incorporated under the style of the Charleston New Theatre Company, but no change was made in the style of the company, or the management, W. continuing to act as chairman of the Trustees. The Theatre being damaged by fire, on the 28th of April, 1838, the chairman of the Trustees applied to the Bank for the benefit of the Fire Loan Act, (6 Stat. at Large, 156;) the title being referred to the Attorney General, he certified that there was a judgment against the Theatre—that the title was in the Trustees—that the Bank should

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receive money to pay the judgment, *and called their attention to the fact, that the mortgage from complainants to the Bank, was not marked satisfied. On the 16th September, 1839, complainants conveyed the premises to the Charleston New Theatre company, and a valuation of the property having been previously made, on the 19th November, 1839, the chairman of the trustees executed a deed under the corporate seal of the company, by which the company mortgaged the Theatre to the Bank, to secure the payment of $6,500, and interest, the amount, the same day, being carried to the credit of the Charleston New Theatre. The loan was applied to the payment of the judgment, and the residue to the payment of the notes of the Trustees. For the balance of the notes, a renewal was received in February, 1840, and again, in June following, after which the note last received was protested, and suit brought on it. The Bank also filed a bill for the sale of the property and payment of the fire loan. The complainants, by their bill, sought to restrain the action at law, contending that the mortgage of May, 1837, must be paid out of the proceeds of the sale, before any part could be applied to the fire loan. When the loan was applied for, the President of the Bank was one of the Trustees—the necessity of some arrangement as to the prior mortgage had been pointed out to him, and the Cashier testified that he had received instructions that the first mortgage was to be postponed—that after paying the judgment, the balance was to be applied to reduce it; and, further, that in conversation with the President of the Bank, it was understood that the fire loan was to have the preference; and that he believed complainant, W., was present when the subject was discussed.

Under these circumstances, held that the deed of the 16th September, 1839, being executed by all of the complainants, their several note being signed by all, and reduced by the fire loan, they must be presumed to have known of that loan, and of the conditions upon which alone it could be made—that having received the benefit of the greater part of the loan, they could not now insist that the entry of satisfaction, by the Bank, on the prior mortgage, which might have been made at any time, or their

refusal to proceed on it, worked any injury to their just rights.

[Ed. Note.—Cited in Bank of South Carolina v. Rose, 1 Strob. Eq. 259.

For other cases, see Mortgages, Cent. Dig. § 312; Dec. Dig. ⟸159.]

Robert Wotherspoon, James Rose, William A. Carson, Henry Gourdin, and Richard W. Cogdell, were managing committee of certain persons who had subscribed to the building of a theatre. The site of the theatre was conveyed to them by deed, bearing date the 10th July, 1835, and contracts for building were entered into, with the expectation of an increase of subscribers, but these expectations were not fulfilled, and as the cost of the ground and improvements ex-

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ceeded the amount of subscriptions, the *managing committee, or trustees, as they were called, had recourse to loans. On 24th May, 1837, a note of the trustees, for 6000 dollars, endorsed by Mr. Logan, the treasurer of the company, was discounted by the bank of the State of South Carolina, and the money placed to the credit of George W. Logan, treasurer of the Charleston New Theatre Company. On the same day, the trustees, by deed, mortgaged the theatre to the bank, to secure the payment of that note, and any other similar notes which might be afterwards discounted by the said bank, for the use of the trustees of the Charleston New Theatre company. The state of the accounts was laid before the subscribers at a meeting on the 26th June, 1837, whereupon it was resolved, "that the trustees are fully authorized to adopt all such measures as may be deemed by them requisite to put the building under roof and advance the construction of the same." At the same time it was determined that application should be made to the Legislature for an Act of incorporation. Loans were from time to time obtained from the bank, upon the security of the mortgage, and the notes of the trustees, endorsed by the treasurer; by which means the completion of the work was prosecuted, and the theatre, in the winter of 1837, was opened to dramatic performances. By 29th section of the Act to incorporate certain societies, passed on 20th December, 1837, the subscribers were incorporated under the style of the Charleston New Theatre Company, and the Act was accepted by the company; but no change was made in the style of the company, or the management, Mr. Wotherspoon continuing to act as chairman of the trustees.

The theatre was damaged by the fire of 28th April, 1838, and Mr. Wotherspoon applied for the benefit of the fire loan to the bank of the State. The title was referred to the Attorney General, who certified that there was a judgment of one Walker against the theatre, and that the title to the property was in the trustees; that Walker's judgment would have to be paid out of the proceeds of the loan, and the trustees would be required to convey to the corporation, and called the attention of the bank to the mortgage of the same property already made to them by the trustees, as not being satisfied.

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On the 16th September, 1839, the *trustees conveyed the premises to the Charleston New Theatre Company, and on the 19th November, 1839, R. Wotherspoon, as chairman of the trustees of the Charleston new theatre, executed a deed under the corporate seal of the company, by which the company mortgaged the theatre to the bank, to secure the payment of $6500 and interest; and on the same day the amount of the loan was carried to the credit of the Charleston new theatre. There was then due to the bank of the State, upon the notes of the trustees, endorsed by the treasurer of the company, and secured by the mortgage of the 24th May, 1837, $18,950. The 6,500 dollars were applied as follows, viz: $1,838.19, to pay off the judgment of Walker, and the residue, $4,661.18, to the payment of the note of 18,950; and for the balance of that note, say $15,158, a renewal was received on the 21st February, 1840, and the same note was renewed on the 29th June, 1840, for $15,000, which last note was protested for non payment.

The bank filed a bill against the Charleston new theatre, for the sale of the property, and the payment of the fire loan, and brought an action against the trustees to recover the note of $15,000.

This bill was filed by the trustees, to restrain the bank from proceeding with the action at law, until the mortgage was exhausted, insisting that the mortgage of 24th May, 1837, is to be paid out of the sale of the property, and the debt of the complainants thereby extinguished, before any part of the proceeds can be applied to the fire loan.

Defendants, by their answer, insist that it was a condition of the fire loan that all incumbrances on the property should be removed, a condition the bank had no right to dispense with; that Mr. Wotherspoon applied for the loan, as chairman of the trustees of the Charleston new theatre, and that Mr. Rose, one of the trustees, was then president of the bank, and that it was agreed at the time that the mortgage for the fire loan should have precedence of the other mortgage.

The cause came to be heard on the 23d June.

Mr. Bailey, the Attorney General, gave evidence.

He communicated with Mr. Rose, and

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pointed out to *him that the loan could not be granted until some arrangement was made respecting the mortgage of 24th May 1837.

Mr. Furman. He received instructions that the first mortgage was to be postponed, and

that the balance left by Walker's judgment was to be applied to reduce that debt. He had conversations with Mr. Rose, and it was understood that the matter had been arranged, and that the fire loan was to have the preference, and believes that Mr. Wotherspoon was present when the subject was discussed, and it was mentioned that unless the first mortgage was postponed to the second the loan could not be had.

His Honor Chancellor Dunkin, who heard the cause, delivered the following decree:

Dunkin, Ch. This case can be properly understood only by an examination of the pleadings and the evidence. The complainants insist on an equity to restrain the suit at law instituted by the Bank, until they have first foreclosed the mortgage held by them to secure the same debt. Various grounds of objection are assumed by the Bank, but the principal position is, that if this equity ever existed, it has been waived by the complainants. By the terms of the Fire Loan Act it is provided, that when an application is made for the benefit of this Act, the President and Directors of the Bank shall first be satisfied with the title of the real estate proposed to be mortgaged, and that it is free from incumbrances—A valuation is then directed to be made by the commissioners, and on their certificate the Bank are authorised and instructed to loan to the applicant one half of the appraised value. [6 Coop. 156.]

On the 14th August, 1839, when the letter of Robert Wotherspoon, one of the complainants, was written, the title to the land was in the complainants, and was under mortgage to the Bank of the State for eighteen thousand dollars. This letter of application for the benefit of the Fire Loan Act purports to be on behalf of the Charleston New Theatre Company, and is signed by R. Wotherspoon as Chairman of the Trustees. The letter of application, with the abstract of title, was

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referred to the Attorney *General, who recommended that in order to warrant the loan, it was necessary that the complainants should execute a conveyance to the Theatre Company, that the Bank should receive money to pay Walker's judgment, and called their attention to the fact that the mortgage from the complainants to the Bank was not marked satisfied in the Register's certificate.

On the 16th September, 1839, the complainants executed a conveyance of the premises to the Charleston New Theatre Company. The valuation had been already made by the commissioners on the 21st August 1839, and was fixed at thirteen thousand dollars, thereby entitling the applicant, on complying with the other requisitions of the Act, to a loan of six thousand five hundred dollars. One of the complainants, Mr. Rose, was at the time President of the Bank. The testimony of Mr. Furman, the Cashier, accompanies this decree, and contains a statement of what passed between the President and himself in relation to this loan. On the 19th Nov. 1839, the loan [$6500] was carried to the credit of the New Theatre Company in the books of the Bank. Mr. Furman stated, among other things, that he would not, in this case, have been authorized to give the credit without instructions to that effect from the President—that he believes Mr. Wotherspoon was present at the time the credit was given—Of this loan the sum of $4661 was, under a check of Mr. Wotherspoon of the same date, carried to the credit of the one now given by the complainants to the Bank, which thus reduced their debt to about $15,150, for which a new note was subsequently given by them, on a renewal of which last mentioned note the suit at law is now pending. The balance of the loan was appropriated, under a check of Mr. Wotherspoon of the same date, to the payment of Walker's judgment. Under the provisions of the Act it was the duty of the Bank to see that the mortgage executed to them by the complainants was removed as an incumbrance, before the loan was carried to the credit of the Theatre Company. The power to remove that incumbrance was in the Bank. It was only necessary for the President, under the instructions of the Board, to go to the Register's Office and enter satisfaction.

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He might have done so at *any time. The President of the Institution may do so now. Any creditor or incumbrancer may do so without danger or responsibility, unless to a person assuming to occupy the position of a surety, who can make it appear that such act on the part of the creditor was unnecessary and improper. [1 Story Eq. 477; Hays v. Ward, 4 J. C. R. 130.] Otherwise this Court will regard that as done which ought to have been done. The necessity and propriety of the act, in order to have the loan effected, has been demonstrated. So far as the proceeds of the loan have been appropriated to the reduction of the complainants' debt, it would seem they have no cause of dissatisfaction.

But the Court is of opinion that by the deed executed by all of the complainants on the 16th September 1839, and their renewal note, signed by all, for the debt, reduced $4661 by this loan, connected with the other circumstances detailed in the testimony, they must be presumed to have known of the loan, and of the conditions on which alone it could have been made by the Bank, and that having themselves received the greater part of the benefit of the loan, they are not now at liberty to insist that the entry of satisfaction by the Bank, or the refusal of the bank to proceed on the mortgage, works any injury to the just rights of the complainants.

It is ordered and decreed that the bill be dismissed.

From this decree the complainants appealed, on the grounds,

1. That the bill ought not to have been dismissed, because even if the security for the Fire Loan have all the effect claimed for it, and the agreement on which the bank relies be fully proved, the mortgage of 24th May 1837, is not extinguished, but only postponed; and the complainants should have been relieved to the extent of having the mortgaged premises sold, and the proceeds applied to the satisfaction of the liens upon it, in their order.

2d. That there is no release of the first mortgage, and the evidence shews rather an intention to make an arrangement, than any arrangement actually made for postponing it to the Fire Loan.

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Curia, per DUNKIN, Ch. Whether the mortgage of the 24th May, 1837, should be considered satisfied, is a question which this court do not deem it necessary to determine, nor do they regard that inquiry as necessarily involved in the pleadings.

The complainants' equity, as they insist in their bill, was to restrain proceedings at law against them, until the proceeds of the mortgaged premises had been applied to the extinguishment of the debt secured by the mortgage of May, 1837, "before any part of the proceeds should be applied to the Fire Loan."

The defendants allege that it was a condition of the Fire Loan Act, that the mortgage to secure that, should have precedence of the other mortgage, and that such was the agreement of the complainants.

In the view which the Chancellor took of the testimony, this agreement was fully established; and from his conclusion on that matter, no appeal has been taken.

This disposed of the complainants' claim to the interference of this court, and the decree is affirmed.

JOHNSON and HARPER, Chancellors, concurred.

JOHNSTON, Ch., absent from indisposition.

Petigrue & Lesesne, for appellants.
Bailey, Atty. Gen., contra.

Speers, Eq. *496

*PORTER v. CHEESEBOROUGH. FORD v. CHEESEBOROUGH. BROWN et ux. v. CHEESEBOROUGH et al.

(Charleston. Jan. Term, 1844.)

1. Testator's son, by his will of the 23d of October, 1828, bequeathed the whole of his estate to his wife, and appointed her, his father, with C., W., and D., his executrix and executors. He died shortly thereafter, leaving his widow and five minor children, two sons and three daughters, surviving, and indebted beyond the amount of his estate. His widow and father, with W. and D., proved the will. W., the acting executor, dying in a few months, the will, at the request of the father, was proved by C. On a petition, in the name of the executrix and executors, leave was granted them by the Court of Equity, to borrow money, which was raised on a note drawn by the widow, and indorsed by C. and D.

2. The father, by his will of the 23d March, 1829, of which C. and D., the persons above named, were the executors, amongst other things, directed that his grand-children, abovementioned, should be maintained and educated, and that the income of his estate, after providing for their maintenance and education, should be applied to the payment of his son's debts, till they were all paid, and bequeathed the whole estate to his grand-children, abovementioned, in certain specific shares; to take effect, in case of the grand-sons, when they should attain the age of twenty-one years, and in that of the grand-daughters, at twenty-one or marriage.

3. Should either of the grand-sons die before twenty-one, the real estate bequeathed to him is given to the surviving grand-son; and the personal estate so bequeathed, to the grand-daughters, to be equally divided among them. Should one of the grand-sons die, the survivor is to pay to the sisters, or survivor, or survivors, each, four hundred dollars, in three equal annual instalments; the first, in one year after he takes possession of his estate, the remainder in two succeeding years. In the event that either of the grand-daughters died before coming of age or marriage, the personal estate given her, is given to the grand-sons, if one be dead, to the survivor; and the real estate of the grand-daughter so dying, to be equally divided among the remaining sisters. If a second sister died before coming of age, or marriage, her real estate to become the property of the surviving sister, and her personal estate, that of the grand-sons surviving her. Should both grand-sons die before coming of age, the estate, real and personal, bequeathed them, to be equally divided among the grand-daughters then surviving. Should the three grand-daughters die before coming of age, or marriage the estate bequeathed to them, to be equally divided be-

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tween the two grand-*sons, and if one be dead, to become the property of the survivor. It is further provided, that the real estate bequeathed to the grand-daughters be sold, provided the tract bequeathed to each would sell for two thousand dollars, at least; the money to be put at interest by the executors, subject to the same limitations and provisions as the lands would be, if not sold.

4. The executors blended the accounts of the estates, and applied the funds indiscriminately, to the payment of the debts of either, and to the maintenance of the family.

5. D., upon petition, was released as executor, and the note which had been indorsed by him was, upon his name being dropped, indorsed by F., the complainant in the second case stated.

6. In February, 1830, the executors and executrix of the son were authorized by the court to borrow an additional sum of money, which was obtained on a note drawn by the executrix and indorsed by C.

7. One of the grand-daughters having died under age, and unmarried, the other devisees, infants, by their next friend, filed a bill against the executrix and executors, for an account of both estates. The second bill was filed by complainant F. to have the debt for which he became bound, paid out of the estate of the father.

[8. *Wills* ⇐733.]

The proviso, or restriction, in the will of the father, that no interest was to vest until the legatee attained the age of twenty-one years, or was married, applied not only to the property originally bequeathed to each, but to any interest they might derive under the will from survivorship.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1826; Dec. Dig. ⇐733.]

[9. *Wills* ⇐478.]

It was urged, on the part of complainant in the second case, by way of exception, that the terms of the will of the father, created a legacy equal to the amount of the debts of the son, which should be provided for out of the estate of the former. Although this might be true, it was a pecuniary legacy, encumbered with a preferred charge, and if the fund should prove insufficient, the pecuniary legatee would have no right to resort for satisfaction, to the property of which a specific distribution had been made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 999; Dec. Dig. ⇐478.]

[10. *Executors and Administrators* ⇐504.]

If the executor allowed from the income more than was necessary for the maintenance and education of testator's grand children, it would be a matter of adjustment between the creditors of the son and the executors of the father.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2157–2167; Dec. Dig. ⇐504.]

[11. *Executors and Administrators* ⇐202.]

Bond to the Commissioner in Equity, by the son, with the father as surety, chargeable, in the first instance, on the son's estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 730, 738–745, 748, 754, 763; Dec. Dig. ⇐202.]

[12. *Executors and Administrators* ⇐202.]

The father and son had made a joint purchase of negroes; each took half the gang. It seemed to be assumed that each should be charged with half the debt, although the bonds which each executed, were for very unequal amounts. As between the two estates, this would not authorize the charge of the entire bond against the estate of the father.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 730, 738–745, 748, 754, 763; Dec. Dig. ⇐202.]

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[13. *Executors and Administrators* ⇐221.]

*The second exception of complainant F. was, "that the petition of the father, under which complainant indorsed the notes of the executors of the son, was an admission of assets sufficient to pay the said debts, and complainant is entitled to relief on that account." But as the petition was not signed by the father, his name appearing to have been formally used, and as the court was asked to permit the other executors to borrow the money, by executing their note, this was not sufficient evidence to charge his estate with the debt.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901–903½, 1858, 1861–1863, 1865, 1866, 1871–1874, 1876; Dec. Dig. ⇐221.]

14. Estate of the son ordered to be sold, and further testimony taken as to the debts of the father, at the time of his decease; as also, or any that may now remain unpaid, with leave to report any special matter, &c.

[15. *Executors and Administrators* ⇐289.]

A grand-son and a grand-daughter of the father having died, and complainant B. having intermarried with one of the grand-daughters, *held*, that he was not entitled to distribution of the estate, until the debts were paid.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1150; Dec. Dig. ⇐289.]

[16. *Wills* ⇐583.]

The charge on the surplus of the crops, for the payment of the son's debts, to continue on such parts of the estate as are not delivered to the several legatees, until the period arrives for the delivery of the last share to the grand-children entitled to receive it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1272; Dec. Dig. ⇐583.]

[For subsequent opinion, see Ex parte Shackelford, 1 Strob. Eq. 275.]

John Porter, Jr., by his will, dated 23d October, 1828, bequeathed all his estate to his wife, Esther Ann Porter, and appointed her and his father, John Porter, and his friends, John W. Cheeseborough, Legrand G. Walker, and Anthony W. Dozier, his executors, and died in a few days afterwards, leaving his widow and five children, Charlotte Anzy, John, Eliza Cheeseborough, Hannah Esther, and Anthony Toomer, and indebted beyond the amount of his estate. His widow and father, Mr. Walker, and Mr. Dozier, proved the will on the 7th November, 1828. Mr. Walker, the acting executor, died within a few months, and the will was then proved, at the request of the father, by Mr. Cheeseborough. A petition was presented to the Court of Equity, in the names of Mrs. Porter, Mr. Porter, Mr. Dozier and Mr. Cheeseborough, for leave to borrow money; and on the 4th Feb. 1829, a report in favor of the petition was confirmed, and the money was soon afterwards raised on a note drawn by Mrs. Porter, and endorsed by Mr. Cheeseborough and Mr. Dozier. John Porter, the father, by his will, dated 23d March, 1829, among other things, directed that his grand-children, abovenamed, should be maintained and educated, and that the income of

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the estate, *after providing for their maintenance and education, should be applied to the payment of his son's debts, till they were all paid, and gave his estate to them at the age of twenty-one or marriage, in certain specific shares. Of this will, he appointed Mr. Cheeseborough and Mr. Dozier executors, who proved the will on the 18th of April, 1829. The executors blended the accounts of the estates, and applied the funds indiscriminately to the payment of the debts of either, and to the maintenance of the family. Mr. Dozier afterwards petitioned the court to be released from his duty as executor, and the petition was granted. The note which had been endorsed by him, was, from time to time, renewed, and after he had ceased to act as executor, his name was dropped as an endorser, and George T. Ford endorsed in his stead. An order was granted in February, 1830, authorizing the executrix and ex-

ecutors of John Porter, jr., to borrow ($3,000) three thousand dollars more, and the loan was obtained on 30th June, 1830, on a note of Mrs. Porter, endorsed by Mr. Cheeseborough.

Charlotte Anzy Porter died under age and unmarried, and the first bill is filed by the other devisees, as infants, by their next friend, against the executrix and executors, for an account of both estates. The second bill is filed by George T. Ford, to have the debt for which he has become bound, paid out of the estate of John Porter.

An account was directed, and notice to the creditors of John Porter, and John Porter, jr., and a receiver appointed. John Porter, one of the complainants, died pending the account, under age and unmarried. The master made his report, to which exceptions were taken, and the case was heard upon the report and exceptions, and evidence taken in the cause, at June Term, 1843, when his Honor delivered the following decree:

Dunkin, Ch. These causes were heard together on the Master's report, and the exceptions of the several parties.

In order to understand the judgment of the court, it may be as well to recite all the disposing clauses of the will of John Porter, the elder, of which an extract is em braced in the Master's report. According to the answer of the executor, the testator left

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very inconsiderable assets *not included in the following devise and bequest, viz:—"I will and devise that all my furniture, all my stock of horses, cattle and sheep, with the exception of twelve milch cows, six working oxen, and twelve young steers, be sold, and the money arising from the sale thereof, as well as the money arising from the sale of my crops to be made on my plantations, except so much as may be necessary to defray the expenses of the said plantations, and also except so much as may be necessary for the support, maintenance and education of my two grand-sons and three grand-daughters, whom it is my will and desire to be supported and educated in a manner warranted by my estate, and at the expense and to the charge of the same, be appropriated each and every year, as soon after the funds are realized as may be practicable, to the payment of the debts with which the estate of my son, the late Col. John Porter, is incumbered, until the said debts shall be paid and discharged.

"I will, devise and bequeath to my granddaughter, Charlotte Anzy Porter, when she shall have attained the age of twenty-one years or be married, a tract of land on Black river, known by the name of Cherry Hill, together with the following named negroes, Phœbe, (&c., twenty in number, naming them.)

"To my grand-son, John Porter, jr., when he shall attain the age of twenty-one years, the following property, viz:—a plantation or tract of land, called Jessamine, or Priggs' plantation, on Sampit, together with the following named negro slaves, and the issue of the females, viz., (twenty in number.)

"To my grand-daughter, Eliza Cheeseborough Porter, when she shall attain the age of twenty-one years or be married, I give, devise and bequeath, the following property —a tract of land on Black river, called Hickory Grove, and the following named slaves, viz., (eighteen in number.)

"To my grand-daughter, Hannah Esther Porter, I give, devise and bequeath, a tract of land, near Britton's Ferry, on the Peedee river, and the following slaves, viz., (nineteen in number.)

"To my grandson, Anthony Toomer Porter, I give, devise and bequeath, when he shall

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have attained the age of *twenty-one years, the following property, to wit:—my plantation on Sampit river, by the name of Springfield, and the following named slaves, viz: (twenty in number.)

"The bequest made to my grand-daughter, Hannah Esther Porter, like the bequests made to my two other grand-daughters, is to go into effect when she shall attain the age of twenty-one years, or marry.

"It is also my will and desire, that should either of my grand-sons die before arriving at the age of twenty-one years, such real estate as is hereby bequeathed to him, I, in that event, devise and bequeath to the surviving grand-son, and the personal property bequeathed to the grand-son so dying as aforesaid, I give to my grand-daughters surviving him, to be equally divided among them.

"I also will and direct, that in the event of the death of one of my grand-sons, the survivor shall pay the sisters, or survivor, or survivors, each, four hundred dollars, in three equal annual instalments—the first instalment to be paid in one year after he takes possession of his estate, and the remainder in two succeeding years.

"Should either of my grand-daughters die before she reach the age of twenty-one years, or before she marries, the personal estate to which, by this will, she would be entitled, I devise to my grand-sons, and if one be dead, to the survivor; and the real estate of the grand-daughter so dying as aforesaid, to be equally divided amongst the remaining sisters; and if a second sister die before attaining the age of twenty-one years, or before marrying, her real estate to become the property of the surviving sister, and her personal estate to become the property of my grand-sons who may survive her.

"Should both my grand-sons die before attaining the age of twenty-one years, the estate, real and personal, herein bequeathed to them, to be equally divided among my grand-daughters then surviving.

"Should my three grand-daughters die before attaining the age of twenty-one years, or before marrying, the estate herein bequeathed to them, is to be equally divided between my two grand-sons, and if one be dead, to become the property of the survivor.

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*"It is also my will and desire, that the real estate here bequeathed to my grand-daughters be sold, provided the tract of land bequeathed to each will sell for the sum of two thousand dollars at least, and the money arising from such sale, to be, by my executors, placed at interest and subject to the same limitations and provisions as the lands by the will are, in the event of their not being sold."

According to the scheme of the testator's will, as collected from the several clauses, his entire estate was devised and specifically bequeathed to his grand-children therein named. But the devise and bequest to each was only to take effect when (in the case of the grand-sons) he should attain the age of twenty-one years, and (in the case of the grand-daughters) the legatee should attain the age of twenty-one years or be married. It appears to the court, that this proviso or restriction applies not only to the property originally bequeathed to each, but to any interest they might derive under the will from survivorship. No interest was to vest until the legatee attained the age of twenty-one years, or was married, as the case might be, unless perhaps, on a contingency which cannot now happen.

During the intermediate period, the testator directs the proceeds of the crops, &c., of his estates, to be annually appropriated to the disbursement, in the first instance, of the plantation expenses, &c. He makes no provision for the payment of his own debts. He left no residuary fund of any importance. His silence on this point seems to confirm the testimony of one of the witnesses, that "the testator declared on his death-bed, that he did not owe a dollar in the world."

It is then substantially provided, that so much as was necessary of the income, should be applied to the support, maintenance and education of his grand-children, whom he directed "to be supported and educated in a manner warranted by his estate, and at the expense and to the charge of the same." The surplus of these funds, he directs to be annually applied to the payment of the debts with which his late son's estate was incumbered, until the said debts should be paid and discharged.

It was urged in the argument, and such is the first exception of the complainant in

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the second case, that the *terms of the will created a legacy equal to the amount of the debts of John Porter, jr., and said debts should be provided for out of the estate of John Porter, sen'r. This may be true—but it is a pecuniary legacy, payable out of a particular fund, which was already incumbered with a preferred charge. If this fund should prove insufficient, it is hardly necessary to say that the pecuniary legatee would have no right to resort for satisfaction to the property of which a specific disposition has been made. If the executor has allowed from the income more than was proper or necessary for maintenance and education of the testator's grand-children, in the manner contemplated by the will, it was, and is, a matter of adjustment between the creditors of John Porter, jr., and the executors of his father, although it may be remarked, the Master more than intimates his opinion, that the allowance for this purpose was not unreasonable.

If the testator, John Porter, the elder, was mistaken in his impressions, and was proved to be indebted, either as principal or surety, the debts were, of course, chargeable on his estate, although no provision was made in the will for their payment. On this point the court is not satisfied, and it will be necessary to refer the matter back to the Master, for further examination. In exhibit B., filed with the answer, of the executor, the debts of John Porter, sen'r., at the time of his death, are stated thus:

1. A bond to the Commissioner in Equity, ...$3,850
2. Liability on a bond to the estate of R. Shackleford, (paid since by the executor.) 1,533
3. Open accounts (paid) 774

In addition to these sums, the defendant insists, by his first exception, that the estate of John Porter, sen'r, should be charged with the sum of $1,358.08, with interest from June, 1828, as having been paid by John Porter, jr., on a bond to his father, in the hands of Benjamin Grier.

The bond to the Commissioner in Equity, for $3,850, is, apparently the bond of John Porter, jr., with his father as surety, and is, in the first instance, chargeable on the son's estate. The debt to the estate of R. Shackleford, is termed a liability. It may be important to inquire whether this was also a debt of the son, secured by the father.

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*It seems that, in 1827 or 1828, John Porter, sen'r., and John Porter, jr., made a joint purchase of Munnerlyn's negroes, for about $6600; each took half the gang but it seems to be assumed that each should be charged with half the debt although the bonds to the Commissioners which each executed were for very unequal amounts. This may be so: but as between the two estates it would not authorize the charge of this entire bond against the estate of John Porter, sen'r.

Then as to the first exception in relation to the payment of $1358.08 the court has no testimony as to the time when the indorse-

ment was made on the bond, nor at whose instance, nor under what circumstances, it was made.

In regard to the remainder of the defendant's exceptions, the court concurs in the views of the Master, and the exceptions are overruled.

The second exception of the complainant, George T. Ford, is, "that the petition of John Porter, sen'r., under which the complainant endorsed the notes of the executors of John Porter, jr., was an admission of assets sufficient to pay the said debts, and complainant is entitled to relief on that account."

This petition is not signed by John Porter, sen'r. His name seems to have been formally used; and the court is asked to permit the other executors to borrow the money, by executing their notes, &c. It does not seem to the court that this evidence is sufficient to charge his estate with the debt. The exception is overruled.

On the account between the executors of John Porter, sen'r., and the estate, the Master has reported a balance in favor of the executor, of $3085.20 of which $926 is payable to the said executor, and the balance, $2158.97, is due to the estate of John Porter, jr. On this part of the report, the opinion of the court is reserved, until the report is made on the matter recommitted to the Master.

It is ordered and decreed, that the remainder of the estate, real and personal, of John Porter, Jr., deceased, be sold by the Master of this court, at such time and place, and on such terms, as may be fixed by the solicitors of the parties with the concurrence of

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the Master—that the *Master take further testimony, and report on the debts due by John Porter, sen'r., at the time of his decease, as also on any that may now remain unpaid; with leave to report any special matter; and that, in the mean time, the parties, respectively, have leave to submit any special order that may be deemed admissible or necessary, not inconsistent with the principles of this decree.

In the case of Brown and wife v. Cheeseborough et al. the third case stated, Chancellor Dunkin decreed as follows:

Dunkin, Ch. In the cause of Porter v. Cheeseborough, heard at this term, the views of the Court were expressed in regard to the construction of the will of John Porter, the elder. It is not deemed necessary to add much to what is there stated. The testator manifestly designed that his estate should be kept together until the legatees should respectively arrive at the age, or period, when he deemed them qualified to receive and enjoy the estate bequeathed to them, and as each reached that period, his or her share should be taken off. After having provided for every contingency which occurred to his mind that might destroy or defeat the interests of some, and enlarge the interests of others, during the intermediate period, the testator declares "should both of my grandsons die before attaining the age of twenty-one years, the estate, real and personal, hereinafter bequeathed to them, to be equally divided among my grand-daughters then surviving.

"Should my three grand-daughters die before attaining the age of twenty-one years, or before marrying, then the estates herein bequeathed to them are to be equally divided between my two grand-sons, and if one be dead, to become the property of the survivor."

On the decease of Charlotte Anzy, and the subsequent marriage of the complainant, Mrs. Brown, a moiety of the real estate devised to Charlotte Anzy vested, absolutely in Mrs. Brown. The negroes bequeathed to her (Charlotte) will, in consequence of her death, and the subsequent death of her brother John, become the absolute property of Anthony, if he shall attain the age of twenty-one years. On the death of John Porter, the

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brother of the complainant, *Mrs. Brown, and on her marriage, she became entitled, absolutely, to a moiety of the negroes specifically bequeathed to John; the other moiety will vest in Hannah Esther, should she marry or attain the age of twenty-one years. It is not now necessary to look further.

In the case of Porter v. Cheeseborough, a further enquiry was directed as to the indebtedness of John Porter, Sen. It does not seem necessary to postpone the delivery of the legacies to the complainants, as provision may be hereafter made for the payment of any debts which shall be established. Mrs. Brown is still a minor, and it is proper that her interests under her grand-father's will should be secured.

It is ordered and decreed, that a writ of partition issue, to set off the share to which Mrs. Brown is entitled, of the estates originally devised and bequeathed to her sister Charlotte Anzy, and her brother, John Porter, deceased.

It is further ordered and decreed, that the master of this court report the terms of a settlement, proper to be made, of the estate of Mrs. Brown, devised under the will of her grand-father, John Porter, the elder; as also a fit and proper person to be appointed trustee, or more than one if deemed expedient, and that on the due execution and recording of such settlement, the estate of Mrs. Brown be delivered up by the receiver, to be held subject to the uses of the settlement. It is also ordered, that an account be taken of the income to which Mrs. Brown was entitled since her marriage, and any sums that may have been paid or advanced on account of the same by the receiver.

Finally, it is ordered and decreed, that parties be at liberty to apply, from time to

time, at the foot of this decree, for such further order and direction, as circumstances may render necessary, or as may be deemed expedient for carrying this decree into effect. Each party to pay their own costs; those of the executors to be paid out of the estate of John Porter, the elder.

From this decree Mr. Cheeseborough appealed, on the ground, "that no distribution of the estate should be made until the debts are paid."

And from the decree in Porter v. Cheeseborough, on the following grounds:

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*1. That Mr. Porter, by joining in the petition for permission to borrow money, bound himself for the payment of the money lent to the executors.

2. That by the will of Mr. Porter, the debts of John Porter, Jun., are well charged on his estate.

3. That an account should be ordered that would bring before the court a complete statement of all the debts of Mr. Porter and his son.

Petigru & Lesesne, for Cheeseborough.
Memminger, for Brown and wife.
Mazyck, for ———.
Bailey, for creditors of John Porter, Sen.
Hunt, for Ford.

Curia, per DUNKIN, Ch. The Court concurs, generally, in the views taken by the Chancellor.

It may be proper, however, to remark, that the charge on the surplus of the crops, for the payment of his son's debts, must continue on such parts of the estate as are not delivered to the several legatees, until the period arrives for the delivery of the last share to the grand-children entitled to receive it.

The Court is of opinion that the ground of appeal from the decree in the case of Brown and wife v. Cheeseborough, viz: "that no distribution of the estate should be made until the debts are paid," is well taken. However inconsiderable may be the indebtedness of John Porter, Sen., in comparison with his estate, the creditors have a right to insist that they shall be satisfied before any judicial distribution.

So much of the decretal order as directs a writ of partition to issue, must be suspended until the hearing of the master's report, and the further order of the court. In all other respects, the decrees of the Circuit Court are affirmed, and the appeal dismissed.

JOHNSON and HARPER, Chancellors, concurred.

JOHNSTON, Chancellor, absent from sickness.

Speers, Eq. *508

*D. R. BAUBIEN v. GEORGE M. STONEY.

(Charleston. Jan. Term, 1844.)

1. Defendant, and one Z., a master workman, entered into a covenant in February, 1838, by which the latter undertook and obligated himself to build and finish for the former, by the 1st of May, 1839, a dwelling house and out buildings; to furnish materials of every description, for commencing and completing the same, in a workmanlike manner. Defendant, on his part, undertaking to pay the said Z., when the work should be finished, and not before, the sum of thirteen thousand dollars. On or about the time aforesaid, and in pursuance of his agreement, Z. commenced and prosecuted the work, until about the 20th of July, 1839, when he abandoned it. On the 13th December, 1838, Z. applied to defendant for a loan of $700, which he consented to make, provided Z. would give his note for the amount, with an indorser, payable 1st May, 1839, the day the work was to be completed. Immediately after, and upon Z's. request, complainant wrote his name in blank on the back of a note signed by Z., and made payable to defendant, or order, at the time above stated. The money was advanced, and in October, 1839, complainant was sued on the note, as drawer. A recovery was had against him, which was sustained by the Law Court of Appeals. Between the date of the note, (13th Dec. 1838,) and the time at which the work was abandoned, defendant paid to Z., on the 11th February, 1839, $200 as an advance on the contract, and at other times, between said periods, about $4,690, to mechanics in Z's. employment, and other persons, for work done, and materials furnished.

2. It was alleged, on the part of complainant, that the advance was for the purchase of materials for the buildings, and so used, but denied in the answer; and although, in the absence of the denial of the defendant, there were grounds for conjecture that the fact was as stated, yet it was too vague to amount to more than circumstantial testimony, and could not defeat the answer.

[3. *Principal and Surety* ⇐⇒117.]

As defendant, in his answer, admitted a payment to complainant, and also, payments to divers mechanics and other persons in his employment, for work done and materials furnished in the execution of the contract, and as he was entitled, by the terms of the building contract, to hold the whole price of the work until it should be finished, it was insisted that defendant had a security in his own hands, which, to the extent of the sums paid, was parted from to complainant's prejudice, who was, therefore, discharged. But, *held* by the Court, that as the money was paid on a contract entirely independent of that made by complainant, the ground taken could not be sustained. It might have been otherwise, if complainant had engaged for the completion of the work by Z., and had suffered on that contract, or been held responsible for it.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 284; Dec. Dig. ⇐⇒117.]

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[4. *Principal and Surety* ⇐⇒115.]

*A surety, in order to claim a discharge, must have some connexion or privity with the money paid over, or security parted from.

[Ed. Note.—Cited in Greenville v. Ormand, 51 S. C. 128, 28 S. E. 147.

For other cases, see Principal and Surety, Cent. Dig. §§ 244–268; Dec. Dig. ⇐⇒115.]

[5. *Principal and Surety* ⟸115.]

A security given up, must, in order to discharge a surety, be a real and valid thing; something available, and enforcible, in law.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 244–268; Dec. Dig. ⟸115.]

[6. *Judgment* ⟸452.]

Complainant not concluded by the result of the trial at law, the law court regarding him as a co-maker, and not having received the equitable grounds insisted on in the bill as grounds of defence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 791; Dec. Dig. ⟸452.]

The bill states, that on or about the ——— day of February, A. D. 1838, one John M. Zealy, a master workman, and George M. Stoney, entered into a contract, by which the said John M. Zealy bound himself to build and finish, on or before the ——— day of May, which would be in the year 1839, in the town of Beaufort, for the said Geo. M. Stoney, a large two story frame house, and out buildings, &c.; and to furnish the materials of every description, necessary for commencing and completely finishing the said work, in a faithful and workmanlike manner. And the said George M. Stoney covenanted, on his part, among other things, to pay the said John M. Zealy therefor, when the said house, &c. should be completed and finished, and not before, the sum of thirteen thousand dollars.

The bill further states, that the said John M. Zealy, on or about the time aforesaid, and in pursuance of his aforesaid covenant, commenced to build the dwelling house and out houses, &c., in the town of Beaufort, for the said Geo. M. Stoney, and continued to work thereon, furnishing, from time to time, large quantities of materials of all kinds, and which were used in and for the construction of the said houses, &c., until about the 20th day of July, in the year 1839, when the said houses, &c., being nearly completed, the said John M. Zealy, for reasons not known to complainant, was either compelled by the said George M. Stoney to abandon the work, or of his own accord refused further to proceed therewith; but long previous to the time of the said abandonment, complainant, on or about the 13th day of December, A. D. 1838, the said John M. Zealy, being in want of funds to purchase other materials for the said work, applied to the said George M. Stony for an advance of $700, which the said George M. Stony consented to make,

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provided the said John M. Zealy would *give his note for the amount, with an endorser, payable on the 1st day of May, A. D. 1839, being the day on which the said John M. Zealy had bound himself, under a certain penalty, to complete the aforesaid contract.

The bill further states, that shortly after, at the request of the said John M. Zealy, and to enable him to obtain the said advance, complainant wrote his name in blank, on the back of a note signed by the said John M. Zealy, and drawn in the words and figures following: "$700. On or before the 1st day of May next, I promise to pay to George M. Stoney, or order, the sum of seven hundred dollars, for value received. Beaufort, 13th December, 1838." Which note, so indorsed, was delivered by the said John M. Zealy, on or about the day of the date thereof, to the said George M. Stoney, who thereupon advanced, or loaned, to the said John M. Zealy, the aforesaid sum of $700; but the said George M. Stoney then well knew that the said money was to be used for the purchase of materials, and that it was afterwards so applied, and that the said materials therewith purchased, were all used, either by the said John M. Zealy, or others, to and for the use of the said George M. Stoney, in the construction and building of the aforesaid houses. And the said George M. Stoney also well knew, that complainant derived no kind of benefit or advantage from the said loan, or advance, but that, in fact, he was, as he intended, merely a surety for the re-payment of the said sum of money, only in case the said John M. Zealy should fail to indemnify the aforesaid George M. Stoney, by his work and labor under the aforesaid covenant, or re-pay him otherwise.

The bill states, that on or about the ——— day of October, A. D. 1839, the said George M. Stoney commenced a suit in the Court of Common Pleas, for Beaufort district, against complainant, as drawer of the said note, and at April term of the year 1841, under the charge of the presiding Judge, "that complainant, by his indorsement, had made himself liable as drawer of the note, in the first instance," the jury found a verdict for the said George M. Stoney, for the full amount of the principal and interest; from which charge and finding the complainant hath, nevertheless, appeal-

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ed, and his appeal is now pending, to *be heard at the next regular term of the Appeal Court of Law, in Charleston; but complainant has lately, and since the aforesaid trial, discovered, and believes that he shall, by very satisfactory evidence, be able to shew, that between the day of the date of the said note, and the time of the abandonment of the said work, in July, 1839, the said George M. Stoney paid, in cash, to the said John M. Zealy, himself, and to his orders, from time to time, the entire balance which he supposed was due to him under and by virtue of the aforesaid covenant, being a sum, in all, greatly exceeding two thousand dollars, notwithstanding the said George M. Stoney well knew that the said John M. Zealy was then, as he is now, and has been ever since, hopelessly insolvent, and therefore that complainant did look to the means

which, at the date of the said note, the said George M. Stony had in his own hands, or would have before the said note became due, of procuring satisfaction of the said note, as complainant's only indemnity against his liability as surety for the said John M. Zealy.

The bill states, that complainant has frequently applied to the said George M. Stoney, in a friendly manner, and representing the foregoing facts, many of which have only been recently discovered by complainant, and also that the agreement or understanding between him, the said George M. Stoney, and the said John M. Zealy, made at the time of the aforesaid loan, or advance, was that the money which he then owed, and would thereafter owe, to the said John M. Zealy, under or by virtue of the aforesaid covenant, should be the first, and if sufficient, the only security for the re-payment of the said sum of $700, requested him to stay all further proceedings at law, in his aforesaid action against complainant, or enter satisfaction thereon, for the aforesaid verdict; with which reasonable request complainant well hoped that the said George M. Stoney would have readily complied, as, in equity and good conscience, he ought. But the said George M. Stoney not only refuses to comply therewith, but threatens and will, as complainant believes, unless restrained by the injunction of this court should complainant's appeal be dismissed, proceed to enter his judgment and execution, and levy upon complainant's property for satisfaction.

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*To the end that the said George M. Stoney may answer, and that he may discover and set forth the several sums of money paid by him to the said John M. Zealy, or to his order, between the 13th day of December, A. D. 1838, and the 20th day of July, A. D. 1839, and produce and exhibit to this court, the aforesaid deed of covenant, made and executed between him, the said George M. Stoney, and the said John M. Zealy, in February, in the year 1838; and that the said George M. Stoney may be personally enjoined from entering up his said judgment against complainant, or otherwise using the aforesaid verdict; and that complainant may be discharged from all and every responsibility as surety for the said John M. Zealy, on the said note, and have such other and further relief touching the premises, as your Honors shall deem meet. Bill prays writ of subpœna and injunction.

The answer of George M. Stoney

Admits that he did enter into a contract, under seal, with one John M. Zealy, of the import and effect set forth by complainant, but that the same, although bearing date the 26th of February, A. D. 1838, was not executed until the July following; and that the said John M. Zealy did, in the early part of the spring, commence the building of a dwelling house, and out houses, for defendant, in the town of Beaufort, and continued working thereon, although very slowly and negligently, until some time in July, A. D. 1839, when he abandoned the work, without assigning to defendant any cause for so doing, leaving a considerable part of said work unfinished, which hath continued incomplete to this day. He admits that subsequently to the 13th of December, A. D. 1838, to wit, on the 11th of February, A. D. 1839, he paid to the said Zealy the sum of $200, as so much advanced on his said contract, and that between the said 13th of December, A. D. 1838, and the July following, he paid to divers mechanics, in the employment of the said John M. Zealy, and other persons, for work done and materials furnished in the execution of said contract, about the further sum of $4,690. He admits that he has obtained a judgment at law against complainant on a certain note, in the words and fig-

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ures set forth by com*plainant, and that the verdict of the jury, under the charge of his Honor, Judge O'Neall, is now under appeal, on motion of complainant. But this defendant doth absolutely deny that the sum of $700, paid by this deponent, to the said Zealy, on the 13th of December, A. D. 1838, and for the loan of which this defendant took said note, had any reference, bearing, or relation whatever, to the building contract, or any advantage of indemnity this defendant had, or might have, thereby. He denies that he ever understood so himself, or that he ever heard the said Zealy or complainant so understood the matter.

He was applied to by the said Zealy for a loan, and a loan simply, on the credit of complainant, whose name he found written on the back of said note, which was sent by the said Zealy, enclosed in a letter, to this defendant, from Beaufort, to this defendant's plantation on Hilton Head. The said Zealy never stated in his said letter, which is now unhappily lost, for what purpose he wanted the money, nor does this defendant now know for what purpose he wanted it, or how he spent it. Indeed, so far from this defendant's having the benefit of said loan, as complainant charges, he has been informed that complainant received a part of the proceeds thereof, for his own use. But he positively denies that the payments made by him, to the said Zealy, and to others, by his orders, subsequently to the 13th December, A. D. 1838, were unknown to complainant before the institution of this defendant's suit at law. On the contrary, he avers that the said Zealy, on the trial of said cause, was put on the stand by complainant, and fully and particularly interrogated concerning the matter in dispute with complainant. And this defendant submits whether, on a pretence of right so shallow, this honorable court will entertain jurisdiction of complainant's cause, after the same hath been solemnly and fairly adjudged

at law. And this defendant denies all combination, &c.

The cause came on to be heard before his Honor, Chancellor Johnston, Beaufort, May Term, 1842, who delivered the following decree:

Johnston, Ch. The bill and answer state

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the case. *The only evidence offered at the hearing, was the report of the trial at law, which was affirmed upon appeal, and the two letters from the defendant to the plaintiff.

Hilton Head, 14th December, 1838.

"Dear Sir: By man Prophet, I have, in accordance to your request, inclosed in a separate package, sealed, seven hundred dollars, which I hope will reach you in safety. I have received your obligation with Mr. Beaubien's endorsement for the amount remitted you. In conclusion, allow me to remark, that now you are in possession of lumber sufficient to complete your contract with me, that you be advised by me, and dispose of none, to any person whatever, until you finish your contract. Your basement story, all of your fences, and your cross fences, and your out buildings, will take a great deal of lumber; and you should look closely to this fact, that when the whole of the money is expended, resources through me must stop; and I beg that you keep in mind the items yet that will require funds to procure them, and that too, exclusive of your workmen's hire. I should say that it will take all of 40,000 feet of lumber, at least, to finish for me; that is, to take it as you find it, out of the rafts, &c. George M. Stoney."

"Capt. John M. Zealy, Beaufort."

"Hilton Head, 3d May, 1839.

D. R. Beaubien, Esq.

Dear Sir:—In conformity to the usages and customs of business, I hereby notify you that the note given in my favor, against Capt. John M. Zealy, for seven hundred dollars, for which you are indorser, came due on the 1st inst.

Respectfully, &c.

George M. Stoney."

I think it sufficiently appears from these letters, that the plaintiff was merely surety. The court of law, it appears, not being able to regard him in the light of an indorser, was compelled to consider him as a co-maker of the note; and not finding in the instrument evidences of suretyship, cannot have received the equitable grounds insisted on in the bill, as grounds of defence, on the trial at law. The plaintiff is not, therefore, concluded by the result of that trial.

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*The first position of the plaintiff is, that the money was advanced for the purchase of materials for the buildings, and was so employed by Zealy. This the answer positively denies. There is much in the defendant's letter of the 14th of December, the day succeeding the date of the note, to countenance the suggestion that the money was loaned for the purpose mentioned, but it may be otherwise. The letter certainly does not say so in terms; and although it might furnish sufficient ground for conjecture that the fact was as stated by the plaintiff, in the absence of the denial of the defendant it is too vague to amount to more than circumstantial testimony, and cannot defeat the answer.

The next ground taken by the plaintiff, is based upon the following admission in the answer: "7th," (the defendant,) "admits that subsequently to the 13th of December, 1838," (the date of the note,) "to wit, on the 11th February, 1839, he paid to the said Zealy, the sum of two hundred dollars, as so much advanced on his said contract, and that between the said 13th of December, 1838, and the July following, he paid to divers mechanics, in the employment of the said Zealy, and other persons, for work done and materials furnished in the execution of said contract, about the further sum of $4,690." On this the plaintiff contends, that by the terms of the building contract, the defendant was entitled to hold the whole price of the work until it should be finished, and, therefore, held a security in his hands, which, to the extent of the sums above mentioned, he parted from, and thereby discharged the plaintiff. The case of Law v. The East India Company, 4 Ves. 814, is relied on to sustain this position; if that case is applicable to this, it does sustain it. But there is this distinction between the cases, that in the former, the fund parted from was paid over to the principal in the contract, to which Law was surety. In this case it was paid on one entirely independent of the contract made by Beaubien. The cases would be parallel, if Beaubien had engaged for the completion of the work by Zealy, and had suffered on that contract, or been held responsible for it. "I have never known," says the Lord Chancellor, in Eyre v. Everett, 3 Cond. Eng. Ch. Rep. 161,

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"a case in *which, when a principal and surety on the same bond, a dealing with the principal by considering him as a debtor in another sum of money, or on another security was held to discharge the surety in the first obligation." I think the surety, in order to claim a discharge, must have some connexion or privity with the money paid over, or security parted from; and I perceive none here. It would embarrass the affairs of men too much for the practical purposes of life and of business, to say that one holding a note on two should not voluntarily pay a note due by him to one of them; and that is, substantially, this case.

The argument in this case is, that the plaintiff is prejudiced by the payments voluntarily made by the defendant to Zealy, when, by the terms of the contract, he might have held the money until the work was com-

pleted. If the plaintiff had guaranteed the building contract, and the defendant, after parting from the money, had sued him on his guarantee, for the default of Zealy, he might have been prejudiced. But how is he worse off for the payments made? If the defendant had withheld them, as owing nothing to Zealy, because the work was not finished, how could the plaintiff, any more than Zealy, have turned the money thus withheld, to his own account, in satisfaction of his note? Clearly the fund out of which the payment was made, constituted no security for the plaintiff, until the money was earned. It is said, if the defendant had refrained from the payments, that might have compelled Zealy to finish the work. It might, and it might not. A security given up, must, in order to discharge a surety, be a real and valid thing; something available, and enforceable in law; not a flimsy and conjectural matter, whose efficacy is merely in the moral affections of the principal. But, at the most, upon any view that can be taken of the matter, the plaintiff could only insist upon a discharge, to the extent of the $200 paid to Zealy on the 11th of February. The balance of the $4,690, according to the admission, was advanced for materials, and to under workmen for wages; that is to say, in substance, Dr. Stoney, who was entitled to call on Zealy

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to furnish the materials, and *the work, did it himself, so far as money reached; and how did that injure the plaintiff?

The plaintiff's real hardship is not that any security has been parted from upon which he ever had an existing equitable claim, but that, by an unexpected construction given to his endorsement, at law, he was held to be a principal in place of an indorser. I do not perceive that even in that, he has actually sustained any injury; but if he has, this court has no control over the matter.

It is ordered that the bill be dismissed.

The complainant appealed:

1. Because as the complainant, D. R. Beaubien, was bound to the defendant, George M. Stoney, merely as a surety for the payment by Zealy of his note, on the 1st day of May, 1839, the payments admitted to have been afterwards made by the defendant to Zealy, of monies amounting to $4,800, which the defendant ought to have retained, and applied in the first place to the extinguishment of the said note, operated thereon as a discharge to complainant.

2. Because the building contract set forth in the bill, and admitted in the answer, and in the performance of which the said Zealy had long been, and was actually engaged, at the time of the undertaking of the complainant, was regarded, as well by the complainant as by the defendant, as security for the payment of Zealy's note, but whether so regarded or not, it was a security common to both defendant and complainant, with which the defendant had no right to part.

3. Because the complainant's evidence established the several allegations of the bill, which were either denied, or not admitted by the answer, and no evidence offered by the defendant; the case, therefore, made by the bill and answer alone, and upon which a Chancellor at Chambers, after argument, had ordered an injunction, not having been barred, except in favor of the complainant, his order ought to have been continued and made perpetual.

4. Because the decree is, in other respects, erroneous, and ought to be reversed.

Treville, appellant's solicitor. E. Rhett, contra.

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*PER CURIAM. The report of the commissioner, made under the order of the court, has afforded no further information as to the matter in controversy.

We, therefore, concur in the decree of the circuit court. Appeal dismissed.

Speers, Eq. 518

FERRIS PELL et ux. et al. v. EXECUTORS OF HUGH SWINTON BALL et al.

(Charleston. Jan. Term, 1844.)

1. Testator bequeathed to his wife a pecuniary legacy. The wife survived, and upon her decease, the complainants, as her next of kin, became entitled as well to her interests under the will, as by the Statute of Distributions. He directed his debts to be paid "from the nett proceeds arising from the sales of the crops" of his estate. After payment of his debts, and a legacy of ten thousand dollars to an adopted daughter, from the nett proceeds of his crops, he bequeathed a moiety of the crops to his wife, during her natural life, the other moiety to be equally divided between his brothers, E. O. B. and A. B., until his nephew, N. B. was of age, "after which period, he bequeathed the said half, last mentioned, to him, or in case of his death, to the next eldest of his brother, E. O. B's sons, and their issue. Should the said N. B. leave a son or sons, they will have a precedence to the sons of the others." If his wife should die before N. B. became of age, it was provided that, after her decease, the whole income should be divided between the testator's said brothers, until N. B. was of age, "or the next eldest, in the event of his death, leaving no son or sons." The provision for testator's adopted daughter, and his brother, A. B. lapsed by their deaths in his life-time. Testator also bequeathed an annuity to his mother, of three hundred dollars, which, it was decided, was not chargeable on the crops of the estate, (ante, p. 86.)

[2. *Wills* ⇐601.]

The Court were of opinion that the devise to testator's nephew was sufficient to pass the fee, according to the laws of this State.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1340; Dec. Dig. ⇐601.]

[3. *Wills* ⇐822.]

Had the legacies been charged on the crops, the annuitant would have had the benefit of it,

and the decision must have been otherwise.

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But not *being so charged, both the annuitant and the general legatee must look to the residue of the estate, no other portion of the estate being charged with their payment.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2120; Dec. Dig. ⟸822.]

[4. *Wills* ⟸822.]

The bequest to A. B. having become lapsed by his death, and no disposition having been made of a moiety of the plantations and negroes after the majority of testator's nephew, this portion of the real estate passed to his heirs at law, and the personal estate not effectually disposed of, became assets in the hands of the executors; which, not being sufficient to satisfy the legacy to complainants, it was insisted in their behalf, that the real estate in the possession of the heirs, or the real estate descended, should be resorted to, in aid of the personalty, for satisfaction. But *held* that the real estate descended, was not liable in satisfaction of complainant's legacy, unless a necessity for so applying it had arisen in marshalling assets; as where personal estate, being the only fund for pecuniary legatees, has been appropriated to the satisfaction of creditors, the legatee thus acquiring an equity to stand in the place of the creditor, and be reimbursed, to that extent, from the real estate descended.

[Ed. Note.—Cited in Hull v. Hull, 3 Rich. Eq. 92; Laurens v. Read, 14 Rich. Eq. 267.

For other cases, see Wills, Cent. Dig. § 2120; Dec. Dig. ⟸822.]

[5. *Executors and Administrators* ⟸274; *Wills* ⟸830.]

But where a testator has prescribed the mode, or indicated the fund, as in this case, from which his debts are to be paid, it presents no case for marshalling assets.

[Ed. Note.—Cited in Ford v. Gaithur, 2 Rich. Eq. 271.

For other cases, see Executors and Administrators, Cent. Dig. § 1065; Dec. Dig. ⟸274; Wills, Cent. Dig. § 2150; Dec. Dig. ⟸830.]

[6. *Wills* ⟸732.]

Prior to the enactment of 5 Geo. 2, real estate descended was subject to the payment neither of simple contract debts, nor of legacies. As to legacies, lands are in the same condition as before the Act.

[Ed. Note.—Cited in Laurens v. Read, 14 Rich. Eq. 267.

For other cases, see Wills, Cent. Dig § 1802; Dec. Dig. ⟸732.]

[7. *Executors and Administrators* ⟸274.]

Since Manning v. Spooner, 3 Ves. 114, the principle has been uniformly recognized, that in marshalling assets for the payment of debts, lands descended are never subjected where a fund has been appropriated by the will for that purpose, and that fund remains unexhausted.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1061–1073; Dec. Dig. ⟸274.]

[8. *Partition* ⟸77.]

In this case, a moiety of the real estate being well devised, and the devisee a minor, the court refused to order a partition of the entire premises. Such partition would not be within the purview of the Act of 1791.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211, 217; Dec. Dig. ⟸77.]

[9. *Partition* ⟸77.]

It seems that where an inquiry has been directed, and made, in reference solely to the advantage which the minor would derive from a sale of the entire premises, the court might order such sale, the adults also desiring it. It should always require a strong case, exhibiting not only the present disadvantage of the situation of the minor's estate, but the superiority of the proposed mode of investment, before the court would direct such change.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 217; Dec. Dig. ⟸77.]

[This case is also cited in Lawton v. Hunt, 4 Strob. Eq. 6, as an illustration of the contract of executor over real estate for trust purposes.]

[For subsequent opinion, see 1 Rich. Eq. 361.]

The reader is referred to Cheves's Eq. Rep. page 99, and to page 48 of this volume, for the decisions of the Appeal Court heretofore made in this case, as well as for a statement of the facts connected with it. The present case came before his Hon. Chancellor Dunkin, Charleston, July, 1843, who made the following decree:

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*Dunkin, Ch. The decree of the Court of Appeals directed among other things, that "an account be taken of the different legacies; and that an inquiry be made as to the means of discharging them, or what provision should be made therefor; with leave to the master to report any special matter."

The master's report, filed on the 6th of July, 1843, states the legacy to the complainants at eighty thousand four hundred and forty-nine dollars, (80,449) and that the remaining estate of the testator was valued at ninety-four thousand six hundred and fifteen dollars. This included the plantations and negroes, estimated at eighty-eight thousand dollars ($88,000;) the Newport house at five thousand dollars, ($5000,) and some personalty amounting to sixteen hundred and fifteen dollars, ($1615.)

The remaining trusts of the will of Hugh Swinton Ball, the master reported to be, the annuity to Mrs. Taveau; the legacy to Mrs. Ball; the legacy to Elias O. Ball; and the devise to Nonus Ball.

The will directed the debts to be paid "from the net proceeds arising from the sales of the crops."

It was stated in the argument, that this had been already done, or that the balance would be extinguished by the crop of this year.

After payment of his debts and a legacy of ten thousand dollars to his adopted daughter, Emma Ball, from the net proceeds of his crops, the testator bequeathed a moiety of the crops to Mrs. Ball, during her natural life, and the other moiety to be equally divided between his brothers, Elias O. Ball and Alwyn Ball, until the testator's nephew, Nonus Ball, was of age—"after which period, he bequeathed the said half last mentioned to him, or in case of his death, to the next eldest of his brother Elias Octavus Ball's sons, and their issue—should the said Elias

Nonus Ball leave a son or sons, they will have a precedence to the sons of the others." If Mrs. Ball should die before Nonus became of age, it was provided that, after her decease, the whole income should be divided between the testator's said brothers, until Nonus was of age, "or the next oldest, in the event of his death, leaving no son or sons."

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*It has been already determined, that the provisions for Emma Ball and Alwyn Ball became lapsed by their respective deaths in the life-time of the testator.

About the bequest of Elias O. Ball, it is not understood that any question is made. He will be entitled to a moiety of the crops during the period specified in the will.

The court is of opinion that the language of the devise to Nonus is sufficient to pass the fee according to the laws of this State; and this is all that it is now necessary to determine in prosecuting the inquiry directed by the Court of Appeals, as to the amount of the legacies, and the means of discharging them.

The annuity of three hundred dollars to Mrs. Taveau, the Court of Appeals have already decided not to be specifically chargeable on the crops of the estate.

The means of securing this annuity, and the payment of the legacy to the complainants, constitute them the remaining subject of investigation.

If the testator has, himself, provided any fund, either expressly or by implication, his will is the law of the case. But in this respect, the will affords no aid to the court. It is quite clear that the testator intended his planting establishment to be kept together until Nonus became of age, and probably during the life-time of Mrs. Ball. He has appropriated the entire proceeds of his crops, certainly, until the majority of Nonus. The disposition, after that period, is expressed with less distinctness. Nonus was, manifestly, the ultimate object of his bounty. Throughout the will, the testator seems scrupulously desirous of disposing of his whole estate, and of providing for carrying into effect his entire plan. Yet there is no language used from which the court would be warranted in inferring a devise to Nonus of more than a moiety of the estate; and the other moiety is left without any ulterior disposition. Judging, however, from the will itself, the intention to give the whole to Nonus, might much more naturally be inferred, than that the testator contemplated the payment of this pecuniary legacy to Mrs. Ball, from any part of his agricultural estate. It may be added, that the careful direction as to Emma Ball's legacy precludes

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the presumption *that this legacy to Mrs. Ball was an implied charge on the crops.

But this point seems scarcely open for argument. There is, certainly, no specific provision for the payment of this legacy; and if the legacies, generally, are not made a charge on the crops, there is no ground for contending that they are charged, by the will, on any other portion of the estate.

The Court of Appeals have held that "the annuity to Mrs. Taveau, is not charged, by the will, upon the crops." If the legacies had been so charged, the annuitant would have had the benefit of it, and the decision must have been otherwise. In Sibley v. Perry, 7 Ves. 522, Lord Eldon says, "the rule is that an annuitant will fall under the general character of legatee, unless there is something to shew that the testator himself distinguished between them;" "in that," says he, "I found myself upon the case of the Duke of Bolton's will; upon which Lord Thurlow held that legacies being charged upon real estate, annuities were charged upon real estate as legacies."

If there was any thing in this will to indicate that the testator made a distinction, it is in favor of a charge of Mrs. Taveau's annuity on the crops. In support of her claim, and against the objections of Elias O. Ball, it was argued, at least with plausibility, that as the only productive estate of the testator was his planting interest, and he had directed this estate to be kept together until a particular period, and had made no other provision for the payment of the annuity of three hundred dollars, it was intended to be paid from the crops.

When the Court of Appeals sustained the objection of Elias O. Ball, and negatived this inference in favor of the annuitant, it seems to conclude the question in reference to the general legatee. Both the annuitant and the legatee must look to the residue of the estate.

The bequest to Alwyn Ball having become lapsed, and no disposition having been made of a moiety of the plantations and negroes after the majority of Nonus, this portion of the real estate passed to the heirs at law of the testator, and the portion of the personalty, not effectually disposed of, would be assets in the hands of the executors.

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*The personalty is entirely insufficient to satisfy the legacy to the complainants. It is insisted, on their behalf, that the real estate in the possession of the heirs, or the real estate descended, should be resorted to, in aid of the personalty, for the satisfaction of the legacies.

This presents the principal question involved in the inquiries directed by the Court of Appeals, viz: whether, by the laws of South Carolina, lands descended are liable for the payment of pecuniary legacies?

By the common law, lands in the possession of the heir were not liable even for the debts of the ancestor. Such was the law of South Carolina until the enactment of the statute 5th George 2nd, by which lands

in the hands of the heir are rendered liable for all the debts of the ancestor, in the same manner as real estate in England is liable for specialty debts. This statute was passed for the provinces, and was confined to them in its operation. After a long conflict, in England, the stat. 3 & 4 William 4th, ch. 104, has rendered the freehold estates of a deceased debtor liable for the payment of his simple contract debts. These statutory provisions sufficiently prove the pre-existing law. The injustice of permitting the heir to enjoy the real estates of his ancestor, while his debts were unpaid, called (and not in vain) for legislative interference. It may be that similar relief should be extended to legatees. But if the evil exists, it is for the legislative and not judicial remedy. As an abstract proposition, the court would be of opinion, that real estate descended, was not liable for the satisfaction of legacies. It can hardly be said, however, that this question has been hitherto undecided in our own courts. The condition of the heir was fully considered by Chancellor DeSaussure, in Dunlap v. Dunlap, 4 Desaus Eq. Rep. 324. The authority to resort to the real estate in the hands of the heir, for the payment of debts of the ancestor, is referred exclusively to the stat. 5 Geo. 2. "But," says he, "the Act subjecting lands to the payment of debts, was never supposed to have levelled real to an equality with personal estate, in the administration of the assets of a deceased person." He quotes the language of the court, in Hartly v. Carson, decided in 1795, in which the Judges say "It would be too bold

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for this court to level all the laws and *practices of the country in the mode of the payment of debts, to what might be conceived to be the principle of the law abolishing the rights of primogeniture, by placing real and personal estate on the same footing in all cases. And it does not even appear that this was the intent or spirit of that law." In the case of Dunlap v. Dunlap, the real estate was declared liable for debts in exoneration of the personalty, "it appearing," say the Court of Appeals, "that the legacies are not only specifically given, but that the testator has fully expressed his intention to charge his real estate with the payment of his debts." They held that "this charge amounted to a plain declaration of the testator, that the legacies given shall be exempt from the payment of his debts."

In Warley v. Warley, 1 Bailey Eq. Rep. 397, (to which the court will have occasion hereafter to advert,) and in Drayton v. Marshall, Rice, Eq. 373, [33 Am. Dec. 84] the subject was discussed, and the liability of real estate, in the possession of the heir, referred altogether to the stat. 5 Geo. 2. Prior to the enactment of that law, real estate descended, was subject to the payment neither of simple contract debts, nor of legacies. As to legacies, lands are in the same condition as before the Act.

But in England, as well as in this country, it has always been the doctrine of Chancery, that real estate might, in some cases, be subjected, not only to the payment of simple contract debts, but to the satisfaction of pecuniary legacies. This arises in marshalling assets.

If the testator had left no debts unpaid, the court has been unable to find any principle or authority which would sustain the claim of the pecuniary legatee against the heir at law. The absence of any authority appears to the court a strong argument against such claim.

But the testator left, unpaid, debts to the amount, it was said, of twenty-five thousand dollars. Ordinarily, the real, as well as the personal, estate, would have been liable for the satisfaction of these debts. If the personal estate, which was the only fund for pecuniary legatees, had been appropriated to the satisfaction of the creditors, the legatees would have an equity to stand in the place of the creditor, and be reimbursed, to that

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extent, from the *real estate descended. Aldrich v. Cooper, 8 Ves. 396; Wm.'s Exors., 1056; Story Eq. 531.

But this is a rule of this court, in the absence of any direction on the part of the testator. If he has prescribed the mode, or indicated the fund, from which his debts are to be paid, it presents no cause for mashalling assets. The principle cannot be better illustrated than by Mr. Ball's will. He says "my debts I wish to be paid in the following manner, viz:—from the nett proceeds arising from the sales of the crops, after paying plantation and other expenses." After payment of his just debts, and the legacy of ten thousand dollars to Emma Ball, he directs the nett proceeds of his crops to be given, one moiety to his wife for life, the other moiety to his two brothers, until Nonus is of age, and, in the event of his wife's death, the whole proceeds to his brothers, until the majority of Nonus.

If both the brothers had survived Mrs. Ball, it would be very clear that they could only claim the residue of the proceeds of the crops, after the payment of the debts. Such is the language of the will, and such the plain intention of the testator. Although all the proceeds of the crops might have been exhausted in the payment of the debts, and the brothers get nothing, they would have no equity against the heir or distributees. Though it might well be argued that the testator manifestly intended some benefit to them, and that his bounty ought not to be defeated, yet the court would be bound to presume that he knew the law—that his estate, not disposed of, would pass to his heirs or distributees, and that the brothers must take what was provided by the will, and

nothing else. But if both brothers had lived and enjoyed the surplus of the crops, after payment of the debts, until Nonus was of age, what equity would the pecuniary legatee have against the heir? No part of the estate, to which he had any claim, had been appropriated to the payment of debts in exoneration of the heir; and the principle of substitution is inapplicable. But whatever might be the disappointment, to which either the legatee of the crops, or the pecuniary legatee, would, in such case, be subjected, it is not such as this court is permitted to com-

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pensate at *the expense of the heir. In England, the rule is well settled, that where a fund is created or selected by the will for the payment of debts, whether the fund so created be of real or personal estate, this fund must first be exhausted before the lands descended are liable, and even before personal estate, undisposed of by the will, is resorted to for that purpose. Harmood v. Oglander, 6 Ves. 199, 8 V. 10. In Milnes v. Slater, 8 Ves. 295, Lord Eldon cites, from a note, the language of Lord Thurlow, in Donne v. Lewis, 2 Bro. C. C. 257. "The true question is, whether the testator meant only to behave honestly, which is all that a general charge on real estate imports, or whether, beyond that honest conduct in creating a general charge for the security of his creditors, to create also a particular fund for the payment of his debts." "At this day," says Lord Eldon, "the rule must be considered settled, that (whatever may be the ordinary application) if there be a real fund created for the discharge of debts, that will be applied first; when the question arises between the heir and devisee, either as to estates which the testator had at the time, or which were afterwards acquired; and authority has gone this length now, that where the heir takes, not by the intention, but in the absence of intention, the testator is understood as having denoted, in a question between the heir and the devisee, that the estate devised shall first go to the debts, though the estate devised may not be legal assets, and the descended estates may be legal assets." The case to which Lord Eldon here refers, as settling the rule, is Manning v. Spooner, 3 Ves. 114. That was an estate in the West Indies, where the statute 5 Geo. 2, was of force, rendering lands liable for the payment of debts. The Master of the Rolls, (Lord Alvanley) says, "The question whether the descended estate is liable before those devised, depends entirely upon this point, whether there is a specific gift of any part of the estate for the purpose of paying the debts; or whether it is only a general charge for that purpose." "If part is selected for that purpose, that part shall be applied before the descended estate, whether the testator had that estate before he made his will or not." After referring to the will, his Lordship held, that "there was

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a part selected and appro*priated for the debts;" "especially," says he, "when we consider the nature of the property, which is situated in the West Indies, and is liable to all his debts, independent of any will of his. But even if it were an English estate, which is not liable to all debts, even in that case I should have thought that a provision of this sort, appropriating the rents and profits first to the payment of his debts, is a specific gift, which must be first applied." Considering it, however, as a West India estate, it could not be viewed as a general charge, for the estate was already so chargeable; and if the provision was to have any effect, "it must be to appropriate this fund, and for no other purpose." "If so," says he, "the question is whether the plaintiffs, (among others, the legatees of the testator,) have a right to call upon the heir, to whom the after purchased estate had descended, to apply that estate first to the debts; and I am of opinion that the heir cannot be called on to contribute, till that fund so appropriated, not merely to take care that all the debts shall be paid, but for the particular purpose of the appropriation, has been exhausted." "If creditors are not concerned, the plaintiffs have no right to call upon the heir."

Since Manning v. Spooner, the principle has been uniformly recognized that, in marshalling assets for the payment of debts, lands descended are never subjected, where a fund has been appropriated by the will for that purpose, and that fund remains unexhausted. And in Milnes v. Slater, (already cited) Lord Eldon applied the same rule, in behalf of the next of kin claiming the personal estate not disposed of by the will. In Livingston v. Livingston, 2 J. C. R. 153, and in Livingston v. Newkirk, Ib. 323, Chancellor Kent adverts to the authority of Manning v. Spooner, as the law of this court. So in Hall v. Hall, 2 McC. Eq. 303, Chancellor DeSaussure, after reviewing the cases, states the rule to be that "Where the will creates a particular fund for the payment of debts, that shall be first applied in exoneration of descended estates, whether acquired after the date of the will or not." "I think," continues he, "that as the testator did provide for the payment of his debts and legacies out of the whole estate he possessed, at the time of

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*making his will, and he could speak of and refer to no other, that the after acquired descendable and distributable estate is exonerated from the payment of his debts and legacies, which must be first paid out of the estate subjected by the will to his debts and legacies."

In Warley v. Warley, 1 Bail. Eq. 397, the subject of marshalling assets was fully discussed. It was there held that, in this State, the first fund is the real or personal estate devised for the payment of debts, or in any

manner directed to be so applied. Second: personal estate not specifically bequeathed. Third: descended real estate. Fourth: personal estate specifically bequeathed; and lastly, real estates devised. It may be remarked that, in Warley v. Warley, the principal object of the testator's bounty was disappointed in deference to a rule regarded as well established. The rule of the case is, that if the testator has clearly indicated the fund from which his debts are to be paid, it is the law of his estate and supersedes and excludes the interference of the court in marshalling the assets.

It remains only to recur to the inquiry, whether there is any such selection or appropriation for the payment of the testator's debts; if so, in the language of Manning v. Spooner, "it is a specific gift for that purpose." The testator, more than once, directs, "all his debts to be paid from the net proceeds arising from sales of the crops," which, in one place, he particularizes as "the produce of his plantations, Mepshew, Pimlico and Keckliko, and the negroes' labor, and the toll of Mepshew Mill." The language is too distinct and emphatic to be misunderstood. It amounts to a specific appropriation of the proceeds of sales of his crops to the payment of his debts, until the extinguishment of those debts. Until that period, there was no intestacy as to the proceeds of his crops. It is not a case in which the law of the land has given to the creditor a fund to which the legatee might have resorted, and who might have, therefore, asked the aid of this court for reimbursement. The testator himself has withdrawn the fund. If he had bequeathed to his creditors, by name, twenty-five thousand dollars, directing it to be paid (as he had directed Emma Ball's to be paid)

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out of the first proceeds *of his crops, the appropriation could not have been more perfect.

The court has said that no authority was adduced sustaining the claim of a general pecuniary legatee against the heir at law or distributee, where a fund had been appropriated for the payment of debts. To establish the claim, under such circumstances, would seem, substantially, to subvert settled principles. If the plaintiffs may recover their legacy, or any part of it, from the heir at law, he would certainly be entitled to reimbursement from the legatee of the crops, since, according to the rule fully recognized in Warley v. Warley, as well as previous decisions, that fund (the proceeds of the crops) is chargeable in order before estates descended. In that event, the legatee of the crops would be postponed, not only to creditors, but to general legatees.

It has been already adjudicated that, as to a moiety of the crops, after the payment of his debts, and until the majority of Nonus, Mr. Ball died intestate. On the part of the executors it is submitted that the whole estate should be kept together until that period, and that such was the intention of the testator.

Mr. Ball certainly did not contemplate a sale, or a division or any other change of his agricultural estate, until Nonus became of age. But the scheme of the testator has been partially defeated by events neither within his foresight nor control. The death of Alwyn Ball in his lifetime, and the subsequent decease of Mrs. Ball, have, to a certain extent, marred the purposes which he had in view. It has become impracticable to carry his intentions fully into effect, and the duty of the Court is discharged by fulfilling the intention so far as circumstances will permit. Both the complainants and the heir at law unite in the desire that the portion of the estate, not effectually disposed of, should be forthwith brought to sale. It would present a much more embarrassing question if the sale of this portion necessarily required a sale of the remaining moiety:—strong arguments might, with justice, be urged against thus breaking up the entire plan of the testator. But no such necessity has been exhib-

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ited to the Court. *The testimony reported by the Master has been carefully considered. It is quite clear that, if a sale of the whole estate must be made, the plantations would probably be more advantageously sold together, and as one estate. But there is nothing to warrant the conclusion that a moiety may not be set off to Nonus Ball, leaving the other moiety to be sold for a division between the heirs at law. One of the witnesses testified that there are already two settlements on the plantations, which, in his opinion, would facilitate such division. If this can be done, the manifest intention of the testator in relation to the devise to Nonus should control the discretion of the Court. But it is not certain that, for the mere purpose of partition, this Court has any authority, in the case presented, to direct a sale of the entire premises against the desire of one of the parties. This power has, in no instance, it is believed, been exercised by the Court of Chancery in England. In Story, 1, 608, it is said that "a Court of Equity may, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for equality of partition, so as to prevent any injustice, or unavoidable inequality." The authority cited, Calmody v. Calmody, 2 Ves. p. 570, does not leave it clear that such inequality may be rectified by pecuniary compensation from another part of the estate, although such may be the practice in England, as it certainly is in South-Carolina. But the Court in England have never undertaken to order a sale of the freehold for the purpose of partition. The statute 31 Hen. 8, cited in the argument, does

not confer this power. In this State the Act of Assembly of 1748, which seems confined to the Court of Common Pleas, makes no provision for a sale. Neither this Court, nor the Court of Common Pleas, have any authority to direct a sale of the entire premises for the purposes of partition, but as derived from the provisions of the Act of 1791, and in the cases contemplated by that Act. It has been repeatedly decided that this Act was exclusively confined to partition among the heirs of an intestate; Crompton v. Ulmer, 2 N. & M'C. 429—Blocker v. Spann, Ib. 593. In this

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case a moiety of the real estate *is well devised, and the devisee is a minor. It is not within the purview of the Act of 1791.

It is true that this court, not unfrequently, changes the property of minors, and, for that purpose, sometimes orders the sale of real estate. If the inquiry had been directed, and made, in reference solely to the advantage which the minor would derive from a sale of the entire premises, it may be that the court would order such sale, the adults also desiring it. It is hardly necessary to say, that this was not the character of the inquiry, nor would the evidence in that aspect, warrant a decree of sale. It should always require a strong case, exhibiting not only the present disadvantage of the situation of the minor's estate, but the superiority of the proposed mode of investment, before the court would direct such change.

It is ordered and decreed, that the Master's report, ascertaining the amount due to the complainants, be confirmed, and that the remainder, if any, of the debts due by the testator, be paid from the crops of the estate.

It is further ordered, that a moiety of the negroes on the plantation, be sold by the executors, on such terms as the complainants may direct, and that the proceeds of sale, together with the proceeds of the other personal estate not specifically bequeathed, be applied towards the payment of the legacy to Mrs. Anna Elizabeth Ball, and the annuity to Mrs. Taveau, in average and proportion, the executors investing so much money as will secure the said annuity, the capital to be paid to the legal representatives of Mrs. A. E. Ball, on the decease of the annuitant.

It is further ordered and decreed, that a writ of partition issue, to divide between the heirs of Hugh Swinton Ball, deceased, and Elias Nonus Ball, the plantation on Cooper river, described in the pleadings, so as to set off one moiety thereof to the said Elias Nonus Ball, to be held subject to the limitations and provisions of the will of the testator, and to divide the other moiety, so as to set off one-half thereof to Mrs. Taveau, and the other half, in equal proportions to Mrs. Pell and Mrs. Sumner; and if the commissioners in partition shall be of opinion, that the moiety cannot be fairly divided among the heirs at law of the said H. S. Ball, without manifest injury to the parties therein

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*interested, then the said commissioners shall make a special return in relation to the said moiety, according to the form and terms prescribed by the provisions of the Act of Assembly of 1791.

It is further ordered, that the proceeds of sale of the Cannonsborough house, be divided among the heirs at law of Hugh S. Ball, deceased, in the proportions above indicated.

Parties to be at liberty to apply for such further orders as may, from time to time, be deemed necessary.

Complainants appealed, on the following grounds.

1. That the bequest of the produce of the plantations is not a specific legacy of testator's negroes.

2. That the devise to Mrs. Ball is in satisfaction of a debt, and therefore, chargeable on real estate descended.

3. That by the decrees heretofore made, as well as by the law of this court, the real estate descended is liable to the legacy to Mrs. Ball.

Petigru & Lesesne, for appellants.

Mazyck, Memminger and DeSaussure, represented the other parties.

Curia, per JOHNSON, Ch. The court, after a careful examination of the grounds of this appeal, are of opinion that they cannot prevail, and concur in the decree of the Circuit Court. It is necessary, however, that the cause should go back to the Circuit Court, for the purpose of obtaining the orders necessary to carry into effect the decrees heretofore made: and it is ordered and decreed, that this appeal be dismissed, and that the cause be referred back to the Circuit Court, to make such order as may be necessary and proper for effecting partition of the real estates, conformably to the decrees of the court heretofore made, by sale or otherwise, as may be found necessary: and also, to make such further order as may be necessary for the final settlement of the estate.

DUNKIN and HARPER, Chancellors, concurred.

JOHNSTON, Ch., absent, at the hearing, from indisposition.

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*ROSA D. SHULTZ v. M. E. CARTER et al.

(Charleston. Jan. Term, 1844.)

1. A testator devised and bequeathed to his "three children," a daughter and two sons, "all the rest and residue of his estate, both real and personal, to share and share alike, to them and their heirs forever." The daughter having married after the testator's death, united with her husband in a bill for a partition of the estate; and in confirming the return of the commissioner, the court ordered that the executor retain possession of the property until the remaining debts should be ascertained, and secured to the satisfaction of the creditors. Shortly thereafter the executor delivered to the husband the negroes which had been allotted to him, taking from him a written acknowledgment that he held them subject to one-third of the debts of the estate, in such manner as the Commissioner in Equity and the creditors might prescribe.

[2. *Husband and Wife* ⇐11.]

The court held that the marital rights of the husband attached when he received possession of the slaves, subject to the payment of his proportion of the debts.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 53; Dec. Dig. ⇐11.]

[3. *Husband and Wife* ⇐11.]

The creditors of the estate might have demanded satisfaction under their original equity, or the decree of the court, or the specific agreement between the husband and the executor, not on the ground that his marital right had not attached, but that it was subordinate to their rights.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 39, 40, 47–57; Dec. Dig. ⇐ 11.]

4. The husband of complainant had mortgaged a tract of land on the 11th October, 1837, to two persons, to secure the payment of two bonds, one to each, of the same date. One of the obligees assigned his bond and interest in the mortgage on the 21st February, 1839. Mortgage recorded in the Registry of Mesne Conveyance, for Charleston, the land being in Colleton district. The executrix, heirs and devisees of the mortgagor, by a decree of the 29th Jan. 1841, had been debarred and foreclosed of and from all equity of redemption in the premises after the 4th February, 1841; and on the 13th of November, 1841, one of the defendants in this case obtained an execution against the executrix, under which the land was sold by the sheriff of Colleton, on the 2d January, 1843. He purchased the land, received the sheriff's deed, and claimed to be protected in his purchase, on the ground that he was a purchaser for valuable consideration, without notice of the mortgage, which was not recorded in the proper office; the mortgagees being his co-defendants.

[5. *Vendor and Purchaser* ⇐220.]

The plea of purchase for valuable consideration, would not, as such, afford any defence to the legal title of the mortgagees. Vide Donald v. McCord, Rice's Eq. 340; Cruger v. Daniel, McMullan's Eq. 197. And as the answer contained no averment that the defendant ever parted with his money in any way, being both purchaser and plaintiff in the execution, it must be inferred, that the knowledge of the legal title of the mortgagees reached him in time to prevent injury.

[Ed. Note.—Cited in Williams v. Hollingsworth, 1 Strob. Eq. 113, 47 Am. Dec. 527; Maybin v. Kirby, 4 Rich. Eq. 113.

For other cases, see Vendor and Purchaser, Cent. Dig. § 462; Dec. Dig. ⇐220.]

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[6. *Executors and Administrators* ⇐263.]

*A surety of complainant's testator, on two joint and several bonds, secured by the mortgage of a tract of land, both bonds being due and unpaid at testator's death, had, since his decease, been compelled, by judicial process, to satisfy one of the bonds, and was sued on the other. *Held* that the surety was entitled to rank as a bond creditor, in the application of the assets, and to have the benefit of the mortgage. Vide Liddledale v. Robinson, 2 Brock. 160; Id., 12 Wheat. 594 [6 L. Ed. 740]; Pride v. Boyce, Rice's Eq. 275 [33 Am. Dec. 78].

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 994; Dec. Dig. ⇐263.]

[For subsequent opinion, see 1 Rich. Eq. 280.]

The object of this bill will be fully understood from the Commissioner's report, to whom the bill and answers were referred, to state an account, &c. of what might be due to the creditors of complainant's testator, her late husband.

Commissioner's Report.

The bill and answers in this case were referred to me, to take and state an account of what may be due to the creditors of the late Wade H. Shultz, whether by judgment, mortgage, bond, or otherwise, with the further direction, to take an account of the personal estate of the said Wade Hampton Shultz, which has come to the hands of the complainant, as executrix, or to the hands of any other person, by her order, or for her use, and to state an account of the value of the real estate whereof the testator died seized, and of the amount of the incumbrances thereof, and to report upon the dower which the complainant, as the widow of the testator, is entitled to. I have been attended by the solicitors of the several parties, and have granted an order to amend the bill, in so far as to enable Mrs. Shultz to raise, and have determined, the preliminary question, whether the negroes to which she was entitled under the will of her father, John Boyle, were legally in the possession of her husband, Shultz so as to constitute a reduction into possession. Upon this point, I submit the testimony of Josiah Taylor, executor of John Boyle, and a transcript of the proceedings of this court, in the years 1834 and 1835, in the matters of the partition of his estate.

A second question is raised on behalf of John R. Stull, who purchased the plantation of Shultz, called the "Oak Forest Tract," and the "Marion Tract," at sheriff's sale, in Colleton district, 2d January, 1843, under an

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execution *in the case of the said John R. Stull v. Rosa D. Shultz, executrix, dated 13th November, 1841.

It is proved, that the tract called "Oak Forest," was mortgaged 13th April, 1836, to the Protestant Episcopal Society for the advancement of Christianity in South Carolina, to secure a bond of the same date, in the

condition to pay $2,422.50, with interest; mortgage recorded in Colleton district, 6th June, 1836. The same bond is further secured by a mortgage of twenty-two slaves, bearing same date, recorded in Secretary of State's office, Charleston, 31st May, 1836. A part of this bond has been paid by the executrix, from the proceeds of sales of negroes sold. It is further proved, that the other tract, called "Marion," was mortgaged to John S. Brisbane and Elizabeth Brisbane, 11th October, 1837, to secure a bond to Elizabeth Brisbane, of the same date, with condition to pay $1200, with interest; and also a bond of the same date, to John S. Brisbane, with condition to pay $800, with interest. John S. Brisbane assigned his bond, and his right in the mortgage, to William Carter, 21st February, 1839. This mortgage is of record in the Registry of Mesne Conveyance for Charleston, the land being in Colleton. A decree to foreclose this last mentioned mortgage, and for sale of the premises, was obtained January term, 1841. One or more attempts were made by me to execute the decree, but without effect, for want of purchasers, no bid being made.

A third question arises from a claim put in by Mr. Magrath, in behalf of John Boyle, who was surety of Shultz's bond to Elizabeth Brisbane, above mentioned. A judgment was obtained in Colleton, against John Boyle, on this bond, which he paid, to the amount of $1514, and he now claims this amount as a bond creditor. I have now to ask the judgment of the court on these three points, previous to any attempt at stating the account.

Respectfully submitted.

By the schedule of debts against the late Wade H. Shultz, stated in the exhibits, it is manifest that his estate is insolvent, as to simple contracts.

On the question, whether the marital

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rights of Wade H. *Shultz had attached upon the negroes of his wife, Rosa D. Boyle, the following facts were in evidence:

On 16th January, 1834, Wade H. Shultz, and Rosa, his wife, filed a bill for partition of the real and personal estate of John Boyle, her deceased father, against Josiah Taylor and others, executors of John Boyle, and John Boyle, the younger, and L. Chalmers Boyle, minors. A writ of partition was accordingly issued, and the commissioners returned that they had divided the negroes into three lots, when lot No. 3, containing twenty-one negroes, was drawn by Wade H. Shultz.

This return was confirmed 25th January, 1834.

In the order confirming the return, the court said, "As to the division of the personalty, it is ordered, that the same be confirmed, subject to the following condition: The executor, Josiah Taylor, who sold the crops, and conducted the monied concerns of the estate, shall retain the possession of said property, as executor, until the accounts of the estate are fully adjusted by the commissioner, and the debts remaining shall have been secured by the respective distributees, under the direction of the commissioner, to the satisfaction of the creditors; after which, he shall deliver the respective portions to such of the parties as shall then be of full age. And the commissioner will report all his proceedings to the court at the next term."

At May term, 1835, the commissioner reported to the court, that under the decretal order of January term, 1834, the debts of the estate of John Boyle, deceased, had been provided for, except the following:

Balance due Josiah Taylor	$ 98 93
Thomas H. Boone	54 79
J. W. Toomer	100 00
Estate of William Washington	34 50
William Vaughan	300 00
	$ 588 22
A bond to Joshua W. Toomer, conditioned for	2000 00
A bond to Jno. Porter, ass'd. to J. W. Toomer, for	1000 00
	$3588 22

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*The commissioner further reported, that John Boyle, the younger, had executed his bond to Joshua W. Toomer, conditioned for $1000, and Wade H. Shultz executed his bond to Joshua W. Toomer, conditioned for $1000; both bonds secured by mortgages of their respective shares of the estate allotted to them, which bonds were accepted by Mr. Toomer, in lieu of the bond of the testator. That with respect to the remaining bond due J. W. Toomer, assignee of John Potter, for $1000, as L. Chalmers Boyle is a minor, it would be proper to have a different arrangement, and the commissioner submitted, that the executor be authorized to pay it out of the residue of the estate, and that he be authorized to sell the carpenter fellow, if a full price could be obtained, or if not, any other negroes, so that the debt may be settled in January next, or from the sales of the land, should a sale be effected before that time. The commissioner, in his report, further stated, with regard to the debt due to Mr. Vaughn, that this debt, with the other debts before referred to, ought to be provided from the sales of the land, before the rest of the estate is delivered over to the several parties.

The commissioner also reported an adjustment of the accounts between the several children of testator.

This report was confirmed by the court, and it was "ordered, that the respective debts be paid as therein directed." It was further ordered, "that the land be sold as early as expedient, and the proceeds applied to the payment of the debts, should the said

debts be not otherwise paid by the distributees out of their respective estates."

It was conceded, that the land of the deceased, John Boyle, although put up at auction, has not been sold, for want of bidders.

Mr. Josiah Taylor, in his evidence before the master, in the present cause, taken on 21st June, 1843, said that he was the acting executor of John Boyle, deceased, and proved a receipt from Wade H. Shultz, in the following words:

"Charleston, January 29th, 1834.

"Received of Josiah Taylor, Esq., one of the executors of the will of John Boyle, as the share of the negroes of that estate, allotted to my wife, Rosa Sarah, one of the chil-

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*dren of the said John Boyle, the following slaves, twenty-one in number.

"These slaves are delivered to me by Mr. Taylor, subject to the debts of the aforesaid estate, to be secured according to the direction of the commissioner in equity, in conformity with the wishes of the creditors, as soon as the debts are ascertained, according to the decree in equity, and my wife's portion affixed. I therefore agree to hold them subject to said debts, and be subjected in such manner as the said commissioner and creditors may prescribe.

(Signed) Wade H. Shultz." [L. S.]

Mr. Josiah Taylor further testified, that there are still debts due by the estate of John Boyle, viz:

To J. W. Toomer	$100 00
To Josiah Taylor	98 00
To T. W. Boone	54 79
To estate William Washington	34 50
	$287 29

That he knew nothing of a debt to estate of Vaughn, except that he recollects paying on account of the debt, $590. What the balance was, he did not know. Thinks that Charles Boyle, who was executor of Vaughn, told him he would never require more. C. Boyle would not take more at that time. He said it was of no consequence.

Mr. Taylor further testified, that certain accounts were presented to witness, as executor of John Boyle, after the estate was divided, amounting, together, to $56.75.

That he found the following among his papers:

Estate of John Boyle, to estate of John B. Vaughn. Dr.

1827, To four years hire negroes, at $400		$1600 00
1825, Paid J. and D. Paul, on account of Boone	$400 00	
1828, Jan. 31, Paid Charles Boyle, on account hire negroes	590 00	990 00
		$610 00

Estate of John Boyle, Dr. to Charles Boyle, executor of John B. Vaughn, four years hire

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of thirteen workers, and *a carpenter, at four hundred dollars per year for the whole gang, twenty-one in number, which he was to find clothes and pay the taxes.

(Signed) Charles Boyle.

Sworn to before me this 31st Dec. 1827.

(Signed) S. Miles, Q. U.

Copy of the will of John Boyle, deceased. State of South Carolina.

In the name of God, amen! I, John Boyle, of St. Paul's parish, State aforesaid, sick in body, but of sound mind, thanks be given to God, do make and constitute this my last will and testament. Imprimis. I give and bequeath to my daughter, Rosa, my carriage. Item. I give and bequeath to my three children, Rosa, John, and L. Chalmers, all the rest and residue of my estate, both real and personal, to share and share alike, to them and their heirs forever, retaining to the use of my daughter Rosa, as a home during her single state of life, this residence, at which I at present live, called Mount Pleasant. Item. I nominate and appoint Mr. Josiah Taylor, of Charleston, factor; Mr. Joseph Hall Waring, of St. George's, Dorchester, planter, and my son, John, when at the age of twenty-one years, my executors to this my last will and testament. Item. Not wishing my estate sold, at any rate before my children are of age, I will and appoint Mr. Joseph Hall Waring, of St. George's, the manager of my estate, till my son becomes of the age of twenty-one, he to be suitably remunerated for such services. Should he decline serving, either as executor or manager of my estate, I will and appoint Mr. Thomas W. Boone, of St. Paul's parish, in his stead, either as executor or manager, or as both.

(Signed) John Boyle. [L. S.]

Signed, sealed, and delivered, as my last will and testament, this fifteenth of March, eighteen hundred and twenty-two, in the presence of

(Signed) Wm. Washington.
John Sam'l. Peake.
Jeremiah Dickinson.

We, the undersigned, hereby certify, that

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Mr. John Boyle, in *sound mind, bequeaths to his daughter, Rosa Boyle, the servant girl, called Yanakay, the daughter of Maria.

(Signed) Hugh L. Alison, M. D.
Wm. B. Townsend.
Thos. W. Boone.

11 o'clock, 17th March, 1827.

Dunkin, Ch. The only questions now submitted to the consideration of the court, are presented by the master's report. John Boyle, of St. Paul's parish, the father of the complainant, died in 1827. By his will, he devised and bequeathed to his "three children, Rosa, John, and L. Chalmers, all the rest and residue of his estate, both real and personal, to share and share alike, to them and their heirs forever." Josiah Taylor and Joseph Hall Waring were appointed execu-

tors, and the former qualified and managed the estate. Some time after the testator's death, the complainant intermarried with Wade H. Shultz.

The first question submitted by the report is, whether, under the testimony adduced, the marital rights of Wade H. Shultz had attached on the property bequeathed to his wife by her father. It may be proper to premise that no partition, nor any other judicial proceeding, was necessary, in order to perfect the husband's right. It was only necessary that the executor should assent to the bequest. If the executor had placed all the negroes in the possession of John Boyle, the brother, to hold for himself and the other legatees, this would be deemed an assent to the legacy, and the marital rights of W. H. Shultz would attach, although the negroes may never have been divided, and he may never have been in actual possession of any part of the property bequeathed. Verdier v. Verdier, McMullan's Eq. 106. In 1834, Wade H. Shultz and the complainant united in a bill for a partition of the estate. In confirming the return of the commissioners, the court took care to protect the executor, as well as the creditors of the testator. By the order of the 25th January, 1834, the executor, Josiah Taylor, was to retain the possession of the property until the remaining debts should be ascertained and secured, to the satisfaction of the creditors. On the 29th January, 1834, the

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executor, Josiah Taylor, *delivered into the possession of W. H. Shultz the negroes (twenty-one in number,) which had been allotted to him: and W. H. Shultz gave him a written acknowledgement that he held the negroes subject to one third of the debts of the estate, in such manner as the commissioner in equity and the creditors might prescribe. In January, 1835, the master reported the remaining debts to amount to $3,588, and that of these, W. H. Shultz had paid or satisfied $1000. A very full report was submitted by the master, in January, 1835, and another in May, 1835, providing the manner in which the residue of the debts should be paid, which reports were duly confirmed. It is not deemed necessary to comment particularly on these reports. It may be remarked, however, that the debts then unsatisfied, were then very inconsiderable, and that provision was made for the payment, by the sale of the real estate. It is not now certain that there are any subsisting claims against the estate. But in the view taken by the court, this is not very important. It seems to the court very clear, that when W. H. Shultz received possession of the negroes, on the 29th January, 1834, his marital right attached. Certainly he held them subject to the payment of his proportion of the debts, but his marital right was not the less complete. He did not, thenceforth, hold them in a fiduciary character, but only subject to a charge. The creditors of John Boyle might demand satisfaction under their original equity, or the decree of the court, or the specific agreement of the 29th January, not on the ground that his marital right had not attached, but that it was subordinate to their rights.

The next question arises out of the claim of John R. Stull. It is conceded that the Oak Forest tract was purchased with a knowledge of the mortgage to the Protestant Episcopal Society, and no objection, therefore, is interposed to a sale of the premises. Other questions may hereafter arise, which it is not proper now to anticipate. The court only desires to be understood as expressing no opinion as to any claim of this defendant on the Oak Forest tract, as derived from the purchase at sheriff's sales. As to the Marion tract, it is difficult to discover what the defendant bought at the sheriff's sales, on the

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2d January, *1843. By a decree of this court, pronounced 29th January, 1841, the executrix, heirs, and devisees, of W. H. Shultz, were, on and after "the 4th February, 1841, absolutely debarred and foreclosed of and from all equity of redemption in the said premises." On the 13th November, 1841, J. R. Stull obtained an execution against the complainant, as executrix of W. H. Shultz, which was subsequently enforced, by exposing to sheriff's sale this tract, together with the Oak Forest tract, and both were bid off by the defendant, for sixty-two dollars, the amount of his execution, including damages and costs, being seventy-six dollars eighty-two cents, and he received the sheriff's deed. But the defendant insists that he is a purchaser, for valuable consideration, of the Marion tract, without notice of the mortgage to his co-defendants, Brisbane and Carter, which mortgage was not recorded in the proper office, and he relies on his protection as such purchaser. At law, the mortgagor being out of possession, it would only be necessary for the mortgagees, Carter and Brisbane, to evict the defendant, Stull, by an action of trespass. They do not now apply to this court for any aid. The plea of purchase, for valuable consideration, would not, as such, afford any defence to their legal title, and so it was held by this court in Donald v. McCord, Rice's Eq. 340, and again recognized in Cruger v. Daniel, McMullan's Eq. 197. But there are other objections to the defendant's answer, as a plea. Mr. Sugden, 2 vol. 305, says, "the plea must distinctly aver, that the consideration money, mentioned in the deed, was bona fide and truly paid, independdently of the recital of the purchase deed; for if the money be not paid, the plea will be overruled, as the purchaser is entitled to relief against payment of it." It is afterwards stated, that the plea must not only deny notice at the time of the purchase, but at the time of the payment of the purchase money. This answer contains no averment

that the defendant ever parted with his money in any way. On the contrary, so far as the court can infer, being both purchaser and plaintiff in the execution, the knowledge of the legal title of the mortgagees has reached him in time to prevent injury.

The answer of John Boyle presents the remaining question. He was surety to W. H.

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Shultz, on two joint and *several bonds. These bonds were also secured by a mortgage of the Marion plantation. Both bonds were due and unpaid at the death of W. H. Shultz, and constituted specialty debts against his estate. Since the death of W. H. Shultz, the defendant, Boyle, has been compelled, by judicial process, to satisfy the amount due on one of the bonds, and he is sued on the other. He insists that he is entitled to reimbursement as a bond creditor, and also to have the benefit of the Marion mortgage.

The principle involved in this inquiry, has been repeatedly discussed in the English courts, and in this country. The authorities may be found, collected by Chief Justice Marshall, in Lidderdale v. Robinson, 2 Brock. 160, which judgment was affirmed by the Supreme Court, in 12 Wheat. 594, [6 L. Ed. 740.] The result of the cases is, that a surety who pays a debt of a superior dignity, due by the estate of his deceased principal, is suffered to rank, in the application of assets, according to the dignity of the debt satisfied; or, in other words, is substituted for the creditor who holds the prior debt, and is entitled to the benefit of any security which that creditor may have taken from the principal debtor. See, also, Pride v. Boyce, Rice's Eq. Rep. 275 [33 Am. Dec. 78]. These principles seem to the court to establish the rights of John Boyle.

It only remains to direct, that the report of the master be made up according to these views, and to provide for the sale of the Oak Forest plantation. It is ordered and decreed that the plantation be sold by the master, on the first Monday in January next, or at such other time as the master, with the concurrence of the complainant and mortgagees, may fix, for one-half cash, the balance on a credit of one and two years, secured by bond and mortgage of the premises; and that he hold the proceeds subject to the further order of this court.

The complainant appealed from the decree in this case, upon the grounds:

1. That under the case made in the bill and report, the negroes derived under the will of John Boyle, deceased, the father of the complainant, were not reduced into possession by Wade H. Shultz, so as to vest his marital rights in them.

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*2. That until all the debts of the late John Boyle were paid, the partition decreed in 1834, did not take effect; and by the terms of that decree, the executor was to retain possession of the property until the remaining debts should be ascertained, and secured to the satisfaction of the creditors; and it was proved that some of the debts of the late John Boyle still remain due and unpaid.

The defendant, William Carter, appealed from the decree in this case, on the ground:

That in the administration of the assets of Wade H. Shultz, in the hands of the complainant, as executrix, John Boyle, the surety to the bond of Wade H. Shultz, deceased, who paid off the bond after the death of the principal, is entitled to rank only as a simple contract creditor, and not as a specialty creditor, as decreed by the Chancellor.

Eckhard, solicitor for complainant.

H. W. DeSaussure, for defendant, Carter.

Curia, per JOHNSON, Ch. The court concur in the decree of the circuit court. Appeal dismissed.

HARPER and DUNKIN, Chancellors, concurred.

JOHNSTON, Ch., absent from indisposition.

COLUMBIA, MAY TERM, 1844.

CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
" J. JOHNSTON,
" B. F. DUNKIN.

HON. WM. HARPER absent, by reason of sickness.

Speers, Eq. *545

*CENTRAL RAIL ROAD and BANKING COMPANY OF GEORGIA et al. v. CLAGHORN, WOOD, et al.

STEPHEN S. BUSH, and Others v. CENTRAL RAIL ROAD and BANKING COMPANY OF GEORGIA et al.

(Columbia. May Term, 1844.)

1. The Savannah and Augusta Steam Boat Company, a Georgia corporation, being indebted to the Central Rail Road and Banking Company, and other corporations of said State, by notes, which were indorsed, on the 8th of April, 1840, renewed them, the renewals being indorsed, and conformably to a promise which had been given to their indorsers, to indemnify them, then executed to each creditor a mortgage on three Steam Boats, with the appurtenances thereof, and on some articles of counting-house furniture. On the 12th of June following, one of the mortgaged boats being in the waters of Barnwell district, of this State, the sheriff of that district levied on her twenty-six foreign attachments, sued out by as many creditors of the company. An order was made by the Court

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of Common Pleas, for the *sale of the boat, under the attachments, but before the sale, the mortgage creditors filed a bill for an injunction, praying that the property might be sold by an order of this court, on terms, to prevent a sacrifice, which order was made, and the property sold by the Commissioner in Equity for Barnwell district, the proceeds of the sale being the subject of adjudication between the mortgagees and the attaching creditors.

[2. *Appeal and Error* ⇐1009.]

By an Act of the State of Georgia, (Prince's Digest, p. 164,) it is enacted, "That any person, unable to pay his debts, who shall, at any time hereafter, make any assignment or transfer of real or personal property, stock in trade, debts, dues or demands, in trust, to any person, in satisfaction or payment of any debt or demand, or in part thereof, for the use and benefit of his creditor or creditors, or for the use and benefit of any other person, by which any creditor of said debtor shall or may be excluded from an equal share or portion of the estate so assigned or transferred, such assignment, transfer, deed or conveyance, shall be null and void, and considered in law and equity as fraudulent against creditors. Provided, nevertheless, that nothing contained in this Act shall prevent any person in debt from bona fide and absolutely selling and disposing of any part or the whole, of his estate, so the same be done free from any trust for the benefit of the seller, or any person appointed by him." *Held*, that under the words "any assignment or transfer," found in this statute, an ordinary mortgage is embraced; but on the question whether the company was or was not able to pay their debts at the date of the mortgages, within the meaning of the Georgia statute, that being a doubtful question of fact, the judgment of the Chancellor who tried the cause, that the conveyances at that date were not contrary to the Act, *held* decisive of it, unless there had been a decided preponderance of evidence opposed to that opinion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3974; Dec. Dig. ⇐1009.]

[3. *Receivers* ⇐148.]

Held that the mortgage creditors could not be compelled to resort to and exhaust their remedy against the indorsers, before touching the fund in court. The indorsers having had the promise of a mortgage, being also indorsers upon accommodation paper, and standing as mere sureties to the company, had as strong an equity to be protected, as that of the defendants.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 260; Dec. Dig. ⇐148.]

[4. *Mortgages* ⇐411.]

The well established doctrine of this court is, that the surety is entitled to the benefit of all the securities which the creditor obtains from the debtor for the payment of the debt, and that the creditor must exhaust these before he can call on the surety for payment.

[Ed. Note.—For other cases, see Mortgages Cent. Dig. § 1182; Dec. Dig. ⇐411.]

[5. *Receivers* ⇐148.]

But as there was other mortgaged property to which complainants could resort, it was held that they must shew what had become of it, and what portion of it had been lost to them, before they could take hold of the fund in court.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 260; Dec. Dig. ⇐148.]

[6. *Chattel Mortgages* ⇐138.]

The lien created by the act of the debtor did not stand upon the footing of an assignment, by operation of law, under a commis-

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sion of bankruptcy in *a foreign State, which

operates merely as a power to receive, and vests no legal interest.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228–236; Dec. Dig. ⟸ 138.]

[7. *Corporations* ⟸186, 545.]

Although the indorsers of the several notes may have been the directors of the Steam Boat Company, yet this would not be sufficient to infer that it was a fraudulent device, on their part, to gain a precedence over other creditors, as there is nothing, either in law or equity, which forbids a member, or even a director, of a corporation, from contracting with it. He may prescribe his own terms, which the corporation can accept or reject, and when the contract is concluded, he stands in the same relation as any other individual would, under the same circumstances.

[Ed. Note.—Cited in Albright & Pinchback v. Town Council of Chester, 9 Rich. 399; Farrow v. Bivings, 13 Rich. Eq. 30; Hall & Co. v. Klinck, 25 S. C. 357, 60 Am. Rep. 505.

For other cases, see Corporations, Cent. Dig. §§ 695, 2170; Dec. Dig. ⟸186, 545.]

[8. *Injunction* ⟸114.]

Held unnecessary that the indorsers should have been made parties.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 202; Dec. Dig. ⟸114.]

[9. *Fraudulent Conveyances* ⟸122.]

The debts, to secure which the mortgages were given, being contracted at a date anterior to the execution of the mortgages, and there being an agreement then on the part of the Steam Boat Company to secure their indorsers by mortgage, amounted to an equitable lien, and the fact of the inability of the company to pay their debts ought to be referred to that time. Per Johnson, Ch.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 392–398; Dec. Dig. ⟸122.]

[10. *Fraudulent Conveyances* ⟸122.]

[A mortgage, executed by a person indebted, but solvent at the time, as an inducement for the renewal of a previous note, and without any intention of suspending business, so as to defraud other creditors, is not a fraudulent preference under the act of Georgia of 1818.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 393; Dec. Dig. ⟸ 122.]

Before Johnston, Chancellor, who made the following decree:

Johnston, Ch. On the 8th of April, 1840, the Savannah and Augusta Steam Boat Company—a Georgia corporation—being indebted, in various sums, to the five following corporations of the same State, to wit, the Central Rail Road and Banking Company of Georgia; the Insurance Bank of Columbus; the Savannah Insurance and Trust Company; the Planters' Bank of the State of Georgia; the Marine and Fire Insurance Bank of the State of Georgia; and to one William A. Kain, (all of whom are plaintiffs in the bill,) renewed the notes which the said creditors severally held against them, the said Steam Boat company, which renewals were suitably indorsed; and for the better securing the said renewals, gave to each creditor a mortgage upon the following property of the said Steam Boat company, viz: three steam boats, called the Hamburgh, the Oglethorpe, and the Elbert, with the machinery, tackle, boilers, engines, and other appurtenances, together with ten tow boats or flats, three hand engines, and some articles of counting house furniture.

The debts covered by the said mortgages, which were executed in Savannah, were as follows:

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*Central R. R. and Banking Co. of Georgia	$ 2,900 00
Insurance Bank of Columbus	1,800 00
Savannah Insu. and Trust Company	8,700 00
Planters' Bank of the State of Georgia	5,000 00
Mar. & Fire Ins. Bank of State of Georgia	3,150 00
Wm. A. Kain	2,868 54
Making in all	$24,418 54

On the 12th of June following, the Hamburgh, one of said mortgaged steam boats, being in the waters of Barnwell district, in this State, the sheriff of that district levied upon her twenty-six writs of foreign attachment, which had been sued out against the said Steam Boat company, by as many creditors of said company, all of whom are defendants to the bill.

On the levy of the attachments, an order was made by Mr. Justice Butler, upon application of the attaching creditors, for the sale of the Hamburgh, for cash; under which order the said sale was advertised; but before the expiration of the term limited by the statute for such notices had expired, to wit: on the 9th July, 1840, the mortgage creditors filed their bill for an injunction, and praying that the Hamburgh might be sold by an order of this court, upon terms, to prevent a sacrifice of the property; and that the proceeds of sale might be applied to the payment of such of their demands as were then due, and the residue retained, and applied, from time to time, as the remainder of said demands should come to maturity; and for general relief.

Upon this bill Chancellor Dunkin, by an order of the 9th of July, (the day of its filing,) restrained the sale under the attachments; and on the 15th of the same month passed a further order in the cause, directing a sale by the commissioner; and on the 3d Monday in August of the same year the commissioner made the sale at the sum of $10,700.

The proceeds of that sale are now the subject of adjudication.

The case has been heard upon the pleadings in the cause and cross cause, and upon

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evidence taken, mostly in wri*ting, and to which I must refer for a more full statement, and upon the testimony of a few witnesses produced and examined before me at the hearing, to whose evidence, contained in my

notes taken at the time, and accompanying this decree, I must also refer.

The principal question arises under an Act of the State of Georgia, (Prince's Dig. 164,) approved the 19th of December, 1818.

It is entitled "an Act to prevent assignments or transfers of property to a portion of creditors, to the exclusion and injury of the other creditors, of persons who fail in trade, or who are indebted at the time of such assignment or transfer," and is as follows:

"Whereas, a practice of selecting particular creditors, by assignments and transfers of property, made by persons indebted, and thereby excluding or defrauding other bona fide creditors of their just claims on the estates of insolvent debtors, is contrary to the first principles of equity and justice; to prevent the mischief thereof,

"Be it enacted, That any person, unable to pay his debts, who shall, at any time hereafter, make any assignment or transfer of real or personal property, stock in trade, debts, dues or demands, in trust, to any person, in satisfaction or payment of any debt or demand, or in part thereof, for the use and benefit of his creditor or creditors, or for the use and benefit of any other person, by which any creditor of said debtor shall or may be excluded from an equal share or portion of the estate so assigned or transferred, such assignment, transfer, deed or conveyance, shall be null and void, and considered in law and equity as fraudulent against creditors. Provided, nevertheless, that nothing contained in this Act shall prevent any person in debt from bona fide and absolutely selling and disposing of any part or the whole of his estate, so the same be done free from any trust for the benefit of the seller, or any person appointed by him."

The questions have been raised, whether an ordinary mortgage falls within the instruments contemplated by this statute; and if so, whether the debtor who executed the mortgages here was, at the time of their

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execution, in the *condition intended by the Legislature, to incapacitate him from making the conveyances.

The evidence discloses that the Steam Boat company had promised an indemnity to the endorsers of their notes, of which renewals were made on the 8th April, 1840, and upon which the mortgages were engrafted; that the company required the renewals to enable them to go on; that when the renewals were effected, the security of a mortgage was required at the instance of the endorsers; and that the object of the company in procuring the renewals, was to assist them to put their affairs in such a train as to enable them to make an advantageous sale of their charter and property. As well with a view to show the creditors, from whom they were asking an extension of credit, that their property intended to be mortgaged to them, was a sufficient security, as with a view to a future sale, they caused estimates to be made by competent and skilful persons, of the value of their property; who valued it at $53.-000.

There is the testimony of several witnesses in the cause who valued the property of the company, including their chartered privileges, at from 50 to 78 thousand dollars; most of them, and especially those who had opportunities, estimating the boats and tangible property above 50 thousand. The direction given to the appraisers by the company, was to put the lowest fair valuation upon the property; and the general opinion of the witnesses is, that the value was low. The clerk of the company says, that the debts were about nine thousand dollars below the value assigned to the property by the appraisers.

On the other hand, we have strong circumstantial evidence, that they were much embarrassed at the time. On the 11th of April, three days after the date of the mortgages, Mr. Duncan, the president of the company, then at Savannah, in a letter to the agent at Augusta, says, "We had very nearly come to a halt in the affairs of our company, from the banks' refusing to renew, without additional security." "We gave it," he proceeds, "by a mortgage on our property; and at the same time, secured Mr. Thomas, for his implication, by indorsement of your draft;

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although *we suppose you can manage to get freight enough from him to protect that, or, at all events, will collect your railroad freight bills, so as to pay that. You have now got nearly all the iron; and there can be no objection to their paying the bill then." "Can you not collect and send us down $2000; so as to pay off pressing demands, and keep off judgments? Do make an effort."

The company proceeded, after their accommodation by the banks, in the usual course of their business, and in the month of May even reduced their debts, but to what extent we are not informed.

On the 7th of May, they passed a resolution to sell out, and authorized an offer of sale to be made to two other companies, at $50,000; and if this should fail, then that the offer should be made to other persons. One of the companies declined, without assigning any reason; the other assigned as a reason for declining the offer, that it was not in a condition, or disposed at that time, to purchase any more steam boats than it already had. The offer was then made to Mr. Fawnes, who, thinking it a good bargain, accepted it, upon condition that he could get friends in Augusta to join him. He visited that town to consult them; but the negotiation was broken off by the levy of the attachments.

At that time the Elbert lay sunk in the

river; the Oglethorpe was undergoing repairs; and the Hamburg had broken down, (which was the occasion of her being in the waters of Barnwell when levied on.) The affairs of the company came to a crisis. President Duncan sent down a boat from Augusta, took off the tow boats, and discharged the hands.

Henry and William Harper say the company was, in their opinion, unable to pay its debts at the time the mortgages were given. And the plaintiffs, in their bill, make it a ground of jurisdiction, (and so state the fact,) that by the sacrifice of the Hamburg, they have reason to apprehend that the residue of the mortgaged property will not be sufficient to pay even the $24,000 due them, and for which they held a lien, exclusive of all other creditors. We have the testimony

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of several witnesses, declaring particu*lar instances of their not being able to get money out of the company, some of them about the time the mortgages were given. But in opposition to all this, as I have said, we have the testimony of others, who best knew the indebtedness of the company, on the one hand, and that of those most capable of judging the value of their property, on the other; and by comparing the one with the other, it would appear that their property, at a fair value, as it stood at the execution of the liens, and independently of the casualties that afterwards occurred, was worth more than their debts. If all their debts had been due, and they had been pressed for prompt payment, they could have paid them, if they could have sold their property for cash at a fair price; otherwise they could not. Some of those that pressed, they did not pay, although they were able to prosecute the business until the Hamburg broke down.

Now, were they, at the date of the mortgages, able or unable to pay their debts, within the meaning of the Georgia statute?

I understand there is a diversity of opinion among the profession in that State, upon the construction of the Act; and that it has received different interpretations by the bench, on the different circuits there; and I have seen evidence of this in several brief opinions with which I was favored at the hearing.

When an enlightened profession and eminent Judges differ upon a law familiar to themselves, I can entertain no great confidence in my own humble judgment upon the point. It must be doubtful.

It would have been a relief to me, if I could have learned from the bench of Georgia, what this law of Georgia is; but the peculiarity of her judicial institutions is, that they contain no means for authoritatively declaring it. I must therefore, grope in the dark as well as I can, in deciding upon a statute of her own, in a controversy deeply affecting the interests of her own citizens, and without the aid of her own judicial opinion upon it.

From the whole enactment, taken together, I learn that the debtor described is one who is about to wind up his affairs. He has the

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choice before him of paying his credit*ors equally, or of preferring some of them; or he may act dishonestly towards them all, and under some deceitful device, endeavor to secure an interest in his property to himself or his family, while it is withdrawn from all responsibility for his just debts. The different members of the enacting clause seem to be directed to this state of things, and to admonish him what conduct is pointed out by honesty and justice. The Act says, he may pursue the first course; but forbids him to adopt either of the latter methods. He shall not directly assign or transfer his whole property to one or more creditors, in satisfaction or payment of their demands, excluding other creditors; nor shall he do the same thing indirectly by an assignment or transfer to other persons, in trust for making such a preference by paying particular creditors, or holding the property so that they shall receive the use and benefit of it; nor again, shall he defeat the whole of his creditors by making an assignment or transfer to third persons, in trust for the use and benefit of any other person; a provision which cuts him and his family off from the enjoyment of that property, which, in substantial justice, does not belong to them, but to his creditors. It appears to me, this interpretation satisfies every phrase employed by the Legislature; and if so, the persons said in the Act to be unable to pay their debts, are those whose affairs have come to a stand, and who occupy the position of actual insolvents. The words and spirit of the Act will embrace not only those whose insolvency is known and declared to the world, but those who under a secret knowledge of their ruined condition, are taking steps to close their business. In doing this, they shall do equal justice to all the creditors. If the tendency of their acts is not perceived by others, as may be the case when they intend to defraud all the creditors, and prefer themselves or their children; it makes no difference what the form of the proceeding may be, as soon as it is ascertained what their design was in adopting it, the whole will be set aside as an offense against the Act. And so, again, if under failing circumstances, and with a design to fail, and failing, prefer a particular creditor, the transfer is either effected, or a train laid for effecting it, by concert with him,

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it matters not, *in my opinion, what the form of the transfer is, or by what apparatus the

fraud is perpetrated; the act will condemn it.[1]

I cannot say, in this case, that the company was actually insolvent when they gave their mortgages, or that they gave them as a means of winding up, and in so doing, giving a preference to the mortgagees; or that they were so understood by the banks, or that the latter had any reason to suspect that the transaction was any thing else than one in the ordinary progress of the company's business; and, therefore, I cannot conclude the conveyances were contrary to the Act; although my impression would be that the mere form of a mortgage would not save the transaction, if evidently adopted as a means of getting round the statute.

I see nothing to convince me, that the Steam Boat company intended to stop, when they gave the mortgages, or that they were so understood by those with whom they

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*were dealing. On the contrary, the evidence impresses me with the belief, that their intention was to go on and do a successful business, until they could sell out upon good terms; and that the deeds were not executed or accepted as a payment and satisfaction, but only as a security for the debts; and, therefore, I cannot pronounce them void, under the Act of Georgia.

The deeds operated, under the laws of Georgia, to vest the title in the mortgagees, subject to a right to redeem, in the same manner as mortgages of personalty operate in this State. And, (if the plaintiffs really need the remedy,) the mortgages must be allowed to prevail over the attachments here, and to give a preference, in the distribution of the fund in court, which arose from the sale of the mortgaged property. This is a lien created by the act of the debtor, and must be noticed in the distribution of the proceeds of the property bound by it; and does not stand upon the footing of an assign-

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ment by operation of law, under a *commis-

[1] The following extract is from the opinion of the late Judge Nott, in the case of the BANK OF GEORGIA v. HENRY SCHULTZ, touching the construction of the Georgia statute, on this point:

"The 1st ground which I shall notice, as relied on by the appellants for the reversal of the decree, is, that the mortgage under which the complainants claim is void by an Act of Georgia, passed the 15th day of December, 1818.[2] The title of the Act is, "An Act to prevent assignments or transfers of property to a particular portion of creditors, to the exclusion and injury of other creditors, of persons who fail in trade, or who are indebted at the time of such assignment or transfer." The preamble of the Act is, "Whereas, a practice of selecting particular creditors, by assignments and transfers of property, made by persons indebted, and thereby excluding or defrauding other bona fide creditors of their just claims on the estate of insolvent debtors, is contrary to the first principles of equity and justice," &c. The enacting clause provides that any person or persons unable to pay his, her or their debts, who shall at any time hereafter make any assignment or transfer of real or personal property, stock in trade, debts, dues, or demands, in trust to any person or persons, in satisfaction or payment of any debt or demand, or in part thereof, for the use or benefit of his, her, or their creditor or creditors, or for the use or benefit of any other person or persons, by which any creditor of such debtor shall or may be excluded

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*from an equal share or portion of the estate so assigned or transferred, such assignment or transfer, deed, or conveyance, shall be null and void, and considered, in law and equity, as fraudulent against creditors: Provided, that nothing contained in this Act shall prevent any person or persons in debt, from bona fide and absolutely selling and disposing of any part or the whole of his, her, or their estate, so the same be free from any trust for the benefit of the seller, or any person or persons appointed by him, her, or them."

"Two questions now arise under the construction of this Act. 1st. Whether it embraces such transfers as that now under consideration? 2d. Whether McKinny, at the time of making the mortgage, came within the description of persons contemplated by the Act? In order to determine the first question, we must resort to the rule laid down for the construction of all statutes; to look to the old law, to ascertain the mischief complained of, and the remedy intended to be provided. Of these matters we can know nothing, except what appears upon the face of the Act itself. Those who are acquainted with the recent history of Georgia may, perhaps, derive instruction from particular circumstances existing at the time. But this court cannot look beyond the provisions of the Act for its construction. Neither does it appear to me necessary or proper that we should. The mischief is distinctly set out in the preamble of the Act, and the remedy is as distinctly declared in its enacting clause. The

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manifest object of the Act throughout, *is to prevent a debtor "who is unable to pay his debts," from making any transfer of his property to one or more of his creditors in exclusion of the rest; and to effect an equal distribution among all the creditors. Now there can be no doubt that the McKinneys were indebted to the Bank of Georgia, the sum of $40,000, at the time this mortgage was made. There is as little doubt that it was made to secure to the bank that sum, to the exclusion of the other creditors, if it should turn out that the rest must necessarily be excluded by a failure of funds to pay all their creditors. The Act does not speak of any particular kind of assignment or transfer, but extends to all, of whatsoever description they may be, the tendency, or rather, the effect of which, shall be, to prevent an equal distribution of all the effects among the creditors. I think, therefore, that the terms of the Act are broad enough to embrace the transfer now under consideration; and I am also of opinion, that the spirit of it requires that it should receive that construction. Indeed, it appears to me, that by a contrary construction, the object of the Act would be entirely defeated. If the Act can be evaded by apportioning out the property among a few favorite creditors, by way of mortgage, to the exclusion of the rest, then, I think, the State of Georgia has legislated in vain on the subject. I do not put it on the ground of fraud, but upon the positive provisions of the Act, the policy of which is too plain to be mistaken. I am of opinion, therefore, that the mortgage, so far as it relates to the debt of $40,000, must be considered as void."

[2] Prince's Digest, page 164.

sion of bankruptcy, in a foreign State, which operates merely as a power to receive, and vests no legal interest.

But do the plaintiffs in the bill need the remedy? They have found the property, of which they allowed the custody to the debtor, in the hands of the law. They come to disturb this possession upon equitable grounds, and they show a case in which they have another security, to which they may resort. The defendants insist that they must exhaust this remedy against the indorsers. The ground taken by the defendants is, that the fund in court is a security common to both parties, and that, upon a principle familiar to this court, the plaintiffs must resort to their exclusive remedy against the indorsers, leaving the common fund to the defendants. There is no doubt of the soundness of the principle alluded to, but is it applicable to this case? The indorsers had the promise of a mortgage. This is one equitable considera-

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tion. Again—they *were indorsers upon accommodation paper, and stand as mere sureties to the Steam Boat company. Their right to be protected, presents an equity as strong as that of the defendants; and the court cannot, for the benefit of the latter, turn the plaintiffs round to a remedy which must have the effect to sacrifice them.

The case, however, discloses the fact that there is other mortgaged property to which the plaintiffs may resort. Until this is exhausted, they will not be allowed to disappoint the defendants, who have no security but the fund in court. They must show what has become of the other mortgaged property, and what portion of it has been lost to them, before they can take hold of this fund.

I shall retain the bill, and direct an inquiry into the value and amount of the other mortgaged property, allowing the plaintiffs, of course, a deduction for any portion of it that they can show to have been lost to them, without fault on their part. It is also referred to the commissioner, to take an account of all the debts which have been, or may be proved before him, by a day to be fixed by him, by advertisement for all the creditors of the Steam Boat company to come in and establish their demands; that he report the nature, extent, and priority of the different claims; and that he take an account of all matters of account, necessary for a final distribution of the fund in court, and report a scheme for the distribution thereof. A final order of distribution will be made on the coming in of the report. The costs of these suits, and of the attachments, to be paid out of the fund.

From the foregoing decree the defendants (the attaching creditors,) appealed, and now moved to reform the same, on the following grounds:

1. Because, under the provisions of the Act of the Legislature of Georgia, mentioned in the decree, the mortgages in question are null and void as to the attaching creditors.

2. Because the question, viz: whether the Savannah and Augusta Steam Boat company was or was not able to pay its debts at the time the mortgages mentioned in the decree were executed, is a question of fact depend-

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ing on *the weight of the evidence, and ought to be submitted to a jury.

3. Because the mortgage creditors, under the peculiar circumstances of this case, ought to be required to exhaust their other securities, to wit, their remedy against the indorsers, before they are allowed to have recourse to the fund in dispute.

Patterson, for the motion.

According to the English Bankrupt laws, a mortgage of all the debtor's property, is an act of bankruptcy.

The indorsers are the President and Directors of the company, and they agree amongst themselves, that they will mortgage to themselves, to secure them as indorsers.

The whole machinery shows that the mortgagees intended to secure themselves at the expense of the other creditors.

Mr. Patterson cited 2 Story's Equity, 498–9; Angel and Ames, on Corporations, 200; 15 Johnson's Rep. 358; 2 Cowen, 665–78; 3 Id. 662; 7 Wend. 31.

Cohen, contra.

As to collateral securities, cited 1 Johnson Ch. Rep. 119; 14 Peters, 19; 7 Cranch, 69.

As to a preference claimed for the captain of the boat, 11 Peters, 175.

As to the question of fact, whether such a case of insolvency was made out as to bring the mortgages within the Georgia statute, cited 2 McCord Ch. 15; 2 Id. 59, 71, 73, et seq.

The fact that the testimony is involved in doubt, furnishes no ground to reverse the Chancellor's decree; cited 1 Bailey's Eq. 510.

As to the term insolvency, 3 Cranch, 73–91; 1 Peters, 386–439.

On the question whether mortgages were embraced within the statute in question, Mr. C. contended that to maintain the position that they were, it was necessary to prove that a mortgage was a deed, or assignment in trust; and further, that it is the payment of a debt. On this point, cited 1 Jac. and Walk. 177.

The assignment or transfer contemplated by the statute, he contended, was the ordinary assignment by which an insolvent debtor transfers his property to assignees, in

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trust, for the benefit *of his creditors, who are to receive the same in payment or satisfaction of their debts. Cited 6 Greenleaf, 388.

Can these mortgages be sustained under

the proviso of the statute? Cited 1 McCord Ch. 486; 1 Tread. Con. Rep. 151.

As to the distribution of the fund in court, cited 5 Cranch, 289-298.

The indorsers were promised mortgages when these debts were created, to protect them from loss; and will not equity consider that as done, which should have been done? Cited 1 Bailey's Eq. 223.

On the question whether an issue should be ordered, to try the fact of insolvency by a jury, cited 1 Hill Ch. 442; 2 Id. 515-525.

Bailey, same side, cited 1 Story's Eq. 595, 589-92.

Bauskett, in reply, cited 4 Paige Ch. Rep. 23; 5 Cowen, 547.

Curia, per JOHNSON, Ch. I concur entirely in the decree of the circuit court, and but for some diversity of opinion amongst the members of this court, I should not have felt called on to say more.

The question whether an ordinary mortgage is embraced in the words, "any assignment or transfer," found in the statute of Georgia, came directly before the Court of Appeals of this State, in the case of the Bank of Georgia against Henry Schultz, at January term, 1827, in which it was held that mortgages are embraced by them, and in the absence of any authoritative decision of the courts of Georgia upon the subject, the defendants are entitled to the full benefit of that decision.

Without intending to enter into a minute analysis of this statute, it may be remarked that from what may be collected from its title, the preamble and the enactment, the Legislature intended to prohibit any one who was "unable to pay his debts," from securing any portion of his effects to himself by "assignment or transfer," and from giving to one creditor a preference over another, upon the principle that in justice all were equally entitled; and notwithstanding some grave objections opposed to it, I am disposed to concede that upon a strict construction of the statute, if at the time of the assignment or

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transfer the debtor was in truth *unable to pay all his debts, the assignment or transfer would be void, although the fact was unknown both to the debtor and the assignee or transferee; but it is very clear that the fact of the inability of the debtor to pay his debts, must be referred to the time of the contract, and cannot be made to depend on subsequent casualties, to which the fortunes of all men are exposed. It is not so provided in the statute, and a different construction would render all securities by liens on property dependant on the ultimate solvency of the debtor. I take it, therefore, that it is incumbent on the party seeking to avoid the contract or assignment, to shew that at the time the debtor was unable to pay his debts.

The questions then arise, as to the time when the contract between the Savannah and Augusta Steam Boat company, and the Central Rail Road Banking company of Georgia, was entered into, and whether the former were or were not at the time unable to pay their debts.

I collect from the pleadings that the debt to secure which the mortgage was given, was contracted in 1838, and at that time there was an agreement on the part of the Steam Boat company to secure their indorsers by a mortgage of their effects; that, in itself, created an equitable lien, and the fact of the inability of the company to pay their debts, ought, I think, to be referred to that time, for the subsequent execution of the mortgage in 1840, was but a fulfilment of that agreement. The mortgage being in effect a security to the indorsers, and, moreover, avowedly intended for that purpose, and of the fact of insolvency at that time, there is no evidence at all. But if it be referred to the time of the mortgage, it was incumbent on the party affirming it, to prove the insolvency of the Steam Boat company; and to shew that such was not the fact, I need only refer to the evidence, and the conclusion deduced from it by the Chancellor who tried the cause, and that in all doubtful questions has always been regarded by this court as decisive of it. It is put on the footing of the verdict of a jury in a law court, with regard to which the rule is, that if there is evidence on both sides, the court will not weigh it in an appeal, unless there is a great preponderance on one side, but suffer the verdict to stand;

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and it ought to *be remembered, too, that if the claims of the attaching creditors are sustained, it works a forfeiture of the security which the indorsers and the Rail Road and Banking company have obtained by their vigilance, amounting in effect to a legal, if not an actual fraud, which never can be allowed but on clear and unequivocal proof. Here all the arguments on the part of the attaching creditors are based on the supposition that the evidence is equivocal.

It is very clear that this court has the power to direct an issue at law as well as the circuit court, of which we have numerous examples. The object is to inform the conscience of the court as to the truth of the facts involved in the issue. During the many years that I presided in the law court, the uniform course of the Constitutional Court, on appeals in cases involving doubtful questions of fact, was to refer it to the Judge who presided on the circuit, to say whether in his judgment the verdict was or was not opposed to the decided preponderance of evidence, and to grant or refuse a new trial accordingly; and I think the same rule ought to prevail in this court.

I know that the general usage has been in conformity with it. For the most part, the

Chancellor, who has derived his information from original sources, is better able to judge of the truth of facts, than those who obtain the knowledge of them through a second hand. I do not intend to be understood as laying this down as an imperative rule, for that would cut off all consideration of matters of fact, nor was it so understood in the Law Court. All that I mean to say is, that it ought, like the verdict of a jury, to prevail, unless there is a decided preponderance of evidence opposed to the opinion of the Chancellor; and that I have already shewn is not the case here.

This brings me to the consideration of the last ground of this appeal, which, in effect, insists that under the peculiar circumstances of the case, the mortgage creditors ought to be compelled to resort to and exhaust their remedy against the indorsers, before they should touch the fund in court.

Judging from what appears on the face of the decree, this would seem to be rather a novel proposition. The well established doctrine of this court is, that the surety is entitled to the benefit of all the securities which

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the *creditor obtains from the debtor for the payment of the debt, and that the creditor must exhaust these before he can call on the surety for payment; and this is in the teeth of the proposition stated in this ground of appeal. But under this covert, it was stated in the argument, and for any thing that appears the fact may be so, although it is not in proof, that the endorsers of the several notes were the directors of the Steam Boat company, and that it was they who contracted with themselves to be indemnified by a mortgage against their liabilities as indorsers; and hence it is attempted to be inferred that it was a fraudulent device on their part to gain a precedence over other creditors. There is, upon a superficial view, something very startling in this, if the facts be true, and they probably are as to some, perhaps all, of the indorsers; but the alarm will cease when we take into consideration the motives and influences which operate upon men to lend their credit to assist individuals or corporations to pursue their enterprises. The directors of a corporation ought to be, and generally are, better informed as to its liabilities and resources than any one else, and if they, having the means, refuse to aid them in their operations, by the loan of money or credit, no one else will be found to do it; and I need not add, what is known to all having any experience, that an overweening confidence in their capacity to manage the affairs of a corporation, and a mistaken view of the state of its finances, has often involved the stockholders, and especially the directors, in distress and ruin. No man likes to give up an enterprize in which he has embarked, until he is satisfied that it cannot succeed, and this feeling is strengthened by the numbers that are embarked in it. Few are willing to recede, whilst there are any to persevere. Now there is nothing, either in law or equity, which forbids a member, or even a director, of a corporation, from contracting with it, and like any other individual, he has a right to prescribe his own terms, which the corporation are at liberty to accept or reject, and when the contract is concluded, he stands in the same relation to the other creditors of the corporation, as any other individual would under the same circumstances. When the question of priority

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arises, it must depend on the bona fides *of the transaction, fraud or no fraud. If by greater diligence, and without fraud, he has fairly gained an advantage over the other creditors, he is entitled to retain it; and I cannot, from the evidence in this case, detect the slightest ground of suspicion that there was any fraud on the part of the indorsers, in obtaining the mortgage to secure the debt of the Steam Boat company.

It is objected on behalf of the attaching creditors that the indorsers ought to have been made parties, and certainly the general rule is, that all persons having an interest in the subject matter in controversy, which will be affected by the judgment of the court, ought to be made parties.

It would be a sufficient answer to this objection, that it was not raised by the pleadings, nor is it found in the grounds of appeal, and comes from a party who might have made them parties, if they had thought proper. In addition to this, I cannot perceive how the attaching creditors are interested that the indorsers should be made parties. They are represented by the Rail Road and Banking company, and it is their interest that the company should exhaust their remedy against the principal debtor before they resort to them, (the indorsers) and the court would doubtless compel the company to do so, on the application of the indorsers; but they have not sought to come in for that purpose, and for myself, I cannot see what benefit or advantage the attaching creditors would derive from it, or in what it would aid their defence.

I am, therefore, of opinion, that the decree of the circuit court ought to be affirmed and the appeal dismissed, and it is so ordered.

JOHNSTON, Chancellor, concurred.

Speers, Eq. *564

*MIDDLETON W. COBB v. WM. BROWN et al.

(Columbia. May Term, 1844.)

1. A testator amongst other things directed that a specific sum of money should be raised by a sale of a portion of his estate, and bequeathed it to certain persons in trust, for them or the survivor of them to put the fund at interest, and apply the interest to the support of one of his daughters during her life, and after her death, to be equally divided among her brothers and sisters. The acting trustee having died, defendant was appointed in his stead, and continued to act until the death of the daughter thus provided for, in 1842. Testator left several children at the time of his death, one of whom, a son, died some time after the decease of testator, intestate and a minor, but before the death of the daughter for whom defendant acted as trustee, no administration being taken out on his estate. Complainant intermarried with a daughter of testator in 1833, who died in 1835, leaving an infant son who survived his mother a few days. Complainant claimed a distributive share of the trust fund, as sole heir of his deceased son, who was entitled to a share in right of his deceased mother, as well as her portion of the share in said fund of the deceased brother.

[2. *Descent and Distribution* ⟸17.]

By the terms of testator's will, the remainder being given to the brothers and sisters of the daughter for whose benefit the trust was created, at the expiration of her life, without any contingency, a distributive share of it vested in complainant's wife; consequently by her death and that of her only child, her right was transmitted to complainant.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 51, 52; Dec. Dig. ⟸17.]

[3. *Husband and Wife* ⟸10.]

Administration on the estate of the child *held* unnecessary. But as it did not appear from the pleadings whether or not complainant's wife was a minor at the time of her marriage, and as she may have been an adult, having contracted debts before her marriage, from which the husband was exonerated by her death, and which survived against her representative, *held* that administration on her estate was necessary.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 42; Dec. Dig. ⟸10.]

[4. *Husband and Wife* ⟸8.]

The share of the deceased brother, not having been distributed, but still remaining in the hands of the trustee, complainant held entitled to a distributive share of this share in the trust fund.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 26; Dec. Dig. ⟸8.]

[5. *Executors and Administrators* ⟸3.]

The Statute of Limitations held not to dispense with the necessity of administration on the estate of complainant's wife, as her debts, if any, contracted before her marriage, might not have been parol debts, or been due over four years.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 7; Dec. Dig. ⟸3.]

[6. *Executors and Administrators* ⟸3.]

The exception allowed in cases where the intestate dies in infancy, not to be extended, because even infants may be liable for necessaries.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1, 3–14½, 1782; Dec. Dig. ⟸3.]

George Leake executed his will 23d Oct. 1819, and shortly thereafter departed this

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life; among other things, *the said testator provided that the sum of $1500 should be raised by a sale of a portion of his estate, and bequeathed the same to Jeremiah Leake, Samuel Young and Abner Young, in trust to them, or the survivor of them, to put the said $1500 to interest, and apply the interest arising therefrom, to the support of his daughter, Anna Leake, during her life, and after her death to be equally divided between her brothers and sisters. Abner Young acted as trustee for the said Anna, and after his death, the defendant, Wm. Brown, was substituted in his place, by order of the Court of Equity, in 1834, and has had the management of said fund ever since, up to the death of the said Anna, in 1842. The said testator left a widow and the following children surviving him, to wit:—Samuel, Jinny, wife of the said Wm. Brown, Wm. Leake, James Leake, (who died after his father, while a minor, intestate, and no administration was ever taken out on his estate,) Margaret Leake, Alzira, who intermarried with Adam Bradock, and Malinda, who intermarried with the complainant in 1833, and died in 1835, leaving James W. Cobb, the only issue of the marriage, who was born 15th January, 1835, and died 26th January, 1835, having survived his mother only a few days. The complainant called on the said trustee, since the death of the said Anna, for his distributive share of said trust fund, as the sole heir of his deceased son, James W. Cobb, who was entitled to his said deceased mother's share thereof, as well as her portion of the said James Leake's share of the said $1500; with which request the said Brown refused to comply.

The complainant claimed in his bill, one-seventh part of said fund, the share of his wife, and one-seventh part of James Leake's share of the same, both in the character of sole heir to his son. The bill was filed in 1843. It should also be stated, that James Leake died before Mrs. Cobb.

The case was heard by his Honor, Chancellor Johnston, Laurens, June and July Term, 1843.

Johnston, Ch. The case is very confusedly stated in the pleadings, but may be gathered

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from them; and I refer *to them for the facts and circumstances, and the points raised in this suit.

It appears that the share of James Leake has been already distributed; and as this bill does not allege any error in the distribu-

tion, and particularly as it does not specify the error, if any existed, nor call for a review and correction of it, the distribution will not be disturbed. The present acting representative of the estate is not responsible for the share of James, which never came to his hands as such representative: and if there has been any improper administration of it, the former representative, in whose hands it was, is responsible for that.

The principal question in this case is, whether a distributive share of the remainder created in the fund given to Anna for life, vested in the wife of the plaintiff; and I think there is no reason to doubt it. This remainder is given in plain terms, to the brothers and sisters of Anna, at the expiration of her life, without any contingency. It follows from this, that by the death of plaintiff's wife, and that of their only child who survived her, the wife's right has been transmitted to the plaintiff.

It has been suggested that administration to the wife and child is necessary to entitle the plaintiff to recover this share. The point, with respect to the necessity of such administration upon the child's estate, has been decided. It has been held, that administration in such a case is unnecessary.

With regard to administration to the wife, I am of a different opinion. If it appeared from the pleadings that she was married to the plaintiff before attaining majority, then, I suppose, in conformity to the decision of which I have spoken, it might be concluded that her minority should repel the presumption of any liability for debts on his part, up to the time of her marriage, and that her coverture would rebut it afterwards. But for any thing that appears in the case, she may have been an adult, and may have contracted debts before her marriage, from which her husband is now exonerated by her death, and which survive against her representative.

It is ordered that leave be given to the

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plaintiff to take *out letters of administration to his deceased wife, or to make a party of any other person who may so administer: and upon this being done, and the pleadings amended by suggesting the fact, it is decreed that the defendant, Brown, come to an account before the commissioner with said administrator, according to the principles of the foregoing opinion. As the said defendant could not safely pay over the money without this litigation, and as the other parties have been made parties pro forma, and have created no costs or expense, it is further decreed that the costs of this suit be paid out of the said distributive share of plaintiff's wife, and deducted out of the recovery.

The complainant appealed from so much of the Chancellor's decree, as refuses to allow him any portion of the said James Leake's share of the $1500; and also from that part of said decree, which requires administration to be taken out on Mrs. Cobb's estate, and moved to reverse the same in those particulars, on the following grounds.

1. Because the complainant is entitled, as sole heir of his said son, to one-seventh part of James Leake's share of the $1500.

2. Because no administration is necessary on the estate of Mrs. Cobb.

Sullivan, for the appellant.

Irby, contra.

Curia, per JOHNSTON, Ch. It appears, by the admission endorsed on the brief, that the share of James Leake, in the $1500, has not been distributed, but is still in the hands of the trustee. This error in the circuit decree must, therefore, be corrected. The decree proceeds upon a principle that must entitle the plaintiff to a distributive share of this share, and the same will be taken into the account heretofore ordered. But with the correction of this error, the court must stop. We are of opinion that it was necessary that

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administration should be taken out *on Mrs. Cobb's estate; and for the reasons stated in the decree.

It is said that no administration can be necessary, because all the debts contracted by Mrs. Cobb, before marriage, must be now barred by the statute of limitations. If the statute is a ground for dispensing with administration, it can operate no further than the statute applies; and who is able to say that all the debts, if any, contracted by Mrs. Cobb before her marriage, are parol debts, or that all of them have been due over four years?

The regular course is, to take out administration. An exception has been allowed, in cases where the intestate died in infancy. This was going, perhaps, too far; because even infants may be liable for necessaries. It is not deemed proper to extend the exception.

It is ordered that the circuit decree be modified according to this opinion; and that the cause be remanded to the Circuit Court. The former order, as to costs, to stand, as the judgment of this court.

JOHNSON and DUNKIN, Chancellors, concurred.

Speers, Eq. *569

*POLLY FOSTER, Administratrix of HENRY FOSTER, Jun'r, v. JAMES K. MEANS, DORCAS McDOWELL, CYNTHIA BURROWS, and JAMES FOSTER.

(Columbia. May Term, 1844.)

[1. *Marriage* ⇐7.]

The authorities all agree that persons non compos mentis, or in the language of Chancellor Kent, those who have not the regular use

of the understanding sufficient to deal with discretion in the common affairs of life, are incapable of agreeing to any contract, and of course, to that of matrimony.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 25; Dec. Dig. ⟸7.]

[2. *Husband and Wife* ⟸29.]

The terms "non compos mentis," and "of unsound mind," mean the same thing, and have a determinate legal signification, importing not weakness of understanding, but a total deprivation of sense.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 47; Dec. Dig. ⟸29.]

[3. *Husband and Wife* ⟸29.]

The fact of soundness or unsoundness of mind does not depend on, nor can it be collected from, particular actions, but upon the general frame and habit of the mind.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 47; Dec. Dig. ⟸29.]

[4. *Husband and Wife* ⟸29.]

Where it is seen that the prevailing characteristic of the mind is the absence of the reasoning faculties, accompanied with only occasional manifestations of them, or where only in rare instances the reasoning powers can be detected at all, or where all the evidence tends to the conclusion that the individual is incapable of transacting the ordinary affairs of life, *held* that a marriage contract, under such circumstances, is null and void.

[Ed. Note.—Cited in Keys v. Norris, 6 Rich. Eq. 397; Bowers v. Bowers, 10 Rich. Eq. 554, 73 Am. Dec. 99.

For other cases, see Husband and Wife, Cent. Dig. § 47; Dec. Dig. ⟸29.]

Before Johnson, Ch., at Spartanburg, June, 1843, from whose decree the case will be fully understood.

Johnson, Ch. The late Henry Foster, sen'r., departed this life in 1821. By his last will and testament he devises and bequeaths as follows: "I give, bequeath, and devise, to my son, Henry Foster," (complainant's intestate,) "during his natural life, and at his death to the heirs of his body, lawfully begotten, the following property, viz: the one half of my land, of the lower end of my tract, to be divided according to quantity and quality, to be divided by my executors, hereinafter named, and three other persons, to be by them chosen; to be so divided, however, as to include the improvements and dwelling house where I now live; but not to have possession of the land or house, until the death of his mother, except she consents; also one negro boy, Bob, one horse and saddle, and five head of cattle."

By an addenda to the will, which bears the same date, and is subscribed by the same wit-

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nesses, and, I suppose, *was executed at the same time, he provides as follows, viz: "I do further will and direct, that all the property given, bequeathed, and devised, to my daughter Rachel Foster, and to my two sons, Henry and James, do vest and remain under the sole and entire control of my executors above named, during the several lives of my said children, and the profits arising therefrom to be appropriated to the use and behoof of my said children."

The executors both qualified, and assumed the execution of the will; and on the death of McDowell, the burthen of it devolved on the defendant, Means, and he is, of course, accountable for the personal estate bequeathed to the complainant's intestate.

Within the last ten years, (but at what precise time is not ascertained, nor is it material,) the complainant was married to her intestate, Henry Foster, jun'r., by a magistrate; she lived with him, as his wife, for several years, and then left him, without any cause that appeared at the hearing, unless indeed the circumstances hereinafter stated would have excused it. He died in 1841, without leaving issue, and administration of his estate was granted to the complainant. The defendant, James Means, retained possession of the estate devised and bequeathed to him by his father, under the authority of the addenda to the will, and the bill prays that he may account for the rents, income, and profits, during the time he has had it in possession, and for a portion of the corpus of the estate, between the complainant and the defendants, Dorcas McDowell, Cynthia Burrows, and James Foster, his sisters and brothers.

It was conceded in the argument, that the limitations over of the legacy to complainant's intestate, to the heirs of his body, was in the nature of a fee conditional at the common law, and that as he had died without issue, and had not alienated or changed the real estate, it reverted to the estate of the testator, and is distributable amongst his right heirs; but that the bequest as to the personalty was in legal effect absolute and unconditional, and is, of course, distributable amongst the heirs or next of kin of the intestate. The real and substantial ground of controversy is the fact charged in the answer of the defendant, Means, that Henry Foster, complainant's intestate "was from

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his birth to his *death of unsound mind, wholly incapable of managing his own affairs, and without sufficient capacity to form a matrimonial or other civil contract."

Marriage being regarded by our laws as merely a civil contract, no one can enter into it who has not the legal capacity to contract. "Consensus, non concubitus, facit nuptias," says Judge Blackstone, and, therefore, without a sufficient share of reason, no matrimonial contract can be valid; 1 Black. Com. 434–8; and according to Chancellor Kent, "all persons who have not the regular use of the understanding sufficient to deal with discretion in the common affairs of life, are incapable of agreeing to any contract, and of course, to that of marriage." 2d Kent Com. 656.

The extremes of mental imbecility and vigor are distinctly marked, but the point at which legal imbecility ends, and competent capacity begins, is often, as every lawyer must have experienced, a question of much difficulty, in the solution of which no rules can avail any thing, and is addressed entirely to experience and observation. The evidence in this cause brought down the history of the complainant's intestate, literally from his cradle to his grave, to which he descended at about forty-two years of age, and unlike ordinary cases involving the question of legal capacity of the twenty-four witnesses sworn, (about equal numbers on both sides,) the facts testified were much of the same character, and their conclusions very generally the same, all tending to shew that if he possessed the power of ratiocination at all, it was but in a degree removed from idiocy.

From his very infancy, he exhibited great imbecility of mind, and without entering into a detail of all the circumstances stated by the witnesses, a mere outline will be sufficient to demonstrate that it was incapable of cultivation or improvement.

When a boy, he was put to school by his father, but was incapable of learning any thing beyond the alphabet, and that imperfectly; nor did he then or elsewhere participate in any of the amusements of children of his age; rarely or never spoke, unless spoken to, and then answered in monosyllables. At the age of thirty-two he was again put to school by his mother, his father

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being then dead, and all *that he attained in nine or ten months constant attention was still an imperfect knowledge of the alphabet, and an attempt at spelling words of two syllables. His teacher, Mr. Joseph Foster, a stranger to his family, endeavored to instruct him to read the New Testament, but was unable to teach him to read, intelligibly, the most commonplace sentences understandingly. He often miscalled the words and appeared ignorant of the letters which composed them; and his teacher was under the necessity of pointing his finger to keep him in the line which he was attempting to read. He seemed to know that there was value in money, and was tenacious of it, and could distinguish between a dollar and a six and a quarter cent piece, but had no knowledge of the relative value of the intermediate small coins, nor had he any knowledge of the relative value of larger sums. A neighbor, in jest, offered him $75 for his horse, which he refused to take; he then offered him $95, which he also declined, and then $25, which although he refused to accept, he supposed more than either of the preceding offers; nor did he have a more just estimate of the relative value of property. Another neighbor offered to exchange with him a horse worth about $60, for the negro, Bob, bequeathed to him by his father, worth then, in the opinion of the witness, about $700, provided defendant, Means, would give him a bill of sale of Bob. This was mere matter of amusement, but the intestate took it in earnest and importuned Means to make the bill of sale. He was accustomed to purchase small articles of necessity in the stores in the neighborhood, and some of the witnesses thought that he had judgment enough to form some estimate of their value, but I do not know how that can be re reconciled to his ignorance of the value of even small coins. All the witnesses concur, however, in saying that he was incapable of forming a just estimate of the value of a horse or a negro. His habit of cheapening goods at the stores, and complaining of high prices, was accounted as evidence of his power of reason and comparison, but that might have been a mere imitation of what he had heard others say, and I incline to think so, as it was a general habit. He had, however, occasionally, some glimmerings of reason, as for example, he appeared much distressed when the complain-

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ant left him, *but not long after, he was perfectly reconciled to it, and remarked that, if he had known the troubles incident to a married life, he never would have got married. On one occasion a merchant refused to let him have a pair of shoes on credit, and he requested a friend to purchase them for him. He did so, and the intestate afterwards paid him the money. Before his marriage he had lived with his mother; afterwards, a house was built, and a farm of some three or four acres was cleared for him. He wanted sufficient judgment to make the fence or lay off the ground and plant his corn, the principal crop; but when that was done, he could plough it well enough. He kept some live stock, to which he was attentive, particularly his horse, to which he was partial. Numerous other examples of his want of understanding and of his possessing half reasoning powers, were given in the evidence, but the foregoing are fair specimens, and it is utterly impossible that he could have formed any just conception of the moral duties and obligations incident to the married state. He was, probably, prompted to it by animal instinct alone, as his physical powers were considerable; and although no practices on him are disclosed in the evidence, the circumstances leave but too much reason to suppose that the complainant availed herself of his mental incapacity to involve him in a marriage with her. The small fortune bequeathed to him by his father, which was considerably increased on the subsequent death of his mother, might have been a motive with a woman in very humble circumstances. They both lived in the same neighborhood, and he was well known to her and her father and friends, and the suspicion of

unfair dealing has in support of it the additional fact that the marriage was solemnized without the knowledge of any of the family or friends of the intestate.

The prayer of the bill is that defendant, Means, may account for the rents, issues and profits of the trust estate, and that a sale or partition be made of the corpus of the estates, both real and personal. The complainant is, of course, entitled to an account, but as she has no personal interest in the corpus, and as it is not pretended that it will be necessary for the payment of debts, I shall

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make no or*der for the sale or partition, until the report on the account is made.

I have had some difficulty about the costs. I have, however, concluded that the complainant ought to pay the costs of the contest in relation to the validity of her marriage with her intestate. From the view I have taken of it, her claims are utterly without foundation, and the difficulty in which it has involved her, in all probability, arose out of her own indiscretion. She ought to pay the costs of the answer of Dorcas McDowell and Cynthia Burrows, whom it was unnecessary to make parties to a bill against defendant, Means, for an account.

It is therefore ordered and decreed, that the complainant do pay the costs of the attendance and summoning the witnesses to give evidence as to the fact and validity of her marriage with her intestate, and of the trial thereof, and of the answer of Dorcas McDowell and Cynthia Burrows; and that defendant, Means, do pay out of the trust estate in his hands all the other costs; and it is further ordered, that defendant, Means, do account for the rents, issues, income, and profits of the estate, real and personal, devised and bequeathed to him by the testator, Henry Foster, sen. in trust for the use of the intestate, Henry Foster, jun., during the time he has had the possession and management of it.

Complainant appealed, on the ground that the decree is contrary to law and the evidence.

Henry, for complainant. Leitner, contra; Whitner, same side.

Curia, per JOHNSON, Ch. I have been deeply impressed with the delicacy and importance of the question involved in this case, and after the best consideration I have been able to bestow upon it, my conclusion is, that the decree of the circuit court ought to be affirmed.

The authorities all agree that persons non compos mentis, or in the language of Chancellor Kent, those who have not the regular use of the understanding sufficient to deal with discretion in the common affairs

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of life, are incapable *of agreeing to any contract, and of course, to that of matrimony; and in Ex parte Barnsby, 3 Atk. 167, Lord Hardwick says that "the terms non compos mentis," and "of unsound mind," mean the same thing, and have a determinate legal signification, importing not weakness of understanding, but a total deprivation of sense." These definitions are as precise and clear as could well be given on the subject, and are alike applicable to idiots and lunatics. The great difficulty is in their application to particular cases, for such is the diversity and inconsistency of actions which mark and distinguish the characteristics of the minds of different men, sane and insane, that no rule could be framed to meet them all. Collinson, in his treatise on Idiots, vol. 1, page 43, (note) relates, on the authority of Brydal, who had written on the same subject, several amusing anecdotes, exhibiting particular instances of astonishing acuteness and profoundness of judgment manifested on these occasions by natural fools and idiots, one of whom he describes as the most notorious idiot in all Paris, from whence he deduces the conclusion, that sanity or insanity cannot depend upon, or be collected from, particular actions, unless every part of a person's behavior constituted unequivocal evidence of his habit of mind.

My much valued friend, the late Dr. James Davis, was, for many years, the physician of the Lunatic Asylum in this place, and I have often heard him speak of the astuteness and cunning manifested by the most desperate and hopeless patients of the institution, and such has been the result of my own limited observations in regard to unfortunate persons in this condition.

The case of the Countess of Portsmouth v. the Earl of Portsmouth, 1 Haggard Eccle. Rep. 355, found in 3 Eng. Ecc. Rep. 155, will, in some degree, illustrate this. That, like this, involved the validity of the marriage between the parties, brought into question on the ground of the incapacity of the defendant to enter into the contract of marriage, and the exercise of undue and improper influence over him to obtain the marriage. And Sir John Nichols remarks that in relation to the incapacity or unsoundness of mind of the Earl, the case set up was of a mixed nature, not absolute idiocy, but weakness of

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understanding; not *continued insanity, but delusions and irrationality on particular subjects, a mixture of both by no means uncommon. The evidence shews that the incapacity of the Earl was natural and not accidental. In his youth he was capable of receiving instruction and improvement, and could learn arithmetic and the languages. In 1790, he joined his father in suffering a common recovery, and in making a new family settlement to provide for younger children. The marriage took place in 1799. In 1802, he was examined as a witness in court, and it

was a matter of surprise and common talk that he did so well. He behaved with ordinary propriety at parties, and in the company of persons who commanded his respect. Was capable of making a few observations on the state of the weather, or on horses and gaming; attended the public meetings, races and country balls; but on being left to himself and unrestrained, he indulged in practices so irrational and unnatural, as to be, in some instances, bordering on idiocy, and in others to be attended with actual delusion —a perversion of mind, a deranged imagination, a fancy and belief of the existence of things which no rational being endowed with the powers of reasoning could believe to exist. He was carried to the house of one Hanson, who was the confidential solicitor of the family, and one of the trustees, who, within a week, obtained from him a settlement, and married him to one of his daughters, without the knowledge of his family or friends, and the whole court pronounced that the marriage was null and void, he being at the time not of sound mind sufficient to enter into such a contract; and also, that the marriage was effected by fraud and circumvention. That case illustrates very fully the rule laid down by Collinson, that the fact of soundness of mind does not depend on, nor can it be collected from, particular actions, but upon the general frame and habit of the mind.

On looking through the whole evidence in the case under consideration, which will be found attached to the decree of the circuit court, it will be seen that the prevailing characteristic of the intestate's mind was the absence of the reasoning faculties, and although it occasionally manifested itself in particular circumstances, as in the instance

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*of his wife's separating from him, and the philosophic manner in which he reconciled himself to it, it may be, that it was the result of correct reasoning, but it is not improbable that it had its origin in the consolations offered to him by his friends, the memory of which he retained, rather than in his own reflections. However that may be, it is only in rare instances that we can detect any reasoning powers at all, and all the evidence tends to the conclusion that he was incapable of transacting the ordinary affairs of life; and as remarked in the circuit court decree, I have no doubt but that the complainant availed herself of this imbecility of mind, and the natural instincts which might prompt him to marry, either to induce him to propose marriage, or to propose it herself, with the expectation of securing his property to herself; there could have been no other motive on her part, to enter into such a contract with such a man.

I am, therefore, of opinion, that the appeal should be dismissed, and the decree of the circuit court affirmed, and that is the opinion of this court. Appeal dismissed.

DUNKIN, Chancellor, concurred.

IN THE COURT OF ERRORS.

MAY TERM, 1844.

JUDGES AND CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
" J. S. RICHARDSON,
" J. J. EVANS,
" J. JOHNSTON,
" J. B. O'NEALL,
" A. P. BUTLER,
" B. F. DUNKIN,
" D. L. WARDLAW,
" EDWARD FROST.

CHANCELLOR HARPER absent from indisposition.

*H. W. RICE ads. A. W. BURNETT, Trustee.

(Columbia. May Term, 1844.)

[1, 2. *Husband and Wife* ⟸31.]

By the provisions of a marriage settlement, the real and personal estate of the intended wife was vested in a trustee, to be held for her until the marriage, "and from and immediately after the solemnization thereof, in trust to permit" the husband and wife "to have, use and possess" the said property, "for and during their joint lives, and from and after the death of either, then to permit the survivor to use and possess the said property, during his or her natural life," with contingent remainders over; and it was provided, that the real and personal estate might be altered, sold or exchanged, with the joint consent, in writing, of

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the trustee and cestui *que trusts, provided the proceeds were vested in other property, to be held subject to the same trusts.

The legal title to the real estate, remained in the trustee.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 188; Dec. Dig. ⟸31.]

[3. *Husband and Wife* ⟸31.]

Held, also, that the legal title to the personalty, continued in the trustee, and that the equitable interest of the husband in the same, was not liable for his debts under an execution at law: the proper remedy being in the Court of Equity.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 188; Dec. Dig. ⟸31.]

[4. *Trusts* ⟸151.]

This case, *held* not to come within the provisions of the 10th sec. of the Statute of Frauds.

[Ed. Note.—Cited in Taylor v. Wilson, 8 Rich. 286; Porcher v. Gist, Rich. Eq. Cas. 209; Jones v. Fort, Townsend & Mendenhall, 1 Rich. Eq. 52; Bush v. Bush, 1 Strob. Eq. 379; Rivers v. Thayer, 7 Rich. Eq. 166; Wylie v. White, 10 Rich. Eq. 299; Creighton v. Pringle, 3 S. C. 99.

For other cases, see Trusts, Cent. Dig. §§ 195, 195½, 197; Dec. Dig. ⟸151.]

[5. *Trusts* ⟸131.]

Neither the Statute of Uses, nor the 10th sec. of the Statute of Frauds, embrace personal property.

[Ed. Note.—Cited in Bristow v. McCall, 16 S. C. 549.

For other cases, see Trusts, Cent. Dig. § 175; Dec. Dig. ⟸131.]

[6. *Trusts* ⟸151.]

All the legal estate is vested in the trustee for legal purposes. If the deed be not bona fide, it may be impeached for fraud, either at common law, or by the statute of Elizabeth. If the instrument be a marriage settlement, and is not recorded, so as to prevent misconception from the ostensible ownership of the cestui que use, it becomes obnoxious to the provisions of our own statutes. But so long as the trust subsists, any equitable interest in the cestui que trust, can be reached only through the appropriate tribunals, unless the deed itself violates some principle of law, or wants some of the formalities prescribed by law.

[Ed. Note.—Cited in Jones v. Fort, Townsend & Mendenhall, 1 Rich. Eq. 51; Creighton v. Pringle, 3 S. C. 100.

For other cases, see Trusts, Cent. Dig. §§ 195, 195½, 197; Dec. Dig. ⟸151.]

[7. *Husband and Wife* ⟸31.]

Deeds of this character should be construed according to their plain intent and meaning. The legal estate should continue in the person to whom it is transferred, until the property is to be delivered to those for whom an absolute estate is provided. If those who are entitled to the intermediate use for life, or years, should attempt to remove or destroy the property, there exists no good reason why he, to whom the legal estate was transferred, and, probably, in reference to these very contingencies, should not have the authority promptly to interpose,

assert his legal right, and prevent the destruction of the trust property. If, on the other hand, those entitled to the equitable use for life, or any other equitable interest, are indebted, their creditors should resort to the appropriate forum.

[Ed. Note.—Cited in Harley v. Platts, 6 Rich. 315; Bristow v. McCall, 16 S. C. 550.

For other cases, see Husband and Wife, Cent. Dig. §§ 178–195, 883, 884; Dec. Dig. ⊂⊃31.]

Watson, trustee, v. Pitts, 2 McMullan, 298, and Jones v. Cole, 2 Bailey, 330, cited and approved. Porcher v. Gist [Rich. Eq. Cas. 209] (Charleston, 1832,) and Pringle v. Allen, 1 Hill. Eq. 135, reviewed and examined.

In Pyron v. Mood, 2 McMullan, 281, and Ford, trustee, v. Caldwell, 3 Hill, 248, the court were of opinion, that those decisions might be maintained; in the first, the title of the purchaser was unimpeachable, the trustee, with the consent of the cestui que trust, having clearly the power to sell; and in the latter case, the deed was a gross fraud upon creditors, and void by the common law. But that they could not be safely rested on the principles therein assumed.

[This case is also cited and approved in Raines v. Woodward, 4 Rich. Eq. 407.]

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*Before O'Neall, J., Colleton, Spring Term, 1842.

This cause, though coming up from the Court of Law, it is deemed more appropriate to insert here.

This was an action of trespass, for taking and carrying away a slave, (Simon.) The declaration sets out the title to the slave, Simon, in the following words, to wit:

"Which said slave was, among other lands, tenements, hereditaments, and personal goods and chattels, granted, bargained, sold and delivered, unto Malachi Ford, deceased, late trustee of the said Josiah and Mary W. Beck, (and as successor of whom, in trust, the plaintiff has been regularly appointed by the Honorable Court of Equity,) by the said Josiah and Mary W. Beck, formerly Mary W. Ford, on or about the ——— day of February, in the year of our Lord one thousand eight hundred and thirty-seven, in the manner and form following, to wit:—'Now this indenture witnesseth that, in consideration of the sum of three dollars, paid to the said Mary W. by Malachi Ford, the receipt whereof is hereby acknowledged, she, the said Mary W., by and with the consent of the said Josiah Beck, (testified by his being a party hereto, and executing these presents,) have granted, bargained, sold and delivered and released, and by these presents does grant, bargain, sell, release and deliver, unto Malachi Ford, his executors, administrators and assigns, all that plantation or tract of land, situate, lying and being in St. Bartholomew's parish, in the district and State aforesaid, containing, in the whole, about three thousand acres, more or less, butting and bounding, to the north and west, on the Parker's Ferry road; to the east, on Pon Pon river; to the south, on lands of Mrs. Hort and others; to the north, on lands of Mr. Fraser; together with all and singular the rights and hereditaments and appurtenances thereto belonging. And also, the following negro slaves, to wit:—Beck, Simon, Cyrus, Doll, Lavinia, Pender, Lizzy, Libby, Hagar, Jacob, Sancho, Abram, Peter, Dandy, Amy, Dick, Rhemus, Peggy, James, Abraham, George, Doll, Judy, Charles, Amy, the above named Pender's child, and also Doll's infant child, Andrew, Adam, Silvery, Jane, Jim, Sally, Mary, Nelly, Andrew, Diana, Nancy, Myrah, and her infant child, John, Thomas, and Celia, together with the future issue and increase of the females; to have and to hold

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the land and negroes, *together with the future issue and increase of the females, to the said Malachi Ford, his heirs, executors, administrators and assigns; subject, nevertheless, to such uses and trusts as are hereinafter declared; in trust to and for the use and behoof of the said Mary, until the solemnization of the said marriage, and from and immediately after the solemnization thereof, in trust to permit the said Mary W. and Josiah Beck, to have, use and possess, the said plantation, and the said slaves, and the future issue and increase of the females, for and during their joint lives, and from and after the death of either then to permit the survivor to use and possess the said property, during his or her natural life, with remainder over to such child or children of this marriage, as shall be alive at the death of the survivor; provided, if any child or children, issue of the marriage, should die in the lifetime of either the said Mary W. Ford or Josiah Beck, leaving a child or children, such child or children shall take a share equal to that given to such child or children of this marriage, as shall be alive at the death of the survivor.'"

(The following additional clauses of the marriage settlement were not set out in the declaration, but as the original settlement will be carried to the Court of Appeals, they may be necessary to a full report of the case, and to a complete adjudication of the question.)

"It is covenanted and agreed, between the parties to this indenture, that if the said Josiah Beck, at his decease, having survived the said Mary W. Ford, shall leave no lawful issue, (or the children of such issue,) on the body of the said Mary W. Ford begotten, then all and singular the real and personal property aforesaid, with its increase, shall be equally divided into two parts, one part or moiety whereof shall be subject to such use or appointment as the said Josiah Beck shall, by deed or will, limit, direct and declare, of and concerning the same, and in default of such appointment, bequest or limitation, to and for his right heirs at law.

"It is further covenanted and agreed be-

tween the parties to this indenture, that if the said Mary W. Ford shall survive the said Josiah Beck, and there should be no issue of this marriage, then alive, that all trusts and limitations ceasing, then the above mentioned real and personal property shall vest, absolutely, in the said Mary W. Beck, and become her absolute property in fee simple.

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*"It is further covenanted and agreed, that the above mentioned real and personal property may be, at any time, altered, sold, or exchanged, with the joint consent, in writing, of the trustee and cestui que trusts; provided, that the proceeds of such alteration, sale or exchange, are vested in other property stock, to be held subject to the above mentioned trusts."

The defendant put in a plea in justification to the declaration, setting out that he, the said Henry W. Rice, had taken the negro, Simon, as sheriff of Colleton district, under and by virtue of sundry writs of fieri facias, against Josiah Beck, at the instance of his creditors, for the purpose of selling the interest of the said Josiah Beck in Simon, under those executions.

The plaintiff demurred to the plea, on the ground, that it was not sufficient in law to bar his action, and the defendant joined in demurrer.

The demurrer was sustained, and judgment given for the plaintiff.

The defendant appealed, and moved to reverse his Honor's decision, on the ground, that it is contrary to law.

The case was argued by Mr. McCarthy, for the appellant, and Mr. Memminger and Mr. E. Rhett, contra.

Curia, per DUNKIN, Ch. This court is unanimously of opinion that the judgment of the circuit court, on the demurrer, should be sustained.

Admitting, for the sake of the argument, that all the rules in relation to real estate, under the statute of Uses, and the tenth section of the statute of Frauds, should be applied to personalty, it is very clear, on authority, that the use here was not executed, but that the legal estate continued in the trustee, and that the equitable interest of Josiah Beck, the debtor, was not subject to levy under the executions. The doctrine on this subject was very fully considered in the recent case of Jenney v. Laurens, 1 Speers, 356. "The trust will be executed," says Mr. Justice Evans, delivering the judgment of the court, "unless the object of creating it would be defeated, as in the case of trusts for married women, and to preserve contingent remainders, or where the trustee has some discretion to be exercised in relation to

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*the estate, or the manner of applying the proceeds; or, as was said by Chancellor Harper, in Posey v. Cook, 1 Hill, 414, there must be some object to be effected by the estate's remaining in the trustees." Nor, it may be added, will the provisions of the statute of Frauds apply, where the interests of other parties are mixed up with the debtor's title. See Doe v. Greenhill, 4 Barn. and A. 684; 6 E. C. L. Rep. 564.

By the provisions of this settlement, the real and personal estate of Miss Ford was vested in the trustee, to be held for her until the marriage, afterwards for the joint use of the husband and wife, and of the survivor, with contingent remainders over; and it was provided that the real and personal estate might be altered, sold, or exchanged, with the joint consent, in writing, of the trustee and cestui que trusts, provided the proceeds were vested in other property to be held subject to the same trusts. According to the rules indicated in Jenney v. Laurens, the legal title to the real estate manifestly remains in the trustee. But by the tenth section of the statute of Frauds, 29 Car. 2, C. 3, it is provided that the sheriff "may take in execution all such lands and hereditaments as any other person or persons be seized or possessed in trust for the party against whom execution is so sued, like as the sheriff might or ought to have done, if the said party, against whom execution shall be so sued, had been seized of such lands and hereditaments of such estate as they be seized of in trust for him at the time of the said execution sued." "This statute," says Mr. Chief Justice Abbott, in Doe v. Greenhill, "made a change in the common law, and up to a certain extent at least, made a trust the subject of inquiry and cognizance in a legal proceeding. We think that the trust that is to be thus treated, must be a clear and simple trust, for the benefit of the debtor; the object of the statute appearing to us to be merely to remove the technical objection arising from the interest in land being legally vested in another person, where it is so vested for the benefit of the debtor." He proceeded further to remark that "the term was obviously created, not for the benefit of Mr. Greenhill, the debtor, but for the benefit and secu-

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rity of Mrs. Greenhill, his mother. *She is the principal object of the trust." It was ruled that this clause of the statute was confined to cases where the trustees are seized or possessed in trust for a defendant alone, and not jointly with another person. Where a court of law thus takes cognizance of a trust, the inquiry will be conducted on the settled principles of equity. In the case under consideration, it is not less obvious than in the case cited, that the husband was not the person for whose benefit the trust was created, but that it was for the benefit and security of the wife. She was the primary and principal object of the trust, and the equitable interests of the husband, whatever

they might be, being thus mingled up and united with those of the wife, it is not a case which would fall within the provisions of the statute of Frauds. In Forth v. Duke of Norfolk and others, 4 Madd. 266, Sir John Leach says, "a judgment creditor has at law, by the statute of Frauds, execution against the equitable freehold estate of the debtor in the hands of his trustee, provided the debtor has the whole beneficial interest; but if he has left a partial interest only in his equitable freehold estate, the judgment creditor has no execution at law, though he may come into a court of equity, and claim there the same satisfaction out of the equitable interest as he would be entitled to at law, if it were legal." But it has been expressly ruled, (and I am not aware that the correctness of the decision has been impugned,) that these provisions of the statute of Frauds are inapplicable to the equitable interests in personalty. Lord Ellenborough, in Scott v. Scholey, 8 East, 486, says, "the very silence of that statute, which, while it expressly introduces a new provision in respect to lands and tenements held in trust for the person against whom an execution is sued, says nothing as to trusts of chattel interests, affords a strong argument that those interests were meant to continue in the same plight and situation, in respect of executions, in which both freehold and leasehold trust interests equally stood, prior to the passing of that statute. In the absence, therefore, of any authority in favor of the sale of such an equitable interest under a common law execution against goods, we are of opinion that the sheriff's return of nulla bona, where the defendant in the execution had no other prop-

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erty besides the trust *property in question, was not a false return." It is due to the argument of the appellant to state, that it was not drawn from the statute of Frauds, but rested entirely on the supposed analogies to the statute of Uses, and some recent decisions of our own courts on that subject. As questions of this character have lately been of frequent recurrence, it is deemed not an unfit occasion to offer some further remarks on a matter of great practical interest, and on which some diversity of opinion manifestly exists.

It is believed that, in England, no attempt has ever been made to apply the principle of the statute of Henry 8th, to any other than real estate. Even in regard to real estate, as is said by Lord Hardwicke, in Hopkins v. Hopkins, 1 Atk. 591, the necessities of mankind and reasonable occasions in families, obliged the Judges to give way to the astuteness of conveyancers, and the introduction of three words into the ordinary deeds of settlement defeated altogether the objects of the statute, and left parties to the interference of the Court of Chancery; upon which footing, says his lordship, it has stood ever since.

Cadogan v. Kennett, 2 Cowp. 432, was decided by Lord Mansfield, in 1776. It is a leading case on another branch of the law. By the marriage settlement of Lord Montfort, his household goods belonging to his house in town, and which were very minutely particularized in a schedule annexed to the settlement, were all conveyed to the plaintiffs, as trustees, for the use of Lord Montfort for life, remainder to Lady Montfort for her life, remainder to the first and other sons of the marriage, in strict settlement. The sheriff had seized the goods under an execution against Lord Montfort, and this was an action of trover to recover the goods. The effort on the part of the defence was, to shew that the deed was fraudulent under the statute of Elizabeth, but neither in that case, nor in any other in the English authorities which the court has found, was it contended that the trust in personalty was executed in analogy to the statute of Uses. Lord Mansfield remarks, "in marriage settlements, it is very common for libraries and plate to be thus settled." "An argument," says he, "is drawn from the possession; but it does not hold in this case. It is a part of the trust that the

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goods shall continue in the *house; and, for a very obvious reason; because the furniture of one house will not suit another; and it was the business of the trustees to see the goods were not removed." "How common," continues the Judge, "are settlements of chattels, and money in the stocks; can there be a doubt but they are good?" His Lordship admitted that the debtor had an equitable interest for his life, and that his creditors, in the proper forum, would be entitled to it; but judgment was entered for the plaintiffs, and the goods were ordered to be delivered to the trustees. Burnell v. Foley was a case to the same effect, and decided by Lord Mansfield in the same way. It is cited in a note to Cadogan v. Kennett. But if in the English books no case can be found in which the principle of the statute of Uses has been applied to the personalty, we are not without authority to the same effect in our own courts. When a trust has been created in personalty, and all the purposes of the trust have ceased or are at an end, the absolute estate is in the person entitled to the last use. From the character of the property, possession is a sufficient title, without a formal conveyance.

Watson, trustee, v. Pitts, was decided by the Court of Appeals, at this place, in May, 1831, and is reported in 2d McMull. R. 298. By the marriage settlement of John Barlow, certain slaves were conveyed to the trustee, "to the use of, and in trust, nevertheless, for the sole use, benefit and behoof of the said Ann, (wife of John Barlow,) from this date, for and during the term of her natural life." No disposition of the property was made after the termination of Mrs. Barlow's life estate. The opinion of the court

was delivered by Mr. Justice Johnson. "According to the legal effect of the deed," says he, "the property is" in the trustee, "until her death, (for the statute for transferring uses into possession, is limited to real estate,) and it is necessary that the legal property should abide in him to enable him to fulfil the trust declared in the deed. A conveyance in trust was necessary to obviate the marital rights of the husband, which would have arisen out of a direct conveyance to herself, and as long as she lives, the same necessity will exist, as she may again take husband." "Whether, therefore," says the Judge, "we

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consider the *rights of the trustee, in reference to the legal effect of the deed, or the trusts to be executed under it, the legal estate must abide in him." The case of Whitfield Jones and Lambert Jones v. John B. Cole, was decided at the same court. Mrs. Jones, the mother of the plaintiffs, had conveyed certain negroes to a trustee, "in trust for her separate and exclusive use and behoof, during her natural life, and, after her death, to the use of the plaintiffs, or the survivor of them, and their heirs forever, share and share alike." Mrs. Jones afterwards died, and this action was instituted. "This deed," says Judge Johnson, delivering the opinion of the court, "like all others, must be so construed that it may take effect according to the intention to be collected from the deed itself. The donor, as recited in the deed, was about to be married to a second husband, and being desirous to secure her property to her own separate use during her life, and to her children by her former marriage, after her death, conveyed the negroes to the trustee," &c. After commenting further on the deed, and stating the duties of the trustee, he continues, "the right of possession, as well as the right of property, accrued, therefore, to the plaintiffs, on the instant of the death of the donor. According to the terms of the trust, no act was necessary on the part of the trustee, to invest the cestui que trust with the right of property, not even a conveyance, for personal estate passed without it." Without any reference to the statute of Uses, it was held that the plaintiffs were well entitled to maintain the action. These decisions are in entire accordance with the English authorities, and the then well understood law of South Carolina. Neither the statute of Uses, nor the 10th sec. of the statute of Frauds, embrace personal property. "The very silence of the statute," as is said in Scott v. Scholey, "which introduces a new provision as to lands and tenements held in trust, but says nothing as to trusts of chattel interests, affords a strong argument that these interests were meant to continue in the same situation and plight in which both freehold and leasehold trust interests equally stood prior to the passing of those statutes." All the legal estate is vested in the trustee, for legal purposes. If the deed be not bona fide, it may be impeached for fraud,

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either at common law or by the *statute of Elizabeth. If the instrument be a marriage settlement, and is not recorded, so as to prevent misconception from the ostensible ownership of the cestui que use, it becomes obnoxious to the provisions of our own statutes. But so long as the trust subsists, any equitable interest of the cestui que trust can be reached only through the appropriate tribunals, unless the deed itself violates some principle of law, or wants some of the formalities prescribed by law.

Porcher v. Gist was decided at Charleston, in 1832. It is not reported. But in Iorr v. Hodges, [1 Speers, Eq. 593,] Chancellor Harper, discussing the right of the creditors of the husband to levy on property settled under a marriage deed, on the ground that the legal estate had vested in the husband, remarks that, "the first case on the subject is that of Porcher v. Gist, in which the conveyance was to trustees, for the joint use of husband and wife for life; to the use of the survivor for life; and, after the death of the survivor, to the issue of the marriage. It was held that the property, after the death of the husband, was liable to be taken in execution for the debts of the wife." The case of Pringle v. Allen, 1 Hill Eq. R. 135, was precisely similar, and was decided on the authority of Porcher v. Gist. On principles of equity, and in a Court of Equity, the interests of Mrs. Gist might very properly be subjected to the satisfaction of her debts, and so it is admitted by Lord Mansfield, in Cadogan v. Kennett. But on what principle can it be said that the legal estate was executed? "The statute of Uses," said the court, in Watson v. Pitts, "has no application to trusts of personalty." The legal estate was in the trustee, until the trusts were at an end. In Gadsden v. Cappedeville, [3 Rich. 467,] decided by the Court of Appeals, in Charleston, Feb. 1829, Chancellor Harper says, "I am of opinion that in no case could there be such a partial execution of a use. The estate is one, and must be executed either in the trustee or cestui que trusts. As observed by Lord Hardwicke, in Gibson v. Rodgers, Ambler, 94, this court will not make fractions, and consider them as trustees for only part of the inheritance." If the use was executed in Mrs. Gist, it was executed also at the same time in the issue of the marriage. But what then was the object of continuing the trustee beyond the continuance of the joint estate of the hus-

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band *and wife? The presumption must be, that some object was intended to be accomplished. We may very well conceive that the object was to secure the property from removal or injury, during the continuance

of the life interest. "It was the business of the trustee," says Lord Mansfield, in Cadogan v. Kennett, "to see that the goods were not removed;" and although they were in possession of the person having the life interest, he held them not liable to seizure for his debts. But the parties having the acknowledged right to dispose of the property, have declared, in plain terms, that the legal estate shall remain in the trustee, and the cestui que use shall have the enjoyment. If this were real estate, it cannot be doubted that, before the statute, the cestui que use would have no estate which could be reached in a court of law. This, then, is the condition and plight of the personal estate, to which the statute does not reach. In Torr v. Hodges, Chancellor Harper, commenting on these cases, as well as the more recent cases of Pyron v. Mood and Ford v. Caldwell, to which I shall presently advert, says, "the execution of the trust in these cases, seems to be made to depend on the right to possession in the cestui que trust, and the actual transfer of possession." "Now, in this case," says he, "I suppose that the stipulation to permit the husband "to have, receive, take and enjoy all the interest, income and profits" of the slaves, entitled him to the possession. There is no question with regard to the actual possession." In deference to those decisions, he held that the trust was executed in the husband. But he expressed great doubts on the subject. "If," says he, "when property is conveyed in trust, for the joint use of husband and wife for life, the use is to be executed in the husband, so as to render it liable at law to his creditors, I do not perceive what purpose it answered by having a trustee to a marriage settlement. If creditors were compelled to come into equity for the purpose of making the husband's interest liable, there are various equities by which their claims might be rebutted. But still, if the execution of the trusts depends on the right of possession, and the actual possession, I must, according to the decided cases declare it to be so executed in this instance, so as to render it liable to credi-

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tors. It is said in Pyron v. *Mood (continues the Chancellor) that, in equity, if the purchasers had notice of the trusts, the rights of the wife might possibly be protected. But if the property be liable at law, I know of no ground on which equity could interfere. I am bound to follow the law." He concluded by desiring that the case might be submitted to the appellate tribunal. It was at his instance that the cause was ultimately brought before this court, in order that the decisions on this subject might be reviewed.

In regard to the case of Pyron v. Mood, it seems very clear that the decision may well be maintained, as the trustee had clearly the power to sell with the consent of the cestui que trust, and the title of the purchaser was unimpeachable. So in Ford, trustee, v. Caldwell, the deed was a gross fraud upon creditors, and void by the common law; but a majority of this court is of opinion that they cannot be safely rested on the principles therein assumed. For myself, I think it best that the rules of the common law, and the practice of the country, as I suppose it to have existed until 1832, should prevail. Deeds of this character should be construed according to their plain intent and meaning. The legal estate should continue in the person to whom it is transferred, until the property is to be delivered to those for whom an absolute estate is provided. If those who are entitled to the intermediate use for life or years, should attempt to remove or destroy the property, there exists no good reason why he to whom the legal estate was transferred, and, probably, in reference to these very contingencies, should not have the authority promptly to interfere, assert his legal rights, and prevent the destruction of the trust property. If, on the other hand, those entitled to the equitable use for life, or any other equitable interest, are indebted, their creditors should resort to the appropriate forum. "If creditors were compelled to come into equity," says Chancellor Harper, "for the purpose of making the husband's interest liable, there are various equities by which their claims might be rebutted." It might be added, too, that equity has the power to prescribe conditions by which, while the just rights of creditors are satisfied to the extent of their debtor's interest, the property will be preserved for those who have the ulti-

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mate es*tate; as in Cordes v. Ardrian, 1 Hill Eq. R. 154, where the purchaser was required to give security for the forthcoming of the property. In equity, too, the interests of the debtor would be ascertained by judicial authority before they are exposed to sale, whereas, at a sale by the sheriff, of so uncertain an interest, nobody is benefitted but the unscrupulous speculator, whose immediate business it becomes to improve his bargain, and defeat ulterior claims, by removing the object of litigation. It seems to me not consistent with the principles of law, or with good policy, that the onus of seeking the aid of the court of Chancery should be cast on those for whose particular benefit the legal estate was vested in trustees.

It has been pressed upon the court, with much urgency, as well as plausibility, that if a man owns property, under whatever cover it may be, it should be liable to the satisfaction of his debts, and about this there can be no doubt. The only question is, as to the appropriate forum in which relief should be sought. No case can be stronger than where a man buys real estate with his own money, and takes titles in the name of a stranger. The language of the Supreme Court of the United States, in Watkins v.

Holman, 16 Pet. 25 [10 L. Ed. 873] may be well applied to all this class of cases.

"It is not perceived," says Judge McLean, "why a court of law should regard a resulting trust any more than any other equitable rights; and any attempt to give effect to these rights at law, through the instrumentality of a jury, must lead to confusion and uncertainty."

It is ordered and decreed, that the judgment of the court below, sustaining the demurrer, be affirmed, and the appeal dismissed.

JOHNSON and JOHNSTON, Chancellors, with RICHARDSON, EVANS, BUTLER, WARDLAW and FROST, Judges, concurred.

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*WILLIAM W. IOOR and JULIA S. HODGES, by Her Next Friend, v. ABSALOM T. HODGES and Others.

(Columbia. May Term, 1844.)

[1, 2. *Husband and Wife* ⇐31; *Trusts* ⇐151.]

Certain slaves, by a marriage settlement, were conveyed to a trustee, in trust for the intended wife, until the marriage, then in trust, "to permit the" husband "during the joint lives" of himself and his intended wife, "to have, receive, take and enjoy, all the interest, income, and profits" of the slaves, "to and for their own use and benefit;" and after the death of the husband, if the wife should survive, then to "assign, transfer and set over," the slaves to the wife, discharged of any trust; but if the wife should die before the husband, then in trust "to transfer, assign and set over," the slaves to the issue of the wife, or if none, then "to transfer, assign and set over," the slaves to the husband and next of kin of the wife, "in such lots, shares and portions," as is provided by the statute of distributions.

It was *held*, that the slaves embraced in the settlement were not liable to seizure and sale under executions against the husband. Inquiries, as to his equitable interests, as well as the rights of his creditors, could only be made on proceedings instituted for that purpose.

[Ed. Note.—Cited in Porcher v. Gist, Rich. Eq. Cas. 209; Burnett v. Rice, Speers, Eq. 589, 590, 42 Am. Dec. 336; Bush v. Bush, 1 Strob. Eq. 379; Brooks v. Penn, 2 Strob. Eq. 130; Raines v. Woodward, 4 Rich. Eq. 407; Rivers v. Thayer, 7 Rich. Eq. 166; Wylie v. White, 10 Rich. Eq. 299; Bristow v. McCall, 16 S. C. 550; Farr v. Gilbreath, 23 S. C. 512.

For other cases, see Husband and Wife, Cent. Dig. § 188; Dec. Dig. ⇐31; Trusts, Cent. Dig. § 197; Dec. Dig. ⇐151.]

[3. *Trusts* ⇐131.]

[The statute of uses does not apply to a trust of personalty.]

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 175; Dec. Dig. ⇐131.]

[4. *Trusts* ⇐131.]

[Cited in Jones v. Fort, Townsend & Mendenhall, 1 Rich. Eq. 51, to the point that the statute of uses does not apply to personalty.]

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 175, 175½; Dec. Dig. ⇐131.]

The case will be fully understood from the following copy of the marriage settlement in question, and his Honor's circuit decree, delivered at Edgefield, June Term, 1842.

A. T. Hodges, J. S. Ioor, Wm. W. Ioor. } Marriage Settlement.

The State of South Carolina,—Edgefield district.

This indenture tripartite, made the ninth day of March, in the year one thousand eight hundred and thirty-seven, between Absalom T. Hodges, of Abbeville, of the first part, Julia S. Ioor, of the second part, and Wm. W. Ioor, of the third part. Whereas, a Marriage is intended to be shortly had and solemnized by and between the said Absalom T. Hodges and the said Julia S. Ioor; and whereas the said Julia S. Ioor is possessed, in her own right, of a considerable personal property, consisting of seventeen negroes, names and ages as follows: Josey about fifty years of age, Sally about thirty-five, Julian about nine, Ben about three, Caesar about five, Bella about twelve, Juno about thirty, Jackson about nine, Nanny about two, Louisa about one, Edward about twenty-eight, Drama about twenty-six, Margaret

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*about six, Edwin about four, Janette an infant, Sire about fifty-five, Joan about thirty-three years of age; and it has been agreed that the said seventeen negroes should be settled upon the said Julia S. Ioor and the issue of her body, as is hereinafter provided. Now this indenture witnesseth, that in pursuance of said agreement, and in consideration of the sum of five dollars to the said Julia S. Ioor in hand paid, by the said William W. Ioor, the receipt whereof is hereby acknowledged, she the said Julia S. Ioor, by and with the privity, consent and agreement of the said Absalom T. Hodges, testified by his being made a party to and his sealing and delivering these presents, hath granted, bargained, sold, assigned, transferred and set over, and by these presents doth grant, bargain, sell, assign, transfer and set over, unto the said Wm. W. Ioor, all the seventeen negroes above mentioned and described, and the future increase of the females thereof; to have and to hold the said seventeen negroes, and the future issue of the females thereof, unto the said Wm. W. Ioor, and his heirs and assigns: in trust, nevertheless, and for such purposes and under such provisions and agreements as are hereinafter mentioned; that is to say, in trust for the said Julia S. Ioor, and her assigns until the solemnization of the said intended marriage, and from and after the solemnization of the intended marriage, then in trust, that he, the said Wm. W. Ioor, his executors, administrators and assigns, shall and do permit the said Absalom T. Hodges, during the joint lives of the said Absalom T. Hodges and Julia S. Ioor, his intended wife, to have, receive, take and enjoy, all the interest, income and profits of the said

seventeen negroes, to and for their own use and benefit; and from and after the decease of said Absalom T. Hodges, if the said Julia S. Ioor should survive him, in trust, that he, the said Wm. W. Ioor, his executors and administrators, shall assign, transfer and set over, all the seventeen negroes, and the issue of the females thereof, unto the said Julia S. Ioor, free and discharged from any trust whatever; but if she, the said Julia S. Ioor, die before the said Absalom T. Hodges, then the said Wm. W. Ioor will transfer and assign the said seventeen negroes, and the issue of the females thereof, unto the issue of the body of the said Julia S. Ioor, share and share alike, provided there be such issue; but if the said Julia S. Ioor die without leaving issue of her body, living at the time of her death, then, and in that case, the said Wm. W. Ioor will transfer and assign the said seventeen

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*negroes, and the issue of the females thereof, unto the said Absalom T. Hodges, and the next of kindred of the said Julia S. Ioor, in such shares, lots and portions, as is provided by the laws of this State, now of force, giving an equitable distribution of the estates of persons dying intestate.

In testimony whereof, the said Julia S. Ioor, Absalom T. Hodges, and William W. Ioor, have hereunto set their hands and seals, the day and year first above written.

A. T. Hodges, [L. S.]
J. S. Ioor, [L. S.]
William W. Ioor, [L. S.]

The marriage took effect, and the slaves were levied on by the creditors of the husband. An injunction was granted to restrain the sale, which was dissolved by the Chancellor, and this was a motion to reverse the decree.

Harper, Ch. This cause was heard at Chambers by consent. According to the terms of the marriage settlement the slaves in question are conveyed to the trustee, in trust for the intended wife until the marriage, then in trust, "to permit the said Absalom T. Hodges, during the joint lives of the said Absalom T. Hodges and Julia Ioor, his intended wife, to have, receive, take and enjoy all the interest, income and profits of the said seventeen negroes, to and for their own use and benefit;" and after the death of the husband, if the wife should survive, then to "assign, transfer, and set over," the slaves to the wife, discharged of any trust; but if the wife should die before the husband then in trust "to transfer, assign, and set over" the slaves to the issue of the wife, or if none, then to "transfer, assign, and set over" the said slaves to the husband and next of kin of the wife, "in such shares, lots and portions" as is provided by the statute of distribution.

The slaves have been levied upon by the creditors of the husband, and the question is, whether the legal estate has vested in the husband, for the joint lives of himself and wife, so as to render it liable to be seized under execution at law.

The subject has been very fully considered, and the cases reviewed, in the late case of

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Pyron v. Mood, decided *during the last sitting of the Law Court of Appeals in Charleston. The first case on the subject is that of Porcher v. Gist [Rich. Eq. Cas. 209] (not reported) in which the conveyance was to trustees, for the joint use of husband and wife for life, to the use of the survivor for life, and after the death of the survivor, to the issue of the marriage. It was held that the property, after the death of the husband, was liable to be taken in execution for the debts of the wife. The case of Pringle v. Allen, 1 Hill Eq. 335, was precisely similar. In Ford, trustee, v. Caldwell, 3 Hill, 249, the limitation was similar, and it was held that the trustee could not recover against the party to whom the husband had conveyed his life estate. In Porcher v. Gist, it is observed that the statute of uses does not apply to trusts of personal property; as respects land, if the trust is not executory, or if it is not necessary to preserve the trust, that the legal estate should remain in the trustee; the statute executes the trust so soon as the deed is executed, and the legal estate vests in the cestui que use. In personal estate, the legal estate remains in the trustee, until he executes the trust by delivering the possession to one capable of holding in himself or herself, a legal estate in the property, to the extent of the interest intended by the deed to be conferred. It is said that an estate to the joint use of the husband and wife during life, may, in order to preserve the trust, not be executed by the delivery of the possession to her husband. But in Pyron v. Mood, it is said that the trustee has a general property, the cestui que trust a qualified one, and when to his qualified right of property possession is added, it is complete to the extent of the interest carved out by the deed. Both are legal estates, but, quoting from Ford v. Caldwell, it is said that the trustee had nothing to do with the property during the lifetime of the husband. "He had delivered the slave to one who was under no legal disability; this was equivalent to a conveyance to him for the time he was to possess it." The execution of the trust seems to be made to depend on the right to possession and the actual transfer of possession.

Now in this case, I suppose that the stipulation to permit the husband "to have, re-

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ceive, take and enjoy all the *interest, income and profits," of the slaves, entitled him to the possession. This was the direct and obvious method of taking the income and profits. There is no question with regard to the actual possession.

The particulars in which the present case differs from those to which I have referred, are the directions that at the termination of every particular estate, the trustee shall "assign, transfer and set over," the property to the next in remainder, and in the final event shall assign and transfer it to the husband, and the next of kin to the wife, according to the provisions of the statute of distributions. Though the principles which govern trusts of real and of personal estate are derived from different sources—the latter depending, as is said, on the law of bailments, yet in some respects there is a singular coincidence in the rules which govern them. For example, if the trustee is to receive the rents and profits and pay them over, this prevents the execution of the use. In such case the cestui que trust of personalty is not entitled to the possession. In general, I should say that the rules applicable to one kind of estate, in this respect, are applicable also to the other. But with respect to real estate, if there is any act to be done or any function to be performed by the trustee, this will prevent the execution of the use. In this case, there is an act to be done by the trustee. In a final event, he is to make distribution of the property. In Reily v. Fowler, 2 Fearne, 236, where property was given to a woman and her issue, but if she should die without issue, to be distributed by the executor, this act to be done by the executor, was held to tie up the generalities of the limitation to issue, and restrict the first taker to a life estate. Indeed, if when property is conveyed in trust, for the joint use of husband and wife for life, the use is to be executed in the husband so as to render it liable at law to his creditors, I do not perceive what purpose is answered by having a trustee to a marriage settlement. If creditors were compelled to come into Equity for the purpose of making the husband's interest liable, there are various equities by which their claims might be rebutted.

But still, if the execution of the trusts depends on the right to possession, and the ac-

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tual possession, I must, ac*cording to the decided cases, declare it to be so executed in this instance, so as to render it liable to creditors at law. It is said in Pyron v. Mood, that "in Equity, if the purchasers had notice of the trusts, the rights of the wife might possibly be protected." But if the property be liable at law, I know of no ground on which Equity could interfere. I am bound to follow the law. I am not well satisfied with my conclusion, and wish that it may be revised by an appellate tribunal.

But according to the decision in Pringle v. Allen and Cordes v. Ardrian, 1 Hill Eq. 154, and other decided cases, though the injunction must be dissolved, the purchasers at sheriff's sale must give security for the forthcoming of the property. It is therefore ordered and decreed, that the injunction in this case be dissolved; but that the purchasers of the life estate, in the slaves in question, at the sheriff's sale, give bond with sufficient security, that the said slaves shall not be carried without the limits of the State, and that they shall be forthcoming at the termination of the life estate of the said Absalom T. Hodges. Parties to pay their own costs.

The plaintiffs appealed from the decree of the Chancellor, and moved the Court of Appeals to reverse the same, and for an injunction restraining the sale of the property.

Because the said A. T. Hodges has no such interest in the property included in the trust deed, as is liable to be sold under executions against him, the legal estate being in the trustee.

Griffin & Burt, pro. appellants.
Wardlaw, contra.

Curia, per DUNKIN, Ch. This court is unanimously of opinion, that the slaves mentioned in this marriage settlement were not liable to seizure and sale under executions against the defendant, Absalom T. Hodges. Whatever may be his equitable interests, or whatever the rights of his creditors, the inquiry in relation to them can only be made on proceedings for that purpose instituted.

It is ordered and decreed, that the decree

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of the Circuit *Court be reversed, and that the injunction, originally granted by the Chancellor, be made perpetual.

JOHNSON and JOHNSTON, Chancellors, and RICHARDSON, EVANS, BUTLER, WARDLAW, and FROST, Judges, concurred.

In reference to the two preceding cases, his Honor, Judge O'Neall, delivered the following opinion.

O'NEALL, J. In these cases, I concur in the judgment of the court, by which the motion is dismissed in the first case, and the decree is reversed in the second: but I came to my decision for reasons different from those mentioned by my brother, (Chancellor Dunkin,) in the judgment just read. I still adhere to the doctrine, that a trust, in personalty, is a mere bailment, and that it is executed exactly according to the purposes intended by the donor, and to the extent pointed out in the deed, by the delivery of the possession to the cestui que trust. I know this doctrine is supposed to be quite a novelty by some, but I fancy it will be found to be a little more ancient, and to look a little more reasonable, than may have been supposed, when it comes to be examined. Why was it, that the statute of uses was passed? Was it not by act of law, to unite the legal title to the possession, and thus to prevent a man from holding and enjoying an estate

which was forever to be protected from any legal remedy against him? The answer is yes! that was the great object of the statute. It executes the use exactly as the Court of Equity would order it to be done, according to the intent of the parties. But the statute does not reach personal chattels. There never was any necessity that it should. For, unlike land, the legal title and possession never are separated, unless it be for some qualified purpose, not inconsistent with the general property. So too, personalty passed by word of mouth, accompanied by possession, as well as by writing; but land never did. If, then, personalty depends upon possession, when the property is delivered by the trustee to one capable of holding in his or her own right, and there is no further act of pos-

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*session or right to be exercised by the trustee in reference to the period of enjoyment by the cestui que trust, what is to prevent that from being considered an execution of the trust pro tanto? that is, the bailor, the trustee, has delivered the property to the bailee, the cestui que trust, to be held and enjoyed by him or her, until, by the terms of the bailment, the deed of trust, his or her interest is ended. Let me ask—could not the trustee do this by deed? Every one will say yes. But in personalty, there is no necessity for a deed, possession is enough. Again let me ask, would not equity make a refractory trustee execute his trust, by delivering to his cestui que trust the personalty for the term he or she was to enjoy it? The Chancellors will say yes. If that be so, is not the act of the parties, voluntarily done, just as good as when forced to be done by the Court of Equity? These propositions cannot be denied, but the consequences from them are the difficulty. Let us examine them. May not a cestui que trust, in possession of a personal chattel, maintain trespass against a stranger for an injury done to it? Every lawyer will say yes. How, if the title be in a trustee? By virtue of the possession. True, but does that not shew that possession is evidence of right? But I go further, suppose the trustee was to injure the chattels, shoot a negro, for example, in the possession of the cestui que trust, could not the cestui que trust maintain trespass against him? I have no doubt he could, his possession would be evidence of his right, and his damages would be measured by the extent of his equity, as it is called. It would, at law, be the case of a bailee with an interest suing for an injury done to his possession. Unless you thus resolve the matter, the action would be plain, but the reason why it was given would be in terra incognita.

Again, suppose the cestui que trust in possession, could the trustee recover from him in trover before his equity, as it is called, his right of possession as I regard it, is ended? I deny that he could. For to do so, he must shew, not only right of property, but also of possession; the very deed under which he claims, negatives his right of possession. What is to hinder a law court from regarding and giving effect to the cestui

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que trust's right of possession? *When it is in action, and to be enforced by taking the possession from the trustee, it cannot be done. But when the trustee has done what law could not, but which equity would make him do, how utterly absurd it would be, to allow him to undo the very act done voluntarily or by the compulsion of equity, in a suit at law! If the cestui que trust has thus an ascertained right of possession, must it not be regarded as coming to him from the execution of the trust? This, I hold, is no new doctrine—in Swan v. Ligan & Rudd, 1 McC. Eq. Rep. 227, the slave was conveyed for the use of husband and wife for life, after the death of either, to the use of the survivor, and after the death of the survivor, to the use of the issue of the marriage:—the wife survived the husband, who died, leaving issue of the marriage. She sold, in her lifetime; the issue, the remainderman, filed a bill against her alienee, for the preservation of the property; neither she nor the trustee were parties. Defendants demurred, upon the ground that the trustee was not a party. The Court of Appeals, by Judge Colcock, held he was not a necessary party, he had performed the trust. How? By delivering the slaves to the tenant for life! In Jones v. Cole, 2 Bailey, 330, the conveyance was to a trustee, in trust for the separate use of a lady about marrying, during life, and after her death, for her children. The court held the trust executed, and the property in the children after the death of tenant for life, by virtue of her possession. In that very case, the doctrine of bailment, as applied to these cases, was first adverted to by Chancellor Johnson, with the concurrence of Chancellor Harper. At the same time, the case of Watson v. Pitts was tried, 2 McMull. 298, note. And there, notwithstanding possession in the cestui que trust, it was held that the trustee might maintain trespass or trover against a stranger. Why? Because as bailor and bailee, he or the cestui que trust might maintain the action. In Porcher v. Gist, and Pringle v. Allen, 1 Hill Eq. 135, the doctrine of an executed trust in personalty was maintained, and the life estate of the cestui que trust sold under execution. The same thing occurred in the Court of ten, in the case of Fogartie v. Hubbell, 3 Hill, 30, and in Ford v. Caldwell, Id. 248, in the Law Court of Ap-

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peals. After *such an array of authority and reason, I do not see any propriety in overturning them all, for the sake of sending an execution creditor into chancery to get his money out of some unfettered trust estate.

Such a course will be, to give away the meat and keep the shell.

I see, in looking into 2d Equity Dig. 483, sec. 7, that it is there said to have been decided, in Jones v. Langhorn, 3d Bibb. 453, "Slaves conveyed in trust, are subject to execution for the debts of the cestui que trust;" this seems to square very well with our own cases. But it is utterly inconsistent with law to say, that one has an absolute sole right to the possession of personal chattels, and yet the sheriff cannot seize them in execution. The execution simply transfers the possession to the sheriff, with whatever right the defendant has, and this he sells. But it is supposed there is some necessity, that equity should superintend the sale, to protect ulterior equities. No such necessity can exist. If there be any danger, let the remaindermen or trustee claim the extraordinary jurisdiction to protect their interest. I have no idea of cramming every case into equity, on account of the greater convenience of the remedy. We may use a stronger and more direct remedy at law; but in the main, it suits the people much better than the more uncertain and expensive remedy in Equity. It is, however, said, there cannot be a partial execution of a trust. I admit that in one sense, but not in that in which it is used here. It is true, the trustee cannot partially execute the estate of cestui que trust, but, to the extent of his interest, he may execute it. As under the statute, the use for the life of the cestui que use is executed. Saunders on Uses and Trusts, 112, 113. So in personalty, possession would have the same effect. The trust for the remainderman abides in the trustee.

So much for the principle which I suppose these cases are to overturn. In the cases themselves according to the principles which I have maintained, there is no difficulty. In both, the trust is partially for a married woman incapable of acting sui juris; something still remains to be done by the trustee, shewing that the possession is not absolute in the husband. Both are ante-nuptial settlements. In the first case, the property may

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be sold by the trustee *and the cestui que trusts, and the proceeds invested in other property. This shews the possession was to be permissive only—a mere tenancy at will, if we can properly use such terms about personalty. In the other case, at the death of each, he is to assign, transfer, and set over, the property to the next one entitled. This, also, qualifies the possession. But it is said that this conflicts with Ford v. Caldwell. It does not so seem to me. There the settlement was post-nuptial—the possession was never changed, it was in the husband all along, there was nothing to be done by the trustee for the life of the husband. His possession was absolute for his life; and when he sold the slaves I do not see how the trustee could recover them from his alienee. So far as he and the trustee were concerned, the trust was executed, and that was all that case decided.

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[End of Volume Speers, Eq.]

REPORTS

OF

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS IN EQUITY AND COURT OF ERRORS OF SOUTH CAROLINA

VOLUME I

FROM DECEMBER, 1844, TO MAY, 1845, BOTH INCLUSIVE

By J. S. G. RICHARDSON

STATE REPORTER

COLUMBIA, S. C.
PRINTED BY A. S. JOHNSTON
1845

ANNOTATED EDITION

ST. PAUL
WEST PUBLISHING CO.
1917

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COLUMBIA, DECEMBER, 1844.

CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
" WM. HARPER,
" JOB JOHNSTON,
" B. F. DUNKIN.

*PETER M. HUSON and Others v. DANIEL WALLACE, Adm'r of Thomas McMeekin.

(Columbia. Dec., 1844.)

[*Infants* ⇐113.]

Infant parties to a bill might be entitled to a day to show cause against the decree, if it were erroneous, but while it stands unreversed, it is, in another suit, conclusive.

[Ed. Note.—Cited in Clarke v. Jenkins, 3 Rich. Eq. 339; Barnes v. Cunningham, 9 Rich. Eq. 479.

For other cases, see Infants, Cent. Dig. § 321; Dec. Dig. ⇐113.]

[*Husband and Wife* ⇐9.]

Where partition of personalty, which allotted to a wife her distributive share, was made in 1831, and the return was confirmed nunc pro tunc in 1835, more than four years afterwards, and the wife had died in the mean time, but the husband had possession before her death—*Held*, that the marital rights of the husband had attached on the property allotted to his wife.

[Ed. Note.—Cited in Turbeville v. Flowers, 27 S. C. 337, 3 S. E. 542.

For other cases, see Husband and Wife, Cent. Dig. § 34; Dec. Dig. ⇐9.]

[*Trusts* ⇐331.]

An order confirming the return of commissioners in partition, has relation back to the actual partition, and operates to vest the legal title from that time.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 491; Dec. Dig. ⇐331.]

[*Executors and Administrators* ⇐172.]

Intestate had contracted for the purchase of a tract of land, with the unexpired term of a ferry charter annexed to it. Shortly after his death, the ferry was re-chartered in the name of his wife, who was his administratrix. *Held* that she received the charter as a trustee for the estate, and was accountable for the rents and profits. Per Harper, Ch.

[Ed. Note.—Cited in Kinsler v. Holmes, 2 S. C. 495.

For other cases, see Executors and Administrators, Cent. Dig. § 650½; Dec. Dig. ⇐172.]

[*Executors and Administrators* ⇐152, 391.]

Where the administrator of an estate, who had married his intestate's widow and become the guardian of his children, purchased, at a price below its real value, a tract of land of the estate, sold at public outcry by the commissioner, under an order of the court made on a bill for partition—*Held*, independently of any charge of unfairness or fraud, that he was bound to account to the distributees of the estate for the full value of the land at the time of the sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 621, 1590; Dec. Dig. ⇐152, 391.]

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[*Executors and Administrators* ⇐93.]

*An executor or administrator is not bound to hire out the slaves of the estate, but, on the contrary, is to be encouraged in keeping them on the lands and accounting for the crops; and where he accounts fairly for the crops actually made, he is not to be charged further, unless for gross neglect.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 407; Dec. Dig. ⇐93.]

[*Executors and Administrators* ⇐93.]

Where an executor or administrator keeps up the plantation, it is competent for him to purchase such supplies of any kind as are necessary and proper for keeping it up, and charge them to the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 407; Dec. Dig. ⇐93.]

[*Parent and Child* ⇐14.]

A husband, who receives an estate with his wife, is not bound to maintain her children of a former marriage, but may charge them for their board and education.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 154; Dec. Dig. ⇐14.]

[*Husband and Wife* ⇐10.]

Where a mother died intestate, in 1832 or 1833, owing no debts, and leaving as her only distributee her daughter, whose husband, without administering, took possession of the estate, and kept it until the death of his wife, which was in 1835—*Held*, that the marital rights of the husband had attached on the property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 42; Dec. Dig. ⇐10.]

[*Executors and Administrators* ⇐3.]

Where there are no debts, and but one distributee, the distributee may take possession without administering.

[Ed. Note.—Cited in Markley v. Singletary, 11 Rich. Eq. 403; Grant v. Poyas, 62 S. C. 436, 40 S. E. 891.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1, 3–14½, 1782; Dec. Dig. ⇐3.]

[*Guardian and Ward* ⊂⊃152.]

A guardian is not bound to go beyond the limits of the State in prosecuting the rights of his wards, and if he does go, he is entitled to make a reasonable charge for his services.

[Ed. Note.—Cited in Sollee v. Croft, 9 Rich. Eq. 474.

For other cases, see Guardian and Ward, Cent. Dig. § 503; Dec. Dig. ⊂⊃152.]

[*Reference* ⊂⊃100.]

A party failing to make a particular exception to the report of a referee, when other exceptions were made, on some of which the report was recommitted—*held*, that it was too late to make the exception, when the report came up again, on exceptions to the matters on which it was re-committed.

[Ed. Note.—Cited in Hand v. Savannah & C. R. Co., 17 S. C. 264; Hubbard v. Camperdown Mills, 26 S. C. 589, 2 S. E. 576; Bryce v. Massey, 43 S. C. 388, 21 S. E. 320.

For other cases, see Reference, Cent. Dig. §§ 157–168; Dec. Dig. ⊂⊃100.]

[*Guardian and Ward* ⊂⊃162.]

The commissioner is only entitled to one dollar on each return of a guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 538; Dec. Dig. ⊂⊃162.]

[*Executors and Administrators* ⊂⊃495.]

An administrator, who purchases at an under value the land of his intestate, and is compelled to account for the full value, is not entitled to commissions on the advanced price which he is required to pay.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2099; Dec. Dig. ⊂⊃495.]

[This case is also cited in Jones v. Massey, 14 S. C. 309; Richardson v. Cooley, 20 S. C. 347, and distinguished therefrom.]

This cause came on to be heard, at Union, in June, 1840, before Harper, Chancellor, who pronounced the following decree.

"Daniel Brummet died in 1816, possessed of a considerable estate, and leaving his wife, Susannah Brummet, and his daughter, Elizabeth C. Lewis, married to John Lewis, his heirs and distributees. The widow, Susannah Brummet, and John Lewis, took out administration on his estate. John Lewis died in 1822, leaving his wife surviving, and six children. Two of the children died in infancy, one married the complainant, Peter M. Huson, and died in 1836, leaving one daughter, the complainant, Mary C. Huson. The surviving children of John Lewis were

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*the other complainants. In 1825 the widow of John Lewis married the defendant's intestate, Thomas McMeekin, by which he became administrator in her right, she being administratrix on the estate of her former husband. The intestate, McMeekin, became also the guardian of the infant children of John Lewis. On the 12th May, 1828, McMeekin and wife filed their bill in this court against Susannah Brummet, and the infant children of John Lewis, claiming partition, both of the estate of Daniel Brummet and John Lewis. A writ of partition was ordered and issued. At the June sitting, 1829, the commissioners made a return, recommending, that as both estates were much embarrassed by debt, the land of both should be sold for the payment of debts, and that for the present no partition should be made of the personal estate.

At the same court, as I understand, the creditors of John Lewis presented their petition, that they might be paid out of the proceeds of the land recommended to be sold. The return of the commissioners was confirmed, and an order made for the sale of the lands. These were exposed to sale on the 7th September, 1829, and the land of both estates bid off by defendant's intestate. That of the estate of Brummet, at $850, and that of the estate of Lewis, at $1500. He made an arrangement to comply with the terms of sale, with respect to the land of the estate of Brummet, but did not comply with respect to that of the estate of Lewis.

The commissioner reported these facts, June, 1830, and the court ordered a re-sale of the land of Lewis's estate, and that the second writ of partition issued to divide both personal estates, should be suspended till the former part of the order should be carried into effect. The land was again exposed to sale, on the 6th of September, 1830, and again bid off by defendant's intestate, at the price of $1100, who, for aught that appears, then complied with the terms of sale. On the 9th February, 1831, partition of the personal estates was made by the commissioners to the second writ, in pursuance of the terms of the order and writ, allotting two-thirds of the estate of Brummet to McMeekin's wife, and the other third to Susannah Brummet, and allotting one-third of the estate of Lewis to McMeekin's wife, and dividing the other two-thirds among the children of Lewis. At the instance of the creditors, who were before the court, claiming their debts, the court forbore to confirm the return of the commissioners, till they should

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be paid. At a *special court in September, 1835, the commissioner reported the debts to be paid, and the court ordered the return to the writ of partition to be confirmed nunc pro tunc. In the mean time, and before the making of this last order, the wife of defendant's intestate had died. The time of the death of Susannah Brummet is not precisely fixed, but it is understood that she died before Mrs. McMeekin, leaving the latter her sole heir and distributee.

In 1836, defendant's intestate sold the land he had purchased of the estate of Lewis, at a considerably advanced price. In his management of the estate of Lewis, and also that which had been the estate of Brummet, the whole of which was in his hands after the death of Mrs. Brummet, and perhaps managed by him before, he kept the slaves employed on the land, without hiring or renting, and in his annual returns to the Ordi-

nary gave an account of crops. At the foot of his accounts returned to the Ordinary, and after giving a statement of debts due by and to the estate of Lewis, there occurs the following memorandum, "The principles of the foregoing accounts adopted, were that one-third of the expenses of the plantations of the estates of Daniel Brummet, deceased, and John Lewis, deceased, the management of which were entirely under the control of the administrator, Thomas McMeekin, and charged to the estate of the said Daniel Brummet, deceased, and two-thirds to the estate of John Lewis, deceased, crediting the two estates, in the same proportion, by the amount of the nett proceeds of the crops for each year."

John Lewis, at the time of his death, had contracted for the purchase of a tract of land on Tiger river, to which was attached a ferry, called Hamilton's Ferry. This, in 1823, was re-chartered in the name of Elizabeth C. Lewis, and from that time no account was returned of the rents and profits of the ferry.

William Brummet, a son of Daniel Brummet, and brother of Mrs. Lewis, died in the lifetime of his father. The defendant's intestate, Thomas McMeekin, took out administration on his estate, for the purpose of prosecuting a claim to certain property, and recovered a number of slaves of considerable value. It is understood that Thomas McMeekin left children of his marriage with Mrs. Lewis. Many matters are set forth, and claims made by the bill and answer, not necessary to be now stated. Certain questions were made with a view to the account, which will be directed. The first question

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made is, what interest had John *Lewis in the estate of Daniel Brummet? Complainants contend that he was entitled to two-thirds. Defendant contends that John Lewis had no interest in that estate. I consider the law fully settled, as contended for on the part of the defendant, that if a husband be in possession of an estate as administrator, to a distributive share of which his wife is entitled, and she dies before distribution made, his marital rights will not be held to have attached in her interest in the estate, but that interest will be distributable under the statute. The case quoted, of Sturgineger v. Hannah, 2 N. & McC. 147, seems to be in point, as also the later case of Peay v. Barber, Dud. Eq. 238. There are also several other cases to the same effect. Ex parte Elms, 3 Eq. R. 155; Bunch v. Hurst, 3 Eq. R. 289; Baker v. Hall, 12 Ves. 496. John Lewis was in possession (and it may be said, not in sole possession, as Susannah Brummet was his co-administratrix,) of the estate of Daniel Brummet, as administrator, and there is no evidence of any distribution made during his lifetime. On the part of the complainants, there is an attempt to infer a partition in some way from the memorandum annexed to his accounts in the Ordinary's Office, stating the manner in which he had charged the expenses and credited the crops of the two estates of Daniel Brummet and John Lewis. That memorandum is not very intelligible, but the best conjectural meaning I can give it is, that the administrator, McMeekin, employed the slaves of both estates on the plantations indiscriminately, and bought supplies for both in gross, and that the estate of Lewis being larger and more expensive than that of Brummet, in such a proportion the administrator, not being able to discriminate otherwise, charged and credited one with one-third, and the other with two-thirds of the expenses and crops. The only other possible conjecture would be, that Lewis had no estate of his own, but that under the name of Lewis's estate, was meant the two-thirds of Brummet's estate, to which he was entitled in right of his wife, and by Brummet's estate Mrs. Brummet's share of that estate, and that expenses and crops were apportioned accordingly. But this is contradicted by the fact, that an estate of Lewis has been distributed, the land sold, and the slaves divided, and complainants state that they have received no part of Brummet's estate. Indeed, the conjecture and inference would be entirely extravagant, if I were not concluded by the judgment in partition, allotting one-third of Brummet's estate to Mrs. Brummet, and two-thirds to McMeekin and

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wife. *The complainants, as being infants at the time, might be entitled to a day to show cause against that decree, if it were erroneous, but while it stands unreversed, it must be conclusive in this court. I perceive no shadow of proof of any distribution of Brummet's estate in the lifetime of Lewis, and Mrs. Lewis's interest in that estate must, therefore, be held to have survived to her.

The second point is, "what interest had Thomas McMeekin in the estate of John Lewis? Complainants contend that he was entitled only to one-ninth, and not to one-third, as defendant contends." Partition of the estate of Lewis was made in 1831, by the commissioners in partition, and one-third of the estate allotted and set apart to McMeekin and wife. According to the general law, when partition is made, and the wife's share allotted to her in severalty, the marital rights attach. The ground taken by complainants is, that the wife died before the order for confirmation made nunc pro tunc in 1835; that the partition was not completed till then, and that the marital rights never attached; consequently, that the husband was only entitled to one-third of his wife's third. I have little doubt on this subject, though I do not find any authority directly to the point. There can be no English authority, as partition there relates only to land, and, as it is said, is made in equity

by compelling the parties to convey to each other by deed; Whaley v. Dawson, 2 Sch. and Lef. 372. Nor do I find any direct authority of our own, yet I apprehend that in every case of an order to confirm the return to a writ of partition, the order must have relation to the actual partition, and operate to vest the legal title from that time. The actual partition is a fact, and the order of court recognizes and establishes that fact. The very term confirm, implies a previous act done, which is sanctioned and approved by the order of confirmation. No writing is necessary to convey personal property. Can it be thought, that after the commissioners have allotted property to a distributee, if he should take possession of it, it still remains the property of the executor or administrator, so that, until after confirmation, he could maintain an action at law for this trespass in taking it? Suppose parties to make partition between themselves, and afterwards, for greater personal preservation, or some of them being infants, to obtain the confirmation of the court, must not their several titles be referred to the actual partition?

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*But the commissioners are the agents of the parties, and the incapacity of the infants to appoint their agents is supplied by the court.

But this order was made nunc pro tunc. The very terms import that it is intended to give it the same effect on the rights of the parties as if it had been made at the time to which it is referred. As he had the actual possession, and the several legal title of his wife's portion of Lewis's estate, I must hold the marital rights of defendant's intestate to have attached.

The third question relates to William Brummet; defendant contending that his intestate was entitled to one-third of that estate, and complainants, that he was only entitled to one-ninth. I do not see the grounds of complainants's position. On the death of William Brummet, in his father's lifetime, his father and his sister, Mrs. Lewis, became equally entitled to his estate, and upon the successive deaths of her father and mother, Mrs. Lewis became entitled to the whole. There is no pretence that this estate was ever reduced into possession by John Lewis. Then, on her death, before its reduction into possession, it became distributable under the statute, one-third to her husband, and the other two-thirds to her children of both marriages.

The fourth question made, is whether Mrs. Lewis, having taken a charter of the ferry on Tiger river, while she was the administratrix of her deceased husband's estate, is not to be regarded as a trustee for that estate, and accountable for rents and profits. This question is not without difficulty, but from analogy to the doctrine of renewing leases by trustees or tenants, I am of opinion that she must be construed a trustee. The general rule is laid down in Pickering v. Vowles, 1 Bro. C. C. 198. One of the earliest cases is that of Keech v. Sandford, 2 Eq. C. Ab. 741. In that case, the lease of the profits of a market was devised to a trustee, in trust for an infant; the trustee applied to the lessor for a renewal. He refused; upon which the trustee took a lease to himself. He was decreed to assign the lease. In Tastor v. Marriott, Amb. 668, the residue of a term of twenty-five years was settled on a woman for life, remainder to her son. During the continuance of her life estate, she obtained an additional term of twenty-eight years, and devised it to a daughter. It was held to be engrafted in the old lease, and to go to the son. The lease was from the crown. The case of Rawe v. Chichester, Amb. 715, is similar in circumstances and principle. The rule is laid down, "If trustees, mortgagees and persons interested, ob-

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tain renewal, the *new lease is always subject to the trusts and limitations of the old." In Owen v. Williams, Amb. 734, the tenant for life, instead of a renewal, received a sum of money to induce her to forbear application for the renewal of a lease of Crown lands, and this money was held subject to the trusts to which the term was subject. In James v. Dean, 11 Ves. 383; S. C. 15 Id. 236, the husband gave his wife a term for life. The term expired before his death, but at the time of his death he was in possession of the premises as tenant from year to year; the wife taking the residue of the yearly term, and obtaining a renewal, during that time, the new term was held subject to the limitations of the will. (a)

It is to be observed, that in most of these cases there was no covenant for renewal, so that it was at the option of the lessors to renew or not; but, as it is said, there is a good will in favor of the former tenant, which gives him an interest in the renewal. The question is made, whether she can be regarded as a trustee in relation to this property. The contract of John Lewis was for the purchase of the land, with the unexpired term of the ferry charter annexed to it. It was part of her trust and duty as administratrix, to complete the purchase, by paying the money and taking a conveyance, and it is to be presumed she did so. Then she was in possession of all the land of the estate, and of the ferry, receiving the rents and profits. We have often decided, that from necessity in this country, the executor or administrator may enter on lands for the purpose of keeping up the estate, and, no doubt, may receive tolls for ferriage. This certainly imposes some trust, in relation to the property; that he shall do nothing to impair

(a) Vide Lewin on Trusts and Trustees, 203. 24 Law Lib. 103.—R.

it. The doctrine of equity is, that any person entering on the land of an infant, is to be considered a trustee. I do not understand Mrs. Lewis to have been actually appointed guardian at that time; but she was entitled to the guardianship: her children were incompetent to bring their claims to the view of the Legislature. They had that interest in the renewal of the charter of which the cases speak, and that claim on the good will and preference of the Legislature which we know, in point of fact, to be almost always shown to the former grantees and owners of the adjoining land; and was it not plainly against equity, that disregarding this claim, she should procure the entire benefit to herself? Considering her possession merely as

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joint tenant, or tenant in *common with her children, I have determined, during the present sitting, in the case of Goulding v. Goulding, that the tenant in common in possession is a trustee, to preserve the estate for the rest; and having the claim to renewal, which they had, it appertained to the preservation of the estate, that if a new charter were obtained, it should be for their benefit, as well as for her own. Even at law, it is said that every beneficial act of one joint tenant shall bind the other, but not acts to his prejudice; 3 Bac. Ab. 690, Tit. Joint Tenants and Tenants in Common, H. 3; and if one joint tenant make a lease by parol, or deed poll, reserving rent to himself, this shall enure to the benefit of both. (Id. 688, H. 1.)

It is argued that whatever may be the general law, the Act of the Legislature must prevail, which declares the franchise to be vested in her. But this is founded in misconception. It is not to derogate from or invalidate the grant of the State. Her legal title is acknowledged, but from equitable circumstances, which cannot be supposed to have been in the view of the Legislature, the court attaches on the conscience of the party to prevent her from retaining the issues and profits, to which she is not in conscience entitled. Such a grant of a franchise is different from an ordinary act of legislation, and partakes of the nature of a contract. It is borrowed from the prerogative of the Crown, under the English law, and is subject to the same rules and construction; but, as we have seen, the general doctrine in question is applied to grants from the Crown. It is said that it is matter of public policy, that the Legislature should select a responsible and proper person, as the grantee of such a franchise, and that they might well refuse to grant it to children. The answer to this is found in Keech v. Sandford, already referred to. It is said by the Chancellor, "That it may seem hard that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed, for it is very obvious what would be the consequence of letting trustees have the lease on refusal to renew to cestui que trusts." She was under no obligation to accept the charter for herself, even if the Legislature had refused to renew in favor of the children, (of which there is no evidence.) She was bound, according to the authority, not to accept, and the court will not permit her to receive the benefit of her improper acceptance.—But all the purposes of public policy will be answered. No doubt she was personally re-

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sponsi*ble for keeping up the ferry, and incurring the expenses necessary thereto, and also for damages arising from losses in transportation. The responsibility was of her own seeking. There is no doubt, however, that she is entitled to be indemnified for all such expenses and losses, except such as were incurred by her own actual neglect or mismanagement; and such is the tenor of all the cases.

The next point made, relates to the purchase of the land of the estate of Lewis, by the defendant's intestate. The questions are raised, whether his estate is not to be charged with the advanced price at which he sold the land, or at all events with the sum of $1500, which he bid for it at the first sale. As to the last, I have no doubt. When a purchaser fails to comply with the terms of sale, and a re-sale is ordered, it is the constant course of the court, that the resale shall be at his expense; and this is implied, although it be not expressed in the order. The entry of the sale by the commissioner, is a sufficient memorandum in writing, to take the contract out of the statute of frauds, and the failure to complete the purchase would be a good ground of action for damages at law. As to the first of these questions, I am of opinion that McMeekin did stand in such a relation of confidence to the estate and children of Lewis, as to throw on him the burden of proving that he gave a full and adequate price for the property, and that on his failing to do so, his estate must be charged with the full value. I do not regard it as the case of a trustee to sell, purchasing at his own sale, in which the purchase is to be set aside as of course, on the application of the parties interested. He was not a trustee, as the assignee was in the case ex parte Wiggins, 1 Hill Ch. 353. It was not his particular duty to do every thing that could be done, to make the property bring the best possible price. But I think it comes within the rule which applies to a trustee purchasing of his cestui que trusts, or to the purchase of an attorney or agent, or any other person standing in such a relation of confidence as gives one party an advantage over the other, in the subject of their dealing. As said by Lord Eldon in 6 Ves. 278, "he who bargains in matter of advantage with a person placing confidence in

him, is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attornies, and every one else." Nor does it make any difference that instead of bargaining directly with the persons to whom he stood in the confidential

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relation, he bargained with the officer *of the court, who was the agent of all parties in a judicial sale. He possessed all the advantages in purchasing as if he had treated with them. The same reasons apply for making his purchase subject to the scrutiny of the court, and several of the cases are of that character. I should think that he came within the rule, if there were nothing else, but that he was an administrator in possession of land. As I have said in the case of Reynolds v. Scarborough, Car. Law Jour. 110. "If a stranger knowing of a mine on a man's land, of which the owner was ignorant, should purchase the land without informing the owner, the purchase would be good—he was under no legal obligation to give the information. But suppose the fact to be established by proof, that in consequence of his connection with the estate as administrator, the party had obtained knowledge of a mine in the land, would he be at liberty to purchase without disclosing his knowledge? If he would not, it is clear that he does not stand in the relation of a stranger to the real estate. He is on a relation of confidence, giving him advantages in his dealings with respect to the estate." He had a right to take possession and employ the land; but if neither beneficial owner nor wrong doer, he must be some sort of trustee, in some position of confidence. If he does not discover a mine, an administrator has advantages for ascertaining the real value of the estate. He is commonly in possession of the title deeds. The very fact of an executor's or administrator's bidding, is apt to give the impression that he is bidding for those entitled to the estate. If he had declared, at or before the sale, that he was bidding for the heirs, and then after getting the property for an under price, had claimed the purchase for himself, this would have been a plain fraud. But he might easily contrive to give the impression, without any express declaration to that effect. Evidence was offered of his declarations, after the sale, of his having purchased for the estate. This I think was admissible, not, as was objected, to establish a trust in land by parol, but to strengthen the presumption, that he might by some such means have affected the sale. But besides being an administrator, in possession of the land, he was the guardian of the children, and bound to protect their interest. It is true, it is stated that the commissioner of the court was their guardian ad litem. But the duties of such a guardian I understand to relate to the conduct of the suit; certainly his appointment does not discharge the guardian in chief from the burden of shewing that he has

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*taken no advantage of his confidential relation to them. If the intestate, McMeekin, had sold at an advance very soon after his purchase, I should have thought it conclusive that he had purchased at an under value, and that he ought to be charged with the advanced price. But there was an interval of five or six years between the purchase and sale. If he gave a full and fair price at the time, I do not think the purchase ought to be affected, because subsequent accidental circumstances, or the prosperity of the country, causing a general appreciation of property, had given the land a greater value. There could be no presumption of fraud in such a case, and it is only as a security against fraud, that the rule in question is adopted. We know that in point of fact there was a great appreciation between the years 1830 and 1836. It is true that in the case of Whichcote v. Lawrence, 3 Ves. 740, a trustee was charged with the advanced price, obtained after an equal lapse of time. But that was a case of a trustee to sell, whose duty it was to make the property bring the best price. It was in proof that he knew more might have been got, and he had offered more privately himself. The property had been so divided for sale, as to make the part purchased by him of less value to any one else than to himself. A principal cause of the advanced price appears to have been the skilful division of the property into lots for sale; which skill, the Chancellor said, the trustee was bound to have employed for the benefit of his cestui que trust. It appears to me to have been not so much a case of presumption to prevent fraud, as of actual fraud or breach of trust. In taking the account, defendant's intestate must at all events be charged with the sum of $1500, bid at the first sale; enquiry must be made of the actual value at the time of sale, and if it should be found to amount to more, he must be charged with the actual value.

The next question is, whether the intestate McMeekin is not to be charged as for the rent of the land and for the hire of the slaves; that is to say, whether he was not bound to let and hire, instead of keeping the slaves employed upon the land, and accounting for crops. As to this there can be no question. It has often been decided, that an executor may keep slaves employed upon the land, and I know of no decision or suggestion to the contrary. In some cases, when the executor has failed to return an account of crops, he has been charged as for rent and hire, but never when he has accounted; and I think executors and administrators are to be encouraged to this course, and

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*very indulgently considered when they adopt it. It adds a good deal to the trouble

of management, and consequently they are tempted either to apply for a sale of the property, or to let the land and hire the slaves. I have no doubt but that in general a greater income may be obtained by letting and hiring, but the consequence very commonly is, that the slaves are not so well treated, there is less increase, and they are morally injured; the soil is exhausted, and buildings, fences and fixtures dilapidated; so that at the expiration of the trust, though a greater income may have been obtained, it is more than compensated by the depreciation of the capital. If by the gross neglect of the executor he should fail to make such crops as he ought to have made, he would of course be responsible for the deficiency, and this disposes of the next question made, to wit: Whether defendant's intestate is entitled to credit for "carriage, horses, corn, &c., purchased for the use of the plantation." If it was competent to him to keep up the plantation, it was also competent to purchase such supplies of any kind as were necessary and proper for keeping it up; of course I do not decide what sort of articles were necessary and proper for the use of the plantation. That must be a subject of investigation on the reference.

The last question made was whether defendant's intestate had a right to charge the children of his wife's former marriage with board. An authority was quoted, Reeves' Dom. Rel. 74, to shew that a husband who receives an estate with his wife, is bound to maintain her children of a former marriage. But this must be peculiar to the State of Connecticut. The case of Tubb v. Harrison, 4 T. R. 118, shews that such is not the law of England, and the question only came to be made there in consequence of the stat. 43 Eliz. c. 2, s. 7, which has not been made of force in this State.

There is no doubt but he might make such charge. It is ordered, that an account be taken in pursuance of the directions given."

In June, 1842, the case came up, on exceptions to the report of the referee, before Dunkin Chancellor, whose decree, upon the complainants's exceptions, was, inter alia, as follows.

"This cause was heard by Chancellor Harper in June, 1840, and under his decree was referred to J. J. Pratt, Esq. special referee, the commissioner of the court being the defendant. His report is very full, is presented

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with great clearness, and ex*hibits a patience of investigation, and a single view to do justice which is worthy of all praise.

The first exception(b) seems to be met by an application of the principles of Spann v. Jennings, 1 Hill Eq. 324, to the circumstances of this case. The exception is overruled.

(b) Same as the 1st of complainants's grounds of appeal.

The second exception is because the estate of McMeekin has not been charged with the price at which McMeekin sold the land, purchased by him at the commissioner's sale, to Henry Rogers, to wit: $4,750. On this exception the referee remarks that he "only charged the estate with $1,500, being the amount bid by McMeekin at the first sale, because he understood that to be a settled point. If, however, he is mistaken in this, he awaits the further directions of the court." Certainly this is a misapprehension. The decree of Chancellor Harper directs that in any event McMeekin's estate should be charged with his bid at the first sale, even if the second sale was supported, as the second sale must be regarded as made on account and risk of the former purchaser. In respect to the character of the second sale, the Chancellor does not regard it as the case of a trustee to sell, purchasing at his own sale, in which the purchase is to be set aside, as of course, on the application of the parties interested, but that McMeekin came within the rule which applies to a trustee purchasing of his cestui que trusts; that he stood in such a relation of confidence to the estate and children of Lewis, as to throw on him the burden of proving that he gave a full and adequate price for the property.

It may be as well to advert to the circumstances under which this sale was made. McMeekin had married the widow of Lewis, was administrator of his estate, and guardian of his children. He applied to this court for partition of the estate of Daniel Brummet and John Lewis. The widow of Brummet, and children of Lewis, were parties defendants. At June Term, 1829, a sale of the real estate of Daniel Brummet and of John Lewis was ordered. In June, 1830, the commissioner reported, among other things, that he had sold a tract belonging to Lewis's estate, containing 430 acres, to McMeekin, for $1,500, but that he was unable to comply with the terms. He recommended that this tract of 430 acres and a tract of Brummet's estate of 256 acres, be re-sold. An order was entered, directing a re-sale of these two tracts, on a credit of one-third till 1st Jan-

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uary, and the *balance in two equal instalments, from the first of January. At this second sale in September, 1830, McMeekin became the purchaser of the Lewis tract for $1,100.

At the lowest estimate fixed by any of the witnesses, this land (the Lewis tract,) was at that time worth $4 per acre, or $1,720. The greater number fixed the price at from $6 to $7 per acre. Admitting then that this is not a case in which the sale would be set aside, as of course, at the instance of any of the parties interested, yet when the purchaser has wholly failed in his attempt to shew that he gave a full and adequate price for the property, he can derive no advantage from

the purchase. For myself, I am prepared to hold that in such case, in the language of Lord Eldon in the case cited in the decree from 6 Ves. 278, "even a benefit arising by accident, upon the principles of this court, should accrue to the plaintiff." If a trustee buys from his cestui que trust bank stock at $50 per share, which is proved to be at the time worth $100, it seems not doubtful that the cestui que trust might avoid the sale, and that the trustee would not be permitted, against the consent of the cestui que trust, to keep the stock, on paying what would have been a fair price at the time of sale. He cannot have any advantage from his own wrong. If the stock had risen in value, I should be of opinion that the sale being invalid, on principles of policy the enhanced price should enure to the benefit of the cestui que trusts. In Sir Edward Sugden's treatise on Vend. 434, (2d. Amer. fr. 5th. Eng. ed.) he says, "if the trustee has actually sold the estate, the cestui que trust may compel the trustee to pay him what he may have received above the original purchase money."

It is proved that about 1836 McMeekin sold this land to Henry Rogers, for about $7 per acre, or $3,000 for the 430 acres which he had purchased for $1,100. It is said that land had in the mean time appreciated. Granting to the defendant the full benefit of the position, that the complainants are not entitled to the appreciated value, it seems to me incumbent on him to prove clearly, not only that lands had appreciated, but that this land had also appreciated, and that the enhanced price which he received was in consequence of such appreciation. It being established that he sold the land for $3,000, the onus is on him to prove that it was not worth this sum at the time of the original sale, and in weighing the testimony the scales should not be very nicely balanced in favour of a trustee claiming this advan-

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*tage. The evidence on this point was all taken by the referee, and is submitted with his report. The court can only state what seemed to be the general result. Some fifteen witnesses were examined; of this number seven testified that in 1830 this land was worth $7 per acre, or about $3,000. One valued it at $6. One from $5 to $6, and three witnesses said lands appreciated 50 per cent. from 1829 to 36, and that they should think such lands in 1830 not worth more than $4; but, as I think, they all three stated that they did not know these lands well, or had only seen them from the road. W. Kelly, however, said that the improvements on the Lewis tract were worth $1,000; that a good gin house and screw were worth $500. It appeared that the improvements had all been put on the land by Lewis. The court is unable to say what degree of credit should be attached to the witnesses respectively, but on this testimony it would be difficult to pronounce that $7 per acre is more than the tract was worth. In 1830, lands appreciated in value, but improvements made in 1830, and then worth $1,000, may under the thriftless management of McMeekin, have deteriorated in 1836. There was some testimony too that the ferry was not so valuable. One witness, Johnson, said he thought that at the commissioner's sale the land belonging to Lewis's estate would have brought $3,000, if people had known it to be free of incumbrance. The testimony was, altogether, not very conclusive and satisfactory, but sufficient, as it appears to the court, to charge the defendants's intestate with the price at which he sold the land to Henry Rogers, Esq. This exception is sustained.

The third exception is because the intestate's estate was not charged with the rent of Lewis's land and hire of the negroes, while in possession of McMeekin, in consequence of his entire mismanagement.

The principles on which this exception is to be determined are stated in Chancellor Harper's decree. The difficulty exists in the application of the testimony. Both parties seem content to be governed by the decree.

McMeekin married the widow of Lewis in the latter part of 1825 or early in 1826. He did not make the crop of 1825. Lewis left five or six children, all of whom were living with their mother. The estate was kept together until 1830, when the lands were sold and the negroes divided. For the intermediate six years the administrator is accountable. He rendered returns to the Ordinary irregularly, but it was not suggest-

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ed *that the returns were unfair, or that they did not contain a correct statement of cotton actually made and sold. The objection is, that with the force under his charge he should have made much greater crops. That the result proved gross negligence, and that he should be held to account for the rent of the land and the hire of the negroes, without reference to what he actually realized.

The court is not in possession of such testimony as would fix with accuracy the task hands belonging to the estate of Lewis, while it remained undivided. Probably there were from 15 to 17 out of a gang of about 40 negroes. The year before McMeekin took possession, only 15 bales were made. In 1826, the crop was 36 bales. In 1827, only 17 bales. In 1828, 50 bales. The average crop, as far as the court can judge, did not exceed 37 1-2 bales. Then he frequently bought corn, and sometimes pork. Compared with some of his neighbors, his crops were very inferior; and both from the result, as well as the testimony of several witnesses, he was evidently an indifferent, perhaps a bad, manager. But I do not understand this to be enough in order to subject him to the severe rule implied in

this exception. McMeekin was an honest man: all the witnesses bore grateful testimony to this trait in his character. He kept the large family of his intestate together for six years, and he made no charge for the board of the children, or for his own services in the management of the plantation. The court would rather infer that while sober he was an industrious man, and his evil habits of intemperance were not observed (if they existed) until about 1831 or 1832, after the division of the estate. To sustain this exception, the court should be satisfied that it would have been better to have treated the children of Lewis as strangers. Under similar circumstances every prudent administrator would hereafter rent out the land and hire out the negroes, and would probably be compelled to board out the children. The effect of such course might be easily predicted. In the opinion of the court, every case of this character must be governed by its own peculiar circumstances. This was not an out place, for the profits of which an agent or manager might be strictly accountable. McMeekin probably acted according to his best judgment, certainly in good faith, and the court concurs with the referee that his returns should form the measure of his responsibility. The exception is overruled.

4th exception. Robert N. Lewis, the uncle

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of complainants, *died in New Orleans. In 1836, McMeekin went on in person to attend to the estate. He received about $6000 belonging to his wards. On his return he settled, in December, 1836, with the complainant, P. M. Huson, for his wife's share, and he also settled with D. B. Lewis, retaining the share of two minors. In settlement with Huson and D. B. Lewis, he charged for his expences, services, &c., on the trip, and receiving and paying over the money, a gross sum of $800, in lieu of commissions and other compensation. Huson and Lewis seem not to have been dissatisfied. On the part of the minors, it is excepted that this amount exceeds the lawful commissions of a guardian, and should not have been allowed. Certainly the guardian was not bound to go beyond the limits of this State in prosecuting the rights of his wards. He had no legal authority as guardian in Louisiana. The courts in that country might, and probably would, order the fund to be paid to the guardian in South Carolina, as the courts in this State have sometimes done, and sometimes refused to do. If he had found it necessary to employ an agent to go on and take papers or receive money in Louisiana, belonging to his wards, he would be reimbursed any moneys he might properly pay such agent. He went himself. The reasonableness of the charge is established by the fact that the adults, whose interest was the same, made no objection. I think the exception should be over-ruled.

The report is recommitted to the referee, to be reformed on the principles of this decree."

The case again came up, in June 1843, on exceptions to the report of the referee, before Johnson, Chancellor, who decreed as follows.

"This cause is now before the court for the third time. The bill is for an account and settlement of the estate of the defendant's intestate, and involves the settlement of several other estates of which he had been the administrator. It came up for hearing before Chancellor Harper, at June Term, 1840, who laid down, very fully and clearly, the general principles on which the accounts were to be stated, and the defendant being commissioner of the court, the matters of account were referred to Mr. John J. Pratt. At June Term, 1842, the case again came up on exceptions to Mr. Pratt's report, Chancellor Dunkin presiding, and an order was made, referring back some of the matters of account with instructions. An amended report has been made, and the case is now be-

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fore the court on exceptions *to that report. For the general history of the cause, and for the details of the matters of account, I refer to the decrees and reports heretofore made, and will proceed directly to the consideration of the questions raised in the report and exceptions now before me.

Of complainant's first exception: It is because the defendant's intestate is not charged with the rents of the land and ferry from 1830 to 1836, during which time he had them in possession. To understand this exception, it will be necessary to refer back to the previous proceedings in the cause, for the circumstances under which the intestate kept the possession of the land and ferry from 1830 to 1836. From these, it appears that the land was sold by the commissioner, under an order of court, in September, 1829, and was bid off by the intestate, at $1500. He neglected to comply with the terms of the sale, and at June Term, 1830, an order was obtained for a re-sale. At this sale, which was made in September following, the intestate again bid it off, at the sum of $1100, and in 1836 he sold the land to Henry Rogers, for $3000, he, the intestate, having had possession of the land and ferry in the intermediate time. No question was raised as to the validity of the sale to Henry Rogers, but the complainants insisted that he was bound to account for the amount at which he sold to Rogers, and this gave rise to the various questions whether he was bound to account at that rate, or at the price at which he bid it off at the first or second sales made by the commissioner of the Court. The report charges the intestate with the crops made on the plantation as substitute for land rent and slave hire, and with the rents of the ferry up to the end of the year 1830. Nothing is said in either of the decrees as to the intestate's liability for the use and occupation from that time down to

the time intestate sold to Rogers, and the referee remarks on this exception, that he has refused to allow any thing for it now because the claim has not been before made. The question is not, I think, concluded, by the omission to make it heretofore. The object of the court is to do equal justice between the parties, consistently with the rules of law, and that object would be violated if the rights of a party were suffered to be compromitted by mistakes or omissions of himself or counsel, whether from mere neglect or ignorance, if the correction of them neither delayed or injured his adversary. The case of Price v. Nesbit, 1 Hill. Eq. 445, is a memorable instance in which the court permitted the party to open a decree after it had

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been *confirmed by the Court of Appeals, and let him into an examination of its merits, on the ground that a fragment of the cause remained undisposed of, and left it in the possession of the court. The claim is the more reasonable here, because the court are already in possession of all the facts necessary to the determination of the question raised by the exception. To get at the merits of the question, we must go back to the decrees heretofore pronounced, and ascertain the principle on which the court proceeded in declaring the intestate liable for the price at which he sold to Rogers. The question came before Chancellor Harper, who, under the 5th head of his decree, expresses his opinion that the intestate was bound to account for the value of the land at the time he bought at the commissioner's sale, and directed an inquiry as to the value. He put it on the rule which applies to a trustee purchasing from his cestui que trust, or to the purchase of an attorney or agent, or any other person standing in such a relation of confidence as gives to one party an advantage over the other in the subject of their dealing, according to which it is incumbent upon the purchaser to show that he had paid the full value. The question of value was first heard by the referee, under the order of Chancellor Harper, and from what I collect from the summary of the evidence detailed in Chancellor Dunkin's remarks on the complainants's second exception, there was great diversity of opinion amongst the witnesses, as to the value of the land—some estimating it at as low as $1720, one at about $2680, and the majority at about $3000. The referee, notwithstanding, charged the intestate with $1500, the price he bid for it at the first sale, in pursuance of what he supposed to be the opinion of Chancellor Harper, and the complainants excepted to that report, on the ground that he ought to have charged him the price at which he sold to Rogers. This exception was argued before Chancellor Dunkin, who, after a careful examination of all the facts, sustained the exception, and referred the matter back, with instructions to make up the account accordingly, and the referee has, in pursuance of it, charged the intestate with $3000, as of the day on which he sold to Rogers. When the exception now under consideration was argued before me, I was strongly inclined to think it had merits, and indicated that opinion. But on a further examination into the evidence, I regard it as res judicata—and it will be observed that the question of rent or the interest on the value was not raised in the exceptions

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heard by *Chancellor Dunkin, nor is it noticed in his decree. He simply sustains the objection, which, in effect, entitled the complainants to what they asked for in the exception, the price paid by Rogers for the land, and that, of course, referred to the time when the money was paid. To that I have no authority to add, either in the form of rents or interest on the money value. I am inclined to this conclusion from another consideration. The Chancellor himself remarks, that the evidence of value was by no means satisfactory, and on looking through it, it will be seen that it is impossible to extract from it any thing like a certain value at any precise time; and if the matter occurred to the Chancellor at all, I can well suppose that as a means of compromising the conflicting opinions of the witnesses, he fixed on a sum in gross as the measure of all the complainants's claim on account of the sales; and there is nothing in the decree which indicates a different opinion. This exception is, therefore, overruled.

Of complainants's second exception. The referee remarks upon this exception, that complainants are only charged one dollar for commissioner's fees for recording and filing intestate's annual returns as guardian of Mrs. Huson; and that is the sum allowed by law for that service. The additional charge of three dollars, complained of in this exception, is charged, I understand, for the commissioner's annual report on the guardian's accounts, and that is the sum allowed by the Act for each report. Exception overruled.

The defendant has also filed a single exception to the report, but that was not insisted on, and very clearly has nothing in it. It complains that although he is charged with the advanced price at which his intestate sold the land, no allowance is made for his commissions or expenses in effecting the sale. The decrees heretofore made in this cause, put the defendant's intestate on the footing of a wrongdoer, in purchasing and selling, and I can hardly suppose the counsel in earnest in supposing that that would entitle him to a reward—overruled.

It is ordered and decreed, that the report of Mr. Pratt, the referee, be confirmed in all its parts, and be made the judgment of the court.

The complainants appealed, on the grounds,

1. Because the defendants's intestate was entitled to but one-third of Mrs. S. Brummet's estate.

2. Because the intestate was entitled to only one-ninth, instead of one-third, of John Lewis's estate.

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*3. Because the intestate should have been charged with the rent of the land and the hire of the negroes, and should not have been allowed his charges for horses, mules, hogs, &c. purchased for the farm.

4. Because the complainants are charged with their education and maintenance, when the intestate had received an ample fortune with their mother, and had often declared he would not charge them.

5. Because the intestate has been allowed an extravagant charge for collecting the estate of Robert N. Lewis.

6. Because the intestate is liable for the rent of the land and ferry, from 1830 to 1836.

7. Because the proceedings in the case of Thomas McMeekin and wife v. S. Brummet et al. are not binding on complainants, as they were minors at the time.

8. Because the intestate is credited with four dollars each year for fees paid the commissioner for receiving his return as guardian.

The defendant also appealed from Chancellor Dunkin's decree,

Because it directs the estate of defendant's intestate to be charged with the advanced price for which he, (the intestate) sold the land purchased by him at the commissioner's sale, as the property of the estate of John Lewis, instead of the price at which he bid off the land.

Failing in this, he then appealed from Chancellor Johnson's decree,

Because it refuses to allow defendant's intestate commissions on the advanced price of the land, which he is required to account for by the decree of Chancellor Dunkin.

A. W. Thomson, for the complainants.
Dawkins, contra.

Curia, per DUNKIN, Ch. It is not proposed to discuss, seriatim, the grounds of appeal from the several decrees which have been pronounced in this case.

The complainants's first ground of appeal was that which was most pressed upon the consideration of the court, both here and at the circuit, to wit, that the defendants's intestate had been credited with the whole of Mrs. S. Brummet's estate, whereas he was entitled only to one third, as he took possession of the same without an administration.

Mrs. S. Brummet died intestate in 1832 or

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1833, leaving as *her only distributee and next of kin, her daughter, Mrs. McMeekin, the wife of defendant's intestate. McMeekin took possession of the estate and held it. His wife died in February, 1835. It is insisted on the part of the complainants, that the marital rights of McMeekin never attached, and that the complainants are entitled to two thirds in right of their deceased mother Mrs. McMeekin.

Marsh v. Nail [Rich. Eq. Cas. 115] was decided by the Court of Appeals, at Columbia, in January, 1832. Dicey Glover died intestate in November 1823, leaving, as her only distributee, Sarah Nail, the wife of John Nail. On the death of Mrs. Glover, John Nail took possession of her property without administration or other legal authority (in the language of the decree) and held it till his death in November 1825. His widow, in October, 1826, intermarried with John Marsh, who took out letters of administration on Mrs. Glover's estate and claimed the property. It was not alleged that there were any debts of her estate. Chancellor Desaussure held that the marital rights of Nail had attached, and that, under the circumstances, no administration was necessary. In affirming the decree of the Chancellor, the Appeal Court say, it would be very unreasonable to require an administration where there were no debts, where the wife was the only distributee, and there could be no partition. Mutate nomine, that is this case. The whole court, consisting of Justices Johnson, O'Neall and Martin, concurred in the judgment. In Spann v. Jennings, 1 Hill Eq. 324, Chancellor Harper, recognizing the authority of Marsh v. Nail, says, "James L. Spann was entitled to the administration in right of his wife. But to what purpose should he have administered? There were no debts to pay, and no distribution to be made. Was it simply that he might take possession in his own right? That would have been going through merely a nugatory ceremony. Or if any other person had administered, could the property have been recovered from him? No. By going into equity and shewing that there were no debts, and that his wife was exclusively entitled, a recovery at law would have been restrained. In every point of view, then, administration would have been superfluous." But if a nominal administrator would be restrained, on the ground that there were no debts, can the complainants make a better case? If, as in Marsh v. Nail, the claim of the wife surviving was rejected, can the distributees of the wife be entitled to more favor? We think not.

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*The fourth ground of appeal insists that the defendant should not have been allowed for the board and maintenance of Lewis's children, when he had often declared that he did not intend to charge board. The court is quite satisfied with the principles of the decree of June, 1840. No allowance is made for board while the family and their property were kept together. After the land was sold and the negroes hired out, board is

charged and allowed. The referee thought the declarations of the intestate related only to the former period, and the court sees no cause to question the correctness of his conclusion.

It is also insisted, that the defendant's intestate should have been charged with the rent of the land and ferry from 1830 to 1836. The court is constrained to say, that this objection comes too late. The report of the commissioner was made in 1842; many exceptions were taken, but no objection was made on this ground. So far as the exceptions made were not sustained, that report became the judgment of the court. The door of litigation must at some time be closed. It is a relief to the court to feel, that although the complainants are not now permitted to agitate this question, they have, probably, no cause to complain of the general result in regard to the ferry and the land.

And in this connexion it may be as well to consider the defendant's ground of appeal, to wit: that the intestate was charged with the advanced price for which he sold the land, instead of the price at which he had bid it off at the Commissioner's sales.

At the first sale, the intestate bid off the land for $1500; at the second sale, for $1100. According to the lowest estimate placed by any of the witnesses, the land was, at that time, worth $1720, or $4 per acre. There seems, then, no ground whatever to maintain that the intestate should only be charged with the sum at which he had bid off the land. But he acted in good faith, and a difference of opinion may well exist as to the sum with which he should be charged. Five or six years afterwards he sold the land to Henry Rogers for $3000. Out of the fifteen witnesses examined, seven regarded this sum as a fair price for the premises in 1830, when it was bid off by the intestate. Others thought less. The Chancellor, regarding the onus of proof as on the defendant, and that the intestate ought not to make any profit out of those standing in the relation of the complainants, has fixed the amount to be paid at $3000. The average price, at the

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sums fixed by the witnesses, would be *$2548. But this would be a very unsatisfactory standard. We might send back the case for further examination before the referee, but the defendant prefers that this protracted litigation should be closed, if there be no other ground for opening the report.

The complainants's eighth ground of appeal is well taken. The referee has allowed $4 as costs paid to the commissioner on each return of a guardian. The Commissioner is entitled only to one dollar, as was decided in Prince v. Logan, Speers Eq. 29. In this respect, the referee must correct the account filed with his report. But this is a mere ministerial act of the commissioner or referee, which does not require the further interference of the court.

On all the other grounds taken, both by complainants and defendant, the appeal is dismissed, and it is further ordered and decreed, that each party pay his own costs.

HARPER and JOHNSTON, CC., concurred.

JOHNSON, Ch. I doubt whether the purchase made by the defendant's intestate at the sale of the real estate, comes within the rule applicable to purchases made by persons standing in a fiduciary relation. That applies more immediately to contracts made between a trustee and cestui que trust. This was a sale made under the authority of the court, over which he had no control. In all other matters, I concur in the opinion of the court.

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1 Rich. Eq. *26

*JOHN M. COOPER and Wife and Others v. JOHN DAY.

(Columbia. Dec., 1844.)

[*Evidence* ⇐208.]

In general, the statements of a bill are not evidence against the plaintiff; where, however, he has sworn to the bill, they are evidence against him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 714; Dec. Dig. ⇐208.]

[*Evidence* ⇐179.]

Trust deed set up, as against the trustee and against his answer, on evidence of the contents, and that the trustee had had possession of the deed, and had acted under it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 595–599; Dec. Dig. ⇐179.]

[*Trusts* ⇐167, 345.]

Cestui que trusts who have vested interests, though not the right of immediate enjoyment, may maintain a bill to have the trusts of the deed declared, and the trustee removed for misconduct.

[Ed. Note.—Cited in Walker v. Fraser, 7 Rich. Eq. 246.

For other cases, see Trusts, Cent. Dig. §§ 219, 510; Dec. Dig. ⇐167, 345.]

[*Trusts* ⇐234.]

A trustee who failed to have the trust deed recorded, and to give notice thereof to a purchaser of the land, held liable to the cestui que trusts for the value of the land.

[Ed. Note.—Cited in Nance v. Nance, 1 S. C. 224.

For other cases, see Trusts, Cent. Dig. § 340; Dec. Dig. ⇐234.]

[*Trusts* ⇐166.]

If a trustee raises a grossly unreasonable claim to the trust property, in open defiance of his cestui que trusts, and in direct violation of his obligations, this is such misconduct as authorizes his removal from office.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 218; Dec. Dig. ⇐166.]

[*Deeds* ⇐82.]

A trustee who purchases slaves included in the trust deed, cannot set up the want of regis-

tration in opposition to the claims of the cestui que trusts.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 217; Dec. Dig. ⇐82.]

[*Evidence* ⇐179.]

[Where the primary evidence is in the possession, or under control, of the adverse party, who fails or refuses to produce it, secondary evidence is admissible.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 596; Dec. Dig. ⇐179.]

[*Trusts* ⇐179.]

[Cited in Hext v. Porcher, 1 Strob. Eq. 172, to the point that a trustee must act as a prudent man would in the conduct of his own affairs.]

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 233; Dec. Dig. ⇐179.]

Before Johnston, Ch., at Edgefield, June, 1843.

The Chancellor. The defence adopted in this case renders it necessary to go back to the case of Hancock v. Day,(a) and I do not know that I can explain the circumstances better than by repeating in the first instance a greater part of the statement of that case, contained in my decree of 1839.

The original bill in that case was filed the 20th of February, 1838, by Nancy, Simon, and William J. Hancock, infants suing by Benjamin R. Tillman, their guardian, against Martin H. Day.

It stated, that on the 12th February, 1828, Simon Hancock, Sr. since deceased, conveyed by deed, to his wife, Elizabeth, and to the plaintiffs, his children, in equal undivided shares, a certain tract of land, in said deed described, containing 400 acres. That the said Elizabeth, after the death of the grantor, intermarried with one David Gurganus, with whom she afterwards united in conveying her undivided fourth part of said land to the defendant, Martin H. Day, who had, thereupon, taken possession of the entire tract, and had, thenceforth, had the use and occupation thereof. That the plaintiffs

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were desirous that the same should *be divided or sold, and that the said Martin H. should account to them for the rents and profits thereof, whilst in his possession. The bill prayed for a writ of partition, in order to a sale or division of the land, and for an account of the rents and profits.

To this bill, Martin H. Day put in his answer, in which he admitted that he was tenant in common with the plaintiffs, in the said tract of land, in the manner set forth in the bill; and stated that he had no objection to the partition or sale prayed for.

On the 28th of May, 1838, the plaintiffs filed their bill, by way of amendment to the original bill, and made John Day an additional defendant.

They stated in the amendment, that in the same deed whereby Simon Hancock, Sr. conveyed the said tract of land to his wife and children as aforesaid, he conveyed to his said wife Elizabeth, two slaves, Will and Ned, his stock of cattle, horses and hogs, and all the rest of his goods and chattels of every description, except six slaves, Bob, Louisa, and Rebecca, with the three children of Rebecca, Winny, William and Basil, and certain other property therein set forth, which he gave to the plaintiffs, to be divided among them, together with their shares of said land, when the youngest of the said plaintiffs should arrive at eighteen years of age.

The plaintiffs then proceeded to state, that since the filing of the original bill, they had been informed that their mother, the said Elizabeth, did, on the 6th day of May, 1829, before her marriage to the said David Gurganus, but in contemplation of said marriage, execute a deed of trust to the said John Day, the father of his co-defendant, Martin H. Day, whereby she conveyed to the said John all the real and personal property which had been conveyed to her, as aforesaid, by her late husband, Simon Hancock, Senr. and constituted him trustee thereof; and moreover, invested the said John, by said deed, with power to control, manage and dispose of the same at his discretion, until her youngest son, the plaintiff, Wm. J. Hancock, should arrive at eighteen years of age, when the said property was to be equally divided among the plaintiffs.

That the plaintiffs had frequently, through their guardian, applied to the said John Day to produce the said trust deed, in order to ascertain their interests under it; but he declared the said deed was lost or mislaid.

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The plaintiffs stated, however, that *on the 10th of October, 1834, the said John Day, as their next friend and guardian ad litem, filed a bill against the said David Gurganus, to restrain him from removing their property from this State, and for other purposes, of which bill they made an exhibit. That in that bill reference was made to a copy of said trust deed, as therewith filed as exhibit B, but that the plaintiffs were informed no such exhibit was, in fact, filed. Nevertheless, in confirmation of the fact that such a deed was executed, the plaintiffs craved reference to the said bill, so filed by the said John Day, wherein he described the said deed, in terms corresponding to those employed by the plaintiffs.

They insisted that the terms of the deed must operate to destroy the conveyance from Gurganus and wife to Martin H. Day, set forth in their original bill, or to restrict said Martin's interest thereunder, to a mere use of Mrs. Gurganus's share of the land until the plaintiff, Wm. J. Hancock, should attain the age of eighteen years; the said Martin, as they further alleged, having had notice of the trust deed, before his purchase.

(a) Vide this case reported in McM. Eq. pp. 69, [36 Am. Dec. 293,] and McM. Eq. 298—R.

The prayer of the bill was, that the said John and Martin H. Day should answer the same; that they should "exhibit the trust deed, if in their power;" and that Martin should answer particularly "whether before or at the time of his purchase of Mrs. Gurganus's share of said land, he did not know of the existence of said trust deed." There was a prayer, also, for general, but none for particular, relief.

A writ of partition, which had been awarded on the original bill and answer, was returned at this stage of the pleadings, with a recommendation that the land should be sold on a credit; which return was confirmed by order of Chancellor Harper—which order provided, however, that the proceeds of the sale should be subject to the further order of the court. The land was sold accordingly for $3,800.

Subsequently to this, answers were put in by both defendants.

John Day, answering, said, that he did prosecute the suit referred to in the bill, as next friend of the plaintiffs, against Gurganus and his wife, but that his sole purpose in said suit was to secure the negroes specifically given to the plaintiffs by the deed of their father, Simon Hancock, and not to interfere with the negroes and other property given by said deed to Mrs. Gurganus, formerly Mrs. Hancock; and that no further proceeding was had in the said suit, after the negroes specifically given to the plaintiffs

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were given up to this respondent. *Respondent did draw a deed of trust from the said Mrs. Gurganus to himself, as trustee, before her intermarriage with Gurganus; which (unskilfully drawn,) was intended to secure the property given by Simon Hancock to his children, from the improvident control and management of said Gurganus: it being supposed by Mrs. Gurganus and the respondent, when the said trust deed was drawn, that by virtue of the deed of Simon Hancock, Mrs. Hancock, afterwards Gurganus, was entitled to the management and profits of the real and personal property given to her children, until the youngest should attain the age of eighteen years; and the respondent submitted that nothing inconsistent with this could be fairly deduced from the statements in his bill against Gurganus; and that any seeming contrariety might be explained by his want of skill in the forms of proceedings. He admitted that plaintiffs's guardian did once apply to him for said trust deed, and that he answered that it was lost or mislaid; and so the fact was. Respondent placed the said trust deed in the hands of his counsel, Mr. Bauskett, about the time of filing his bill against Gurganus; and, if it was returned to him by his counsel, of which he was not certain, he could not find it among his papers; it was not in his possession or control, nor had it been wilfully placed beyond his control, to avoid any consequences that might grow out of it, affecting him.

He submitted that he had been improperly made a party to that suit, (the one in which he was answering,) as no relief was sought against him, and no discovery sought from him of facts not within the knowledge of plaintiffs or their guardian; and he was joined unnecessarily for other ends. He closed his answer by stating that "the said trust deed was not registered; and, it is submitted, has no legal efficacy."

Martin H. Day, in his answer, said, that he was an innocent purchaser, for valuable consideration, (to wit: for the sum of eight hundred dollars,) of the share of David Gurganus and wife, in the land described in the bill, without notice of any trust affecting said share in said land. He had indeed, heard, before his purchase, of the existence of a trust deed to his father, executed by Mrs. Gurganus, but he never had understood that said deed in any way affected the share of Gurganus and wife in said land; on the contrary, he had always understood and believed, that the said deed of trust embraced only the shares of the children of Simon Han-

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cock, as specifically given *by the deed of said Simon, together with the interest that Mrs. Gurganus might have in the profits of the children's shares, before the youngest child attained eighteen years of age. He submitted, that as said trust deed was not recorded, and he had never had any express notice of it, he was in no wise bound by its provisions.

These were the pleadings in that case, so far as they are relevant to the present suit.

It was heard upon the pleadings and testimony taken in the cause in June, 1839. Before stating the decree then pronounced, it may be proper to observe, that the deed of Simon Hancock, sen. referred to, gives and grants "unto the said Elizabeth, my wife, and to the said Nancy, Simon and Wm. J. Hancock, my children, the following property, viz: —unto my wife, Elizabeth, her heirs, executors and administrators, I have given two negroes, Will and Ned, one hundred acres of land, together with my stock of horses, cattle, hogs, and all my other goods and chattels, of every description whatever, except what is hereafter mentioned.

"Secondly, Unto my three children, Nancy, Simon, and Wm. John Hancock, I have given, to the three jointly, (to be equally divided among them, when the youngest child arrives at the age of eighteen years,) my six negro slaves, viz:—Bob, Louisa, Rebecca, and her three children, Winny, William and Basil, and their future increase; one hundred acres of land to each of said children; one horse, one cow, one feather bed; besides, to my daughter, I have given one set of silver table spoons; to have and to hold," &c.

It was decreed, that by the terms of this

deed the plaintiffs were entitled to have their shares of the land presently separated from their mother's, although, by the express words of the instrument, they were not to subdivide their shares among themselves until March, 1845, when Wm. J. Hancock will have attained the age of eighteen years.

The bill was dismissed as against John Day, on the grounds, that no act of misconduct, on his part, was charged by the plaintiffs; that there was no prayer for specific relief against him, and none could be granted under the prayer for general relief, but what was warranted by the statements of the bill, and it contained no statement to warrant any. That the discovery sought from him was not pointed towards any relief required of him, but for the purpose of using it as evi-

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dence against Martin *H. Day; but for this purpose, it was unnecessary and inadmissable to exact a discovery from him. It amounted to the assertion of a right to implead a witness and obtain his evidence by answer. He might have been examined as a witness on the part of the plaintiffs; and, therefore, could not be compelled to discover: nor could his answer be read against his co-defendant. 2 Vern. 380. 3 P. Wms. 311, note H. 12 Ves. 361, [Leeds v. Marine Ins. Co.] 2 Wheat. 380, [4 L. Ed. 266.]

As against Martin H. Day, so much of the bill as sought to avoid his purchase of Mrs. Gurganus's share of the land was dismissed, upon the ground that he had paid a full and valuable consideration without notice of the trust deed; there being no proof whatever to establish its existence, except the recital of it in John Day's bill against Gurganus, and in a mortgage executed by John Day, Gurganus and wife, to one Cloud; which, however conclusive upon John Day of the existence of the deed, and however strongly he might be bound by it for misconduct properly charged against him, was no evidence of notice of its provisions, or even its existence, against Martin.

The right of Martin to Mrs. Gurganus's share of the land was established; a share of the proceeds of its sale being given in lieu of it.

After this decree was pronounced, Nancy Hancock, one of the plaintiffs, intermarried with John M. Cooper.

The bill in the present case was filed the 13th December, 1841, against John Day alone, by the said Cooper and wife, and by her two brothers, Simon and Wm. J. Hancock, who are still infants, and sue by their guardian, B. R. Tillman. It states, substantially, the foregoing facts. It repeats the statement made in the former cause, relating to the execution of the trust deed by Mrs. Hancock, before her intermarriage with Gurganus, and to the conveyance by Gurganus and wife, of the wife's share of the land, to Martin H. Day; which it alleges was executed after the trust was created, and accepted by John Day, and with his knowledge; and it adds, that at the time of the execution of the trust deed, Mrs. Hancock was in possession of the two negroes, Will and Ned, given her by her late husband's deed, and that they thereby vested in the said John Day, as trustee. That by his acceptance of the trust it became his duty to preserve and protect the interest of the plaintiffs, his cestui que trusts, in the land and negroes covered by the trust deed, which duty he violated by gross negligence,

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in omitting to register the said deed, *and allowing his son, the said Martin H. Day, to obtain an absolute conveyance from Gurganus and wife of her fourth part of the land, without giving any notice of the deed previously executed by Mrs. Hancock to himself. The bill further states, that the defendant has the two slaves, Will and Ned, now in his possession, pretending to claim them in his own right, by virtue of a purchase which he alleges he has made, either directly from Gurganus and wife, or at some sale of them under a mortgage, executed by said Gurganus and wife, for a debt due by Gurganus to one John Cloud, which mortgage was given after the execution of the trust deed, and in which he joined as trustee, in violation of his duty.

The prayer of the bill is, that the rights of the plaintiffs under the said trust deed may be declared; that the defendant may be decreed to account for his administration of the trust property, particularly that he may be ordered to account for the value of one-fourth of the said tract of land, which was lost to the plaintiffs in the former suit, by his fraud and negligence as trustee; that he may be required to deliver up the said slaves, Will and Ned, and account for their hire; and that the trust may be transferred from him to a trustee to be appointed in his place; and for general relief. The bill also prays for a ne exeat, which it is unnecessary to notice further, the facts charged being sworn off, and there being no proof in contradiction to the answer.

The answer admits the execution of a trust deed, by Mrs. Hancock, conveying to the defendant all her interest in the management and profits of the property conveyed by her husband, Hancock, to her children; but denies that it conveyed, or was intended to convey, any portion of her specific share under her said husband's deed; or that he accepted any trust whatever, except in that sense; or that he ever controlled or managed the property specifically given to Mrs. Hancock, afterwards Gurganus, by the deed of Hancock. The defendant admits that he gave no notice to Martin H. Day as to any trust affecting the land purchased by him from Gurganus and wife; being himself ignorant of the existence of any. He further

states, that he bought the negroes, Will and Ned, from Gurganus and wife, for a full and fair price, under a like ignorance. He did, indeed, join them in mortgaging them to Cloud, but this was done merely to satisfy Cloud, who was his neighbor and friend; that he asserted no claim or control over said

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negroes, and *he does not remember whether the mortgage was read to or by him.

He does not know what has become of the trust deed; and it is not in his power or possession.

He submits that it is, in fact, a marriage settlement; and that it is void for want of registration.

He submits, further, that inasmuch as the plaintiff, Wm. J. Hancock, will not be eighteen years of age until March, 1845, the bill is prematurely filed.

That Gurganus and wife are materially interested in the suit, and should be made parties.

And that in the former suit of these plaintiffs, against Martin H. Day and himself, the same matters, at least so far as concerns the land, were stirred and decided against the plaintiffs; which decision he pleads in bar of the present bill.

It is a misconception that this bill is barred by the former adjudication. So far from the charges of this bill corresponding with those of the former bill, or their being adjudicated in that case, the former bill was dismissed, as against this defendant, upon the express ground that it contained no charges at all, against him.

Turning to the present bill, I can only repeat what I said in the decree of 1839, in reference to evidence then taken, and now, again, produced; that I think there is evidence enough to establish not only the execution of the trust deed, but its contents also, as against this defendant; and that there is proof of such misconduct on his part as should render him responsible for the trust property.

Of the execution of a trust deed of some sort, and of the acceptance by the defendant of the trusts, whatever they were, there can be no doubt. So much is admitted; and the principal questions contested here relate to the terms of the instrument, and the culpability of the defendant's conduct, principally the former. There being no doubt here, that a proper foundation exists for the reception of secondary evidence of the contents of the paper, a good deal has been given. The bill sworn to and filed by the defendant against Gurganus on the 10th of October, 1834, is in evidence; in which, after accurately describing the deed from Simon Hancock to his wife and children, he states, "that Elizabeth Hancock, his (Simon's,) widow, afterwards, to wit: on or about the 6th of May, 1829, in contemplation of an intermarriage with the said David Gurganus,

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made *and executed a deed of trust to your orator, John Day, with a view of protecting her property against any indiscretion of her intended husband, whereby she nominated your orator her trustee of her real and personal estate," (not a part of it,) "which had been given to her by her late husband; and authorized your orator to contract and manage her business as her agent and trustee; and, also, vested in him the right of disposing of said estate, by buying and selling, as he might think best, until her youngest son, John Hancock," (Wm. J.) "should arrive to the age of eighteen years; then the said estate was to be equally divided between the said three children, Nancy, Simon and John Hancock."

This evidence was received upon the ground that the bill was sworn to and subscribed by the defendant Day; his affidavit being "that the matters and things contained in the foregoing bill are true, to the best of his knowledge, information or belief." The statement which I have extracted is not made as matter of information and belief, but as of his own knowledge. It is true that generally a bill is not evidence against the plaintiff in the cause: the statements being attributed to the counsel, and not to the party. But I have been in the habit of ruling, that any paper signed by a party, much more one sworn to by him, is good as his statement.

There is a singular coincidence between the fact stated in this bill and another piece of written evidence, also subscribed by the defendant. This consists of the mortgage of the 12th of February, 1833, by which the defendant joined Gurganus and wife in conveying the slaves Will and Ned (specifically given to her by her late husband's deed.) to John Cloud, by way of securing a debt due to Cloud by Gurganus and wife. In this mortgage are the following passages:

"Whereas the said Elizabeth Gurganus did, in the year 1829, execute a deed of trust unto John Day, Esq. investing him with full legal power to take charge of, and act and transact for me and my children, viz: Nancy Hancock, Simon Hancock, and William J. Hancock; and whereas, being then about to marry the said David Gurganus, (which I have done.) and wishing to secure to me and my children, in named, the sure and perfect enjoyment, possession and management of the property deeded to me and my children by my husband, the said Simon Hancock, which will appear by reference to the Clerk's office," &c. "I did appoint and confide

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in the said John Day, Esq. as trustee, *for that special use, and to act and transact with said property for us, as he might deem best to our interests," &c. "Now, we, David

Gurganus, Elizabeth Gurganus, and John Day, trustee, the better to secure," &c. "Do firmly pledge and mortgage unto the said John Cloud, his heirs and assigns, two negro slaves, to wit: Ned and Will, being part of the property given by Simon Hancock, deceased, unto his said wife, the in named Elizabeth Hancock and her heirs, and subsequently transferred by her to the said John Day, Esq. in trust, as trustee for the use expressed," &c.

Now, we have for proof of the execution of the instrument, the admission of the defendant, in his former answer, that he drew it; and his statement in the mortgage to Cloud of its actual execution; which statement he subsequently confirmed by oath in his bill against Gurganus; so I think there are to be found indices pointing to its terms so directly as to leave no reasonable doubt what they were.

There is no accounting for the errors and absurdities of men, but if this defendant sought to convince Mr. Cloud, (as he states) of the fact, that he had no claim to, or authority over, the two slaves Will and Ned, it seems to me he adopted a very illogical method in the statement that they had been transferred to him as trustee. I confess my conclusion is the other way. There may be a bare possibility that the statement was made with that view. The reasonable probability is that the statement was made, not because it was false, but because it was true. It appears by the evidence, that the defendant was in possession of the instrument a little over a year afterwards, and the inference is natural, that it was at this time, and had been all along, in his possession, as it should have been. Would it not have been a surer method to quiet the suspicions of Mr. Cloud, to have shown him the deed? If the fact was as stated in the defendant's answer, could it not have been proved by Cloud? Under these circumstances, I cannot persuade myself to disbelieve the intrinsic evidence of the transaction. Then, the defendant having possession of the trust deed, is it to be supposed that his memory, (at least,) as to its contents, was not consulted on this occasion? Now, if the representation of its contents, set forth in the mortgage, had materially varied from the information we have from other quarters, upon the same subject, we might have some suspicion of a mistake. But we find there is no substantial discrepancy. The mortgage was

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evidently not drawn by an expert hand. *It tells its story rudely but faithfully. It sketches the outlines, and depicts the substance of the thing intended to be represented. There is no detail, no finish, but there is no misconceiving the picture. We are informed that the subject matter of the deed was not, as represented in the answer, the mere right of managing the children's shares, and their profits, but the whole body of property given by Hancock to his wife and children; and to put it beyond doubt that Mrs. Hancock's specific share was included and actually conveyed, the two slaves, Will and Ned, are said to be part of the property given by her former husband to her, and subsequently transferred by her to the defendant, as trustee. Then, the purpose of the conveyance, extending to the whole property, is distinctly stated; to secure it for the mother and children, against the improvidence of Gurganus; and it is said, in general terms, that the use conformed to this purpose; and that a liberal power, with the right to exercise his discretion (within the trust, of course,) was given to the trustee, "to act and transact" for the benefit of the cestui que trusts.

Whether Mrs. Gurganus had power to invest the defendant with authority over the children's shares, it is not material to inquire. He assumed the authority under her deed, and cannot repudiate his responsibilities. Besides, this point is not in issue here. But emphatically, he became bound in relation to Mrs. Hancock's share, for she had an undeniable right to convey that upon what terms she pleased.

In the mortgage we have general statements, by unskilful persons. But Mr. Bauskett drew the bill filed by the defendant against Gurganus. His recollection is that he drew it either from the original trust deed, or a copy of it furnished by the defendant. He thinks it was the original. This was between one and two years after the mortgage was drawn. In the mortgage the statement of the trust deed was incidental. Here the extent of the trustee's title and authority was the direct question. Now, if that which was incidentally stated tallies, substantially, with the result of a direct investigation, there is little room for doubt that the truth has been stated in both instances.

What does the bill, which sets forth Mr. Bauskett's construction of the deed, and was sworn to and subscribed by the defendant, contain? It states that the trust deed was executed from the identical motives stated in the mortgage. It differs from that, perhaps, in restricting the subject matter to the property given to Mrs. Hancock; but that

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(as it clearly sets forth,) was conveyed *to the defendant. The express trust declared, was that the defendant should manage the property until Wm. J. Hancock should attain 18 years of age, and then divide it equally among the three children. As a substitute for the power, quaintly expressed, to act and transact, we have the power of selling and disposing of the trust property, at discretion.

We are not, now, to enquire whether the deed embraced the children's own shares. It

certainly embraced Mrs. Hancock's share. There is a striking coincidence throughout the recital in the mortgage and the statement in the bill; and when the former was general, as in stating that the trust was for the benefit of both mother and children, the latter tells us the particulars.

It is true that, upon being arrested, Gurganus gave up only the negroes originally belonging to the children, but it is not certain whether Will and Ned were then in his possession. Cloud had a mortgage of them, and it does not appear how the possession was.

If we resort to May's evidence, which, although not impeached, seemed to be questioned, he says that the defendant drew Mr. Bauskett's attention closely to the terms of the deed, by enquiring whether he was liable as trustee; and was assured that he was.

If, after looking at this body of evidence, there is any mind so constituted as to doubt what were the provisions of the trust deed, it must be because such a mind is not satisfied with the substance, but demands scrupulous exactness in every particular. It must be remembered that we are endeavoring to ascertain the terms of a paper in the defendant's possession, under which he twice acted, and the loss of which is not established. If there is any obscurity, who creates it? Why was not the deed registered? and why was it not produced? Under such circumstances it would not comport with a firm and manly administration of justice, to hesitate to act on reasonably satisfactory evidence, from a timid conjecture that the paper, if produced, might possibly, in some minute particular, differ from the representation given by the statement and the oath of him who had the custody of, and acted under it.

If I were to declare the trusts of this deed, at this stage of the case, I should say, that a trust resulted to Mrs. Hancock, particularly as to the land, until Wm. J. Hancock shall arrive at the age of 18 years, and that then the corpus should be divided among the plaintiffs. I speak of course of Mrs.

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Hancock's speci*fic share. As to the original share of the children, they are not now in question. If they were, they must necessarily, and for obvious reasons, obey a different rule, as to the time before Wm. J. shall attain the age of eighteen.

But, I think the trusts should not be declared until Mrs. Gurganus is made a party. I have stated what I conceive to be her interests.

But there are objections by the defendant, which, if sustained, go to the whole bill.

First, it is said the bill is filed before the rights of the plaintiffs have accrued. A right to the present enjoyment of the property has not accrued to them, but they have vested interests in it, and are entitled not only to have the trusts declared, but to have the defendant removed from his trust if he has misbehaved.

Another objection raises the question whether the trustee is liable for the loss of the land, occasioned by his neglect to register the deed, or by failure to give notice of it to his own son, when he took a conveyance of the land. I hold that if the trustee, after accepting, and especially after acting under, a trust, does or omits any act materially calculated to destroy the trust, or impair the interest of his cestui que trusts, and in so doing betrays either a corrupt motive or the want of that diligence which a man of ordinary prudence would exercise in relation to his own property or interests, he is responsible for the consequences that may ensue. I dismiss from the case all that the defendant has said, as to his misconstruction of the deed. He has proven no mistake; and this is an independent fact which he must substantiate. And then, I ask, would any man of ordinary prudence, his own property being at stake, have failed in either of these particulars? It appears that he knew of the conveyance about to be made to his son, and gave no notice. He himself suggests, that a failure to record the deed nullified the trusts; and yet he did not take that little step to preserve them. Then as to his setting up a title to the negroes, whether he bought them of Gurganus and wife and paid for them or not, (of which there is no proof,) is immaterial. He could not have bought them without notice. And I hold that if a trustee raises a grossly unreasonable claim to the trust property, in open defiance of his cestui que trusts, and in direct violation of his obligations, this is such misconduct as authorizes his removal from office.

Then, it is objected finally, that this deed

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is in fact a marriage *deed or settlement, and is void, for want of recording. That it is so, whether considered as a marriage deed or as a landed conveyance, as to strangers without notice, and was rendered so by this defendant's neglect, is precisely the complaint of the plaintiffs. That it was in part a conveyance of land, is evident. Whether it was a marriage deed, in the sense of the statutes, it is not necessary to determine, because, allowing it to be so, I have several times given it for my opinion, particularly in a case now pending in the Appeal Court, that no instrument is void, as between the parties, for want of registration. The parties to an instrument must necessarily have that notice which recording is intended to impart. This defendant was the grantee here. He drew the deed, and had notice in that way, also. And if we waive this last, and choose to consider him abstractly, as a trustee, and not a party, it has been decided that, as trustee, he shall not set up the want

of registration in opposition to the deed under which he holds.

It is ordered, that a suitable receiver be appointed by the commissioner, with the concurrence of the plaintiffs, and that the defendant deliver said slaves, Will and Ned, to said receiver, to be held and hired out by him, until a trustee shall be appointed, as hereinafter provided for.

That the commissioner report a suitable person to act as trustee, in place of the defendant, when the trusts shall be declared, to whom the defendant shall account, in relation to the value of the land and the hire of the negroes Will and Ned, as the court shall order.

That Gurganus and wife be made parties to this suit, and that the present defendant do pay the costs of the suit up to this time.

All other questions reserved.

The defendant now moved the Court of Appeals to reverse the decree of the Chancellor, on the following grounds.

1. Because the trust deed was not produced, nor proved.

2. Because the trusts of said deed had exclusive reference to the estate conveyed by Simon Hancock to his children by the deed of 12th February, 1828.

3. Because the defendant has not violated his duties as trustee, even if the trusts of said deed should be declared to extend to the estate conveyed to Mrs. Gurganus.

4. Because the bill filed by this defendant

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against Gurganus, *and the testimony of Mr. Bauskett, his counsel, concerning the same, were not competent evidence.

5. Because the trust deed is void for want of registration.

6. Because the bill was prematurely filed, inasmuch as Wm. J. Hancock had not attained the age of 18 years.

Wardlaw, for the motion.
Griffin, contra.

Curia, per JOHNSTON, Ch. This court is satisfied with the circuit decree, and the grounds upon which it was put by the Chancellor. It is conceded here that the defendant has purchased whatever rights Mrs. Gurganus may have had in the negroes Will and Ned, under the trust deed, and this renders it proper to explain that no such operation is to be given to the decree as to deprive the defendant of their possession, (in case Mrs. Gurganus shall be declared to have retained an interest in them,) until William J. Hancock shall attain 18 years of age, which will be in March, 1845. At that time he shall deliver them up.

No explanation is necessary in relation to the hire of the negroes. The decree directs no account on the subject, but simply indicates that the defendant may be accountable, as the court shall direct, in accordance with the trusts which it may declare.

With these explanations, it is unanimously ordered that the decree be affirmed.

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1 Rich. Eq. *41

*JOHN CANTEY, Executor, v. JOHN J. BLAIR et al.

(Columbia. Dec., 1844.)

[*Judgment* ⇐446.]

It is a ground of relief in Equity, that a party has, since a trial at law, discovered evidence, of which he had no knowledge, and which, with due diligence, he could not have discovered before the trial; and such newly discovered evidence need not be in writing.

[Ed. Note.—Cited in Jones v. Kilgore, 2 Rich. Eq. 65.

For other cases, see Judgment, Cent. Dig. §§ 845, 847; Dec. Dig. ⇐446.]

[*Witnesses* ⇐98.]

The principal to a bond is not a competent witness for his surety, to prove that the bond was usurious, or that he had made payments thereon.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 303, 338; Dec. Dig. ⇐98.]

[*Usury* ⇐88.]

Where a bond, executed by a principal and his surety, was originally usurious, *Held*, that it was not divested of the taint of usury, as against the surety, because the lender, afterwards, inadvertently advanced to the principal the whole amount of the bond.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 178; Dec. Dig. ⇐88.]

[*Judgment* ⇐847.]

The assignee, for valuable consideration, without notice of a judgment, cannot be placed on a better footing than the assignor.

[Ed. Note.—Cited in Patterson v. Rabb, 38 S. C. 148, 149, 17 S. E. 463, 19 L. R. A. 831.

For other cases, see Judgment, Cent. Dig. § 1554; Dec. Dig. ⇐847.]

[This case is also cited in Tomlinson v. Tomlinson, 11 Rich. Eq. 71, as to the nature and sufficiency of newly discovered evidence in proceedings for equitable relief.]

Before Harper, Ch., at Kershaw, June, 1843.

The Chancellor. On the 10th March, 1829, Henry T. Cantey, the complainant's testator, executed a bond to General James W. Cantey, conditioned for the payment of $2000, which bond the said James W. Cantey afterwards assigned and delivered to the defendant, John J. Blair. On the 16th February, 1830, the said Henry T. Cantey and James W. Cantey executed their joint and several bond, payable to the said John J. Blair, conditioned for the payment of $3,337.50, which was delivered to the said John J. Blair, some time after its execution. The defendant, John J. Blair, after the death of complainant's testator, brought suit on these bonds against the complainant, and at March term, 1834, recovered judgment, which was signed and execution issued.

The complainant charges by his bill, that he made no defence at law, not knowing of

any defence which could be made, but that very lately, and since the rendering of the judgment, he has discovered that the said bonds were given and transferred upon an usurious contract. He alleges that the bond of the 10th March, 1829, was without any consideration, but was given by the said Henry T. Cantey to James W. Cantey, to enable him to raise money. He also alleges, that Henry T. Cantey joined in the execution of the bond of the 16th February, 1830, solely for the accommodation of the said James W. Cantey, for the same purpose of enabling him to raise money, and without any consideration moving to himself. The bill also charges, that various payments have been made by James W. Cantey, on the said two bonds or judgments, for which the de-

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fendant has failed *to give credit. He charges that the defendant is proceeding to enforce his execution, by levy on the estate of Henry T. Cantey, and that there is in the hands of the sheriff a considerable fund, the proceeds of the sale of that estate. He submits to pay the amount actually due, with the lawful interest. It appears that the defendant has assigned to Mrs. C. McKinon and to William McWillie, Esq. several portions of the said judgment, for valuable consideration. The defendant, by his answer, denies that when he purchased the bond he knew that it was a voluntary bond as between Henry T. and James W. Cantey; he denies that he purchased the said bond at an usurious discount, but paid the full amount secured by the face of the condition, abating only the legal discount. I regard it as immaterial whether the defendant knew this or not. The bond was shewn to be voluntary, and it is well settled that a bond or note given for the purpose of enabling the payee to raise money, and purchased for less than the legal rate of discount, is affected with usury in the hands of the purchaser.

With respect to the bond for $3,337, he admits that it was executed to him to secure money which he was to advance to James W. Cantey, at 20 per cent. discount. He states that he did accordingly make advances to the said James W. Cantey, at various times subsequently. But he states that by a late examination of his accounts, that instead of paying 20 per cent. less than the condition of the bond, he is induced to believe, by various receipts, that he has actually paid considerably more.

The defendant positively denies that any payments made to him by James W. Cantey were to be applied to the bonds or judgments in question; but, on the contrary, were to be applied to another bond made by the said James W. Cantey alone, and that this was fully understood between the payer and receiver. He pleads the judgment at law, in bar to any proceedings in this court.

The principal witness offered was James W. Cantey; an objection was taken to his testimony, on the ground of his interest, but it was received, subject to the exception. I am of opinion that in a legal point of view the witness was indifferent in point of interest, and therefore competent. It is hardly necessary to state the well known rule, that to disqualify a witness, the interest must be direct. He must either gain or lose by the event of the suit, or the judgment must be evidence for or against him in a future suit. Certainly the witness will gain

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*or lose nothing by the event of the present suit. He is not a party to it, and if by his evidence the payments made by him should be appropriated to the two bonds in question, he would remain liable to the same extent on his individual bond. Could the decree in favor of the complainant be evidence for the witness in any other suit, take the instance of the latter bond, the joint and several one?—suppose the complainant to be relieved upon the ground of usury, and an action to be afterwards brought on the bond against the witness, certainly the decree would be no evidence for him. It is res inter alios acta, as I have said in the case of Gist v. Davis and others, 2 Hill Eq. 348 [29 Am. Dec. 89], in reference even to the case where the surety, being sued, had given notice to the principal to defend the suit. But though the principal had had notice of the suit, and had in fact defended it, and failed, the verdict would have been no evidence in a subsequent suit by the payee against the principal. Or suppose the decree to be against the complainant, and that he should be compelled to pay the money, the decree might be evidence in a suit against the witness; not as a judgment by which the witness was bound, but to make out the fact of the payment of the money. If he had paid without suit, the fact might be equally well made out. Similar reasoning would apply to the bond for $2000; if complainant should defend himself by the witness's testimony, and the witness should be afterwards sued on the guaranty created by his assignment, the decree in favor of the complainant would certainly be no evidence against him; his assignment binds him to guaranty against any such defence.

But it is not necessary to consider further in relation to this bond. We come now to consider the merits of the defendant's plea. I certainly agree with the argument on the defendant's part, that there is nothing in the defence of usury to make it different from any other defence, and that if the party neglect to avail himself of it at law, when it was in his power to do so, he has no title to relief in this court. I agree also, that when a party comes into this court, on the ground of newly discovered evidence, he must shew some tangible and substantial fact, constituting of itself a defence, of which

the evidence had come to his knowledge since the trial: not particles of testimony, as they are called, or accumulative testimony, which might have influenced the jury more or less in finding their verdict, one way or the other. So, if it be known to the party that his true defence is confined to the knowledge of the

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plaintiff at law, and *he neglect to file his bill for discovery before verdict had. So it is said, as in the case of Woodworth v. Van Buskerk, 1 Johns. Ch. 433, that it is a rule at law, that a party going voluntarily to trial, goes at his peril, and he cannot have a new trial merely to give him an opportunity of impeaching the testimony of a witness of whom he was apprized before hand, and of the very purpose for which he was called. It is added, he must at least shew that he has since discovered testimony of which he had no knowledge before the trial. But there was one position contended for on the part of the defendant, for which I have not found any authority, viz: That the newly discovered evidence must be in writing. The instance put in Ganisborough v. Gifford, 2 P. Wm's 426, and in Williams v. Lee, 3 Atk. 224, of a receipt discovered after the verdict, or that the plaintiff's books are crossed if indeed the latter case be called a discovery of written evidence, seems to be given by way of example. In the latter case Lord Hardwicke supposes the case for relief to be when the plaintiff knew the fact of his own knowledge, and what the jury find by their verdict, and the defendant was ignorant of it, and puts the case of a receipt. I suspect some misreporting, for the plaintiff would be at least as likely to forget the existence of the receipt, as the defendant, in whose possession it was. All the cases concur that the newly discovered evidence must be such as the defendant at law could not have discovered with due diligence before the trial. And there might well seem a want of due diligence in not discovering a paper which was in his own possession. I have examined the various cases referred to in argument, and in all of them, as in Bateman v. Willoc, 1 Sch. & Lef. 201; Winthrop, Todd and Winthrop v. survivors of Lane, son and Fraser, 3 Eq. Rep. 310; Lansing v. Eddy, 1 Johns. Ch. 51; Simpson . Hart, Ib. 96; Barker v. Elkins, Ib. 465; and Floyd v. Jayne, 6 Johns. 479; and in all of them I find it to be laid down as the general rule, that this court will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question pending the suit, without any distinction as to the fact's being evidenced by writing or otherwise. To this must be added, that the party had no means of discovering the fact, by exercise of due diligence, or if the evidence rested in the knowledge of the plaintiff at law, had no means of knowing that fact, so as to put him upon filing a bill of discovery. In the case of

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Floyd *v. Jayne, a payment had been made, as it was alleged, without the presence of any witness, without taking up the note on which the money was due. After recovering on the note at law, the newly discovered evidence offered, was that of several witnesses who had heard the defendant confess the receipt of the money. The bill was dismissed, on the ground that two of the witnesses had intimated what they knew to the defendant before the trial, and that another witness had been present at the payment, so that there was negligence on the part of the defendant at law. But there was no intimation that if such negligence had not existed, the newly discovered evidence was not of such a character as to authorize relief in equity. Then, if usury existed, has it been discovered since the verdict at law? That one was ignorant of the fact, is not strictly susceptible of proof, but the allegation is made as that of a fraud having been discovered within four years, to put the opposite party upon proof of knowledge. But the complainant in the present case has come as near the proof of a negative as is perhaps possible in any case. In the first place, he had no means of knowing; he was not privy to the original transaction between the parties. Mr. Salmond, who, as President of the Bank with which General J. W. Cantey had dealings, was interested to know the state of his affairs, testified that he did not come to the knowledge of Gen. Cantey having borrowed money on usury, until after execution of the second bond, and that he gave notice of it to the complainant, on the 8th or 9th February, 1842, who appeared surprized at the communication, and immediately directed the present bill to be filed. It was explained that Henry T. Cantey was in the habit of lending his name as drawer or endorser to J. W. Cantey, and the latter would be naturally anxious to conceal the circumstance of his borrowing money on usury, in order to preserve his credit. James W. Cantey, himself, testifies that no one knew of the usury except Salmond and himself and that he never communicated it to the complainant. He states that when complainant enquired of him the consideration of these bonds, he told him generally that they were for money borrowed, thus leading him naturally to the conclusion that there was no defence against them. Then we come to the proof of usury; this is positively denied, with respect to the first bond of $2,000, by the defendant's answer. There is no proof except the testi-

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mony of James W. Cantey: *here, I think, the rule applies, which requires more than one witness to discredit the defendant's answer.

I do not perceive that there are circumstances in favor of either one side or the

other. If it be said that the defendant has been guilty of usury with respect to the second bond it may also be said, that he has admitted it. The defendant admits in his answer, that the agreement was that he should retain a discount of twenty per cent., but to avoid the imputation of usury, he states that he made advances to James W. Cantey, from time to time, as his necessities required, by checks and otherwise and that inadvertently by mistake as I understand it, he actually advanced to him more than the amount on the face of the bond; but this can have no effect. The agreement was either usurious or otherwise, at the time it was completed and the bond delivered. It could not effect the usurious character of the transaction, as to one of the obligors, that the obligee has paid more by mistake to the other. Both bonds, however, are now merged in the judgment, and the entire judgment will be opened to investigation in the reference which I shall direct. Perhaps more satisfactory evidence may be produced than has appeared before me so I shall say with regard to the payments alleged to have been made by J. W. Cantey, it is not proved that these payments were directed to be applied to the two bonds in question. It is positively denied by the answer, which is contradicted only by the evidence of a single witness. The only testimony which was produced, the letter of J. W. Cantey to the defendant, tends to support the answer. But this is properly matter of reference, and the evidence in relation to it was not regularly introduced before me. The claim of McWillie to a portion of the judgment is not contested, and that of Mrs. McKinon must be supported, as that of a purchaser for valuable consideration without notice. This is immaterial, however, to them or the complainant; all the parties are before the court, and the defendant must make good to any of them, any injury they may have sustained in consequence of his illegal act. If he had assigned the whole judgment, complainant, having paid it, would be entitled to be reimbursed whatever he had paid beyond the amount actually advanced and lawful interest; in that case, in making up the account, the defendant would be charged with the entire amount of the judgment, and credited with what he appeared to have actually advanced on the bond. As it is, he must be charged with the

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amount of such portions of the judg*ment as he has assigned, and credited in like manner, and must be restrained in proceeding to enforce his judgment beyond the amount that shall be found due to him on such accounting.

It is, therefore, ordered and decreed, that it be referred to the commissioner to take an account of the sums actually advanced by the defendant on the bonds in question, and of the moneys paid to him on account of said bonds or judgments, charging him with portions of the judgment assigned, as so much money paid. The defendant to pay the costs.

The defendant now moved this court to reverse the decree, on the following grounds:

1. Because the Chancellor erred in admitting the testimony of J. W. Cantey as a witness for the complainant, he being one of the obligors to the joint and several bonds which the bill seeks to impair, and incompetent, as well therefor, as by reason of his interest.

2. That the complainant has no right to the interposition of this court, to avoid a judgment of the court of law, by matter of defence allowable in that court, and which, by proper diligence, he could have there submitted in the action on which the said judgment is founded.

3. That the complainant has no claim to the interposition of this court, having failed, in the case at law, to put himself in the position to submit any defence.

4. That the Chancellor erred in deciding that the fact of the defendant having advanced on the second bond more than the actual sums called for by its face, could not affect the original transaction; the appellant respectfully submitting, that equity will look to the true state of the facts, to sustain his lien obtained in the court of law, and will not impair the judgment of that court, by reason of the original contract having been founded on an usurious consideration, when it has been made to appear that the consideration really given was not affected with usury.

5. That the bill charging payments, and calling on the court to enjoin the judgment at law by reason of such payments, and interrogating the appellant specifically thereto, his Honor erred in ordering a reference upon them, the answer denying that any were made—contradicted only by one witness, and no circumstances, as the Chancellor in his decree admits.

[For subsequent opinion, see 2 Rich. Eq. 46].

Preston and Moses, for the defendants.

W. F. Desaussure, contra.

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Curia, per JOHNSON, Ch. The leading question involved in the grounds of this appeal, is as to the admissibility of James W. Cantey as a witness for the complainant, and that seems to have been distinctly settled in the case of Endicot v. Gillam, decided in the Court of Appeals in 1828, in connexion with the case of the same plaintiff against Briggs. They are not reported, but will be found in the 4 vol. of the MS. Records of the Appeal Court. They were separate actions on a joint and several promissory note given by the defendants to the plaintiff. The defence relied on was, that the note was given for an unsound horse, and in the case against Gillam, Briggs, the actual debtor, was called to prove the unsoundness of the horse, and

it was held that he was incompetent, on the ground of interest. That rule is directly applicable here, and I incline to think that there are circumstances in this case which tend to strengthen the objection to the competency of this witness. The object of calling the witness James W. Cantey was to prove that the bonds were usurious, and that he had made payments on them to the defendant Blair. If established, the effect would be to reduce the amount of the judgment against the complainant, by the extent of the usury, and the amount of payments. The complainant could, therefore, have recovered against the witness only the amount which he would be compelled to pay on the judgment, and it might, I think, well be questioned, whether the satisfaction of that judgment would not be a bar to an action on the same bonds against the principal. If that be the effect, it is apparent that the preponderance of interest of the witness was on the side he was called to testify, and he was inadmissible on that account. But it is not necessary to decide that question here, as he is excluded by the case of Endicot v. Gillam. Excluding this testimony, the case must be decided on the other evidence in the cause.

The defendant denies unequivocally that there was any usury in the bond for $2000, of the 10th March, 1829, and that is conclusive. He admits, with frankness, that there was an agreement between James W. Cantey and himself, that he should reserve twenty per cent. on the bond for $3,337.50, of the 16th Feb. 1830, and seeks to avoid the effect of the usury, on the ground that he afterwards inadvertently advanced to James W. Cantey, in money, the whole amount of the bond. We agree with the Chancellor on circuit, that a contract originally usurious cannot be divested of the taint, as to the

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surety, even by a *subsequent agreement between the lender or obligee, and the principal or obligor, and especially when, as in this case, the defendant, in making further advances to James W. Cantey, did so without his consent that they should be set down to the consideration of the bond, and, as is very apparent, without intending at the time that they should be so applied. The complainant's testator was not, therefore, liable, beyond the amount actually agreed to be advanced on this bond, and which was so advanced.

My brethren are of opinion that the answer of the defendant as to the payments made to him by James W. Cantey, and their application, is conclusive, on the ground that it does not appear that the complainant might not, with due diligence, have obtained evidence of the fact of payment, and availed himself of it at law. These views cover all the grounds of appeal, on the part of the defendant; but the complainant also appeals, on the ground that there is error in that part of the decree which declares that the assignment of the judgment to Mrs. McKinon, "must be supported, as that of a purchaser for valuable consideration without notice," from which it is inferred that it was intended to charge the complainant with the whole amount of that portion of the judgment assigned to her, whether he was liable to the defendant for that amount or not, and the expression quoted would seem to import it. But when taken in connexion with what immediately follows, it is manifest that it was intended that if the sum due by the complainant on the judgment was not sufficient to pay both McWillie and Mrs. McKinon, the defendant was liable for any balance that might remain due to them. It is very clear that the assignee of a judgment cannot be placed on a better footing than the assignor.

It is ordered and decreed that the injunction heretofore granted to restrain the defendant from proceeding on his judgment at law, be, and the same is hereby, dissolved, so far as relates to the amount of the principal sum and the interest which has accrued on the bond for two thousand dollars, dated 10th March, 1829, and that the commissioner do ascertain what sums of money were advanced by the defendant Blair to James W. Cantey on the bond conditioned for the payment of three thousand, three hundred and thirty seven dollars and fifty cents, dated 16th February, 1830.

JOHNSTON and DUNKIN, CC., concurred.

HARPER, Ch., concurred in the results.

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1 Rich. Eq. *50

*LEWIS JONES and Wife v. FORT, TOWNSENDS & MENDENHALL et al.

(Columbia. Dec., 1844.)

[*Husband and Wife* ⇐31.]

Where personal property is conveyed to a trustee for the use of husband and wife, it is not liable to be seized and sold under a fi. fa. against the husband; nor does it make any difference in this respect that the husband is himself the trustee.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 188; Dec. Dig. ⇐31.]

[*Husband and Wife* ⇐14.]

The husband's interest in the property may, in equity, be made liable to the demands of his creditors.

[Ed. Note.—Cited in Raines v. Woodward, 4 Rich. Eq. 407; Rivers v. Thayer, 7 Rich. Eq. 167.

For other cases, see Husband and Wife, Cent. Dig. §§ 71–86, 88, 89; Dec. Dig. ⇐14.]

Before Harper, Ch., at Edgefield, June, 1844.

Lewis Jones, Sen. and Elizabeth his wife, and their children, filed their bill, setting forth that William Pou, the father of the

said Elizabeth, in January, 1820, executed a trust deed, whereby, in consideration of love and affection for the said Elizabeth, he conveyed to the said Lewis Jones, Sen. four negro slaves, viz; Rachel, Jeffrey, Celia and Clarissa, with their future increase, in trust for the use of the said Lewis Jones, Sen. and his wife Elizabeth, so long as the said Elizabeth should live, and at her death to be equally divided or distributed to such child or children as she might leave of her body lawfully begotten, and in case there should be no such child or children then living, the said negroes and their increase to be returned and belong to the said William Pou, or his estate, as the case might be. That Lewis Jones, Sen. executed the said deed jointly with the said William Pou, and received the negroes upon the conditions and trusts aforesaid, and the said deed was duly recorded in the office of the register of mesne conveyances, in Orangeburgh district. That Lewis Jones, Sen. had held possession of the negroes ever since the date of the said deed as trustee, and for the uses and purposes specified therein, and the females had had increase. That in 1841, Fort, Townsends and Mendenhall recovered a judgment at law against Lewis Jones, Sen., issued a fieri facias thereon, and lodged it with the sheriff. That Simeon Christie, sheriff of Edgefield, acting under the said execution, and by direction of Fort, Townsends and Mendenhall, had levied on several of the negroes, and their issue, included in the said deed, and advertised them for sale.

The bill then submitted that the negroes were not liable to be taken to pay the debts of Lewis Jones, Sen. and prayed for a perpetual injunction to restrain the defendants from enforcing their execution against the

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said negroes, and that they should *be decreed to be held in trust, free from the debts of Lewis Jones, Sen. for the benefit of the said Elizabeth for life, and after her death for her children.

The answer admitted all the material allegations of the bill.

Per Curiam. It is ordered, adjudged and decreed, That the defendants, Fort, Townsends and Mendenhall, be perpetually enjoined from enforcing, or attempting to enforce, their said judgment and execution, against the negro slaves named and described in the complainants's bill. And that the injunction for that purpose prayed for in said bill, be granted and made perpetual.

The defendants appealed, on the following grounds.

1. That the deed under which the negroes are held, gives Mrs. Jones no separate estate, and therefore her interest in them vested in her husband.

2. That the husband being himself the trustee, had the legal as well as the equitable estate, and there is therefore nothing to protect the negroes from levy under an execution against him.

Mazyck for the motion.

Curia, per HARPER, Ch. I am of opinion that there is nothing in the distinction attempted to be taken between the case where the legal title to the property is in the husband as express trustee, or in a third person as trustee. In the view of this court, the marital rights of the husband do not attach. The argument is that he is both trustee and cestui que trust, and, uniting the legal and equitable estate in himself, must therefore have an unqualified estate subject to executions at law. But such is not the view of this court. It regards the legal and equitable estates as separately existing, and as it would restrain the creditors of any other trustee from making the property liable to the satisfaction of his personal debts, so it will restrain the creditors of the husband. As trustee he has an absolute estate in the property, or, as it is sometimes said, the fee; as cestui que trust he has only an estate for the joint lives of himself and wife. The legal estate is exclusively in him as trustee. He takes the equitable estate jointly with his wife. It is true that the wife takes no separate estate, and when the joint income is received, it will be entirely at the disposition of the husband. But this would be the case if another person were trustee and the property were given entirely to the use of the wife without saying to her sole or separate use. The decisions in the cases of Rice v. Burnett, Speers, Eq. 579, [42 Am. Dec. 336,] and Ioor

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v. Hodges, Speers, Eq. *593, are that the statute of uses does not apply to trusts of personalty; but can it be doubted that, after such a disposition of lands before the statute, the legal and equitable estates would remain separately subsisting?

But it is admitted in the case of Rice v. Burnett, that although the property were in a third person as trustee, creditors may come into this court, after exhausting their remedy at law, to make the husband's interest in it liable to their demands. But though the settlement were simply to the use of the wife, giving the husband the control of the income, it is the wife's property which is settled, and would be regarded as her equitable estate. It is not necessary that the property should be given to her separate use. It would come within the familiar principle, that when it is necessary for the husband, his assignee or creditors, to come into this court to get hold of the estate of the wife, they should not be permitted to do so without making a proper provision for her. The course is to refer it to the master to report a proper provision, in view of all the circumstances; whether she has been already provided for; the circumstances of her husband, herself, and the family.

The creditors in this case might institute such a proceeding; but the court is of opinion that as all the parties are before it, it may proceed to do full justice, and put an end to litigation; that the parties coming to have equity, must do equity.

It is therefore ordered that it be referred to the commissioner to enquire and report what portion of the property in question ought to be settled to the sole and separate use of the complainant, Elizabeth Jones, and the terms of such settlement.

The whole court concurred.

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1 Rich. Eq. *53

*WILLIAMS & CLINTON v. JOHN SIMS and Others.

(Columbia. Dec., 1844.)

[*Limitation of Actions* ⇐33.]

Bill by attorneys, against a sheriff and his sureties, for an account of moneys collected by the sheriff during his term of office, *held*, on evidence of demand on the sheriff four years before the filing of the bill, to be barred by the statute of limitations.

[Ed. Note.—Cited in State ex rel. Van Wyck v. Norris, 15 S. C. 257.

For other cases, see Limitation of Actions, Cent. Dig. § 150; Dec. Dig. ⇐33.]

[*Executors and Administrators* ⇐439.]

To such a bill, the representatives of deceased sureties ought to be made parties.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765, 1766, 1770, 1771, 1774, 1786; Dec. Dig. ⇐439.]

[*Payment* ⇐66.]

Lapse of time, less than twenty years, and other circumstances, *held* to warrant the presumption of payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 180; Dec. Dig. ⇐66.]

Before Johnson, Ch., at Lancaster, June, 1843.

The Chancellor. In 1825, the defendant, John Sims, was elected sheriff of Lancaster district, and the defendants and Robert M. Gill, Robert M. Crockett, Nathaniel Barber and David George, all of whom have since died, joined as sureties in a bond to the Treasurers for the faithful discharge of the duties of his office. The complainants are partners, practising as attorneys in the court for that district, and the bill charges that Sims, during his continuance in office, which expired in 1829, received on executions in cases in which they were the attorneys of record, large sums of money on their account, and by his neglect to enforce executions which were lodged in his office, in which the defendants removed from the State or became insolvent, had lost to them other large sums of money, amounting, in the whole, to $5,123.65. That Sims became utterly insolvent, and removed from the State, and without the jurisdiction of the court. The prayer of the bill is, that the defendants may account to complainants for the sums so received by him on account of complainants's taxed costs, and the sums lost by his negligence. The defendants, in their answer, insist on the statute of limitations, as a bar to their liability to account, and on the lapse of time, and the negligence of the complainants as to presenting their demands against Sims before he left the State, and that if they are liable to account, the representatives of the deceased co-sureties ought to have been made parties. Sims left the State in November, 1838, and the bill was filed in April, 1843, more than four years after Sims left the State, and the complainants, as if anticipating the plea of the statute of limitations, state in their bill that about the time he was leaving the State, Sims remarked to the com-

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plainant, Clinton, that he would *come back next fall and settle with him—and in connection with these defences, it may here be stated, that Sims was again elected sheriff of the district in 1833, and served for another term of four years, which terminated in 1837. The complainants also volunteer to state in their bill, that complainant, Clinton, borrowed several small sums of money from Sims, for which he gave his promissory notes, whilst he was sheriff. The amounts are not recollected, but they insist that the notes were not to be paid until complainant and defendant, Sims, as sheriff, had a settlement, and in that settlement they were to be taken up—and it is averred that they were given on the faith of his having money in Sims's hands, as sheriff. That the statute would bar these demands, is not now an open question—that it will, is distinctly recognized in the case of Wright v. Hamilton, 2 Bail. 51, [21 Am. Dec. 513.] It is, in fact, a purely legal demand, on which an action of assumpsit at law would have been the appropriate remedy against Sims himself, or covenant or debt on the bond against his sureties, and it may well be questioned whether a demurrer to this bill, for want of jurisdiction, would not have been sustained. In Williamson v. King, McM. Eq. 41, the bill was dismissed on that ground, and that was a case exactly like this in all material circumstances—but the question has not been raised by the pleadings, and I will proceed to consider of the merits. In Wright v. Hamilton, it was further held, that although the statute would operate as a bar, it would not begin to run until a demand was made; and this branch of the defence resolves itself into the question, whether the complainants did demand payment from Sims. That, I think, is a necessary inference, from the facts stated in the bill. To what else could the observation of Sims to the complainant, Clinton, when he was about to leave the State, that he would return next fall and settle with him, apply? Is it probable, nay possible, that the complainants, knowing that Sims was about to

leave the State, would suffer him to depart without calling on him to account, if not with the expectation of being paid, at least with a view to an adjustment of their accounts? Would the complainant, Clinton, borrow money from him to be brought into the account on their final settlement, knowing that Sims was largely indebted to him, without asking it as a payment? I think not. This is not all; it is well known that a great portion of the business of the court was in the hands of the complainants. The sheriff is bound to account, at every term at least, for the moneys

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*he may have collected during the preceding vacation, and if he does not, he is subject to summary proceeding by rule, and it is no reproach to the profession that they are not so indifferent to their own interest as to suffer the occasion to pass, without calling on the sheriff for an account and payment of the moneys received to their use—and it is well known that this is rarely, if ever, omitted. Now, it will be remembered that this demand is for moneys collected by Sims during his first term of office, and running through that whole period, and it would be doing the complainants great injustice to suppose that they had, during all that time, and the eight years which followed, including his second term of office, neglected to ask an account from him, and request the payment of the money. I think, too, that the lapse of time, and the accompanying circumstances, will well warrant the presumption of payment. Twenty years would, of itself, be sufficient, and accompanied with circumstances, there is no rule which limits the presumption to time—it may be presumed from a single fact without reference to time. The giving of a promissory note authorizes the presumption that all open accounts between the parties were settled, and slight presumptions gain strength in proportion to the length of time. Now, the bill states that the sums now demanded were received between the time of Sims's going into office in 1825, and his going out in 1829, so that a period of from fourteen to nineteen years must have elapsed before the filing of this bill, and no one will be persuaded to believe that repeated settlements, partially, if not finally, were not made between him and the complainants, and it would be difficult to account why these demands, the evidences of which were always in the power of the complainants, were not brought into the account; and when it is recollected that they suffered Sims to leave the State without accounting, and neglected, for any thing that appears, to give notice to the defendants, the presumption arising from lapse of time acquires irresistible force. From what I have said in the case of McKenna and George, [2 Rich. Eq. 15,] tried during this term, there can be no question that the representatives of the deceased co-obligors ought to have been made parties—their estates are liable to contribute equally with the defendants, if any thing be due the complainants, and equal and ample justice could not have been done without making their representatives parties.

It is ordered and decreed, that the complainants's bill be dismissed with costs.

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*The complainants appealed, on the grounds,

1. Because their right of recovery was not barred by the statute of limitations.

2. Because the lapse of time, and other circumstances, were not sufficient to raise the presumption of payment.

J. Williams, for the motion.
Wright & McMullan, contra.

PER CURIAM. We concur in the decree of the Circuit Court. It is, therefore, affirmed, and the appeal dismissed.

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1 Rich. Eq. 56

WILLIAM C. HILL, by His Next Friend, v. JAS. M. CALVERT et al.

(Columbia. Dec., 1844.)

[*Guardian and Ward* ⇐177.]

Where an Ordinary appointed a guardian of an infant, and took a guardianship bond, with two sureties, and P, one of the sureties, afterwards applied to be released, and the Ordinary, at the instance of P and the guardian, but without the knowledge or consent of the other surety, ran his pen through P's signature to the bond, and permitted a third person, as P's substitute, to sign and seal it, *held*, that neither P nor his co-surety was discharged, in equity, from his liability to the infant, and that P's substitute was not liable.

[Ed. Note.—Cited in Owens v. Walker, 2 Strob. Eq. 292, 294; Glenn v. Caldwell, 4 Rich. Eq. 192; Hall v. Hall, 45 S. C. 179, 22 S. E. 818.

For other cases, see Guardian and Ward, Cent. Dig. § 618; Dec. Dig. ⇐177.]

[*Bonds* ⇐103.]

A mere nominal obligee has no authority, as obligee, to destroy the interests of the true owner of the bond.

[Ed. Note.—For other cases, see Bonds, Dec. Dig. ⇐103.]

[*Principal and Surety* ⇐89.]

An Ordinary has no authority to discharge the surety to a guardianship bond. Per Harper and Dunkin, CC.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 133, 133½, 136–139; Dec. Dig. ⇐89.]

[*Fraudulent Conveyances* ⇐74.]

The voluntary conveyance of a surety to a guardianship bond, set aside as fraudulent as against the infant.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 186–190; Dec. Dig. ⇐74.]

Before Johnston, Ch., at Abbeville, June, 1843.

The bill in this case was filed against James M. Calvert, as guardian of the complainant, Wiley Pullam, Saunders Williamson and John A. Burton as sureties to the guardianship bond, and the children of Saunders Williamson. The object of the bill was to compel the guardian to account for the estate

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of the *complainant, to make the sureties liable for the amount of the account, and to set aside certain conveyances from Saunders Williamson to his children, which were impeached as fraudulent. Pullam and Burton were absent from the State, and were made parties by publication. The controversy, at the hearing, related principally to the liability of Williamson as surety.

It appeared that in March, 1838, the late Mr. Taggart, then Ordinary of Abbeville district, appointed the defendant, James M. Calvert, guardian of the person and estate of the infant complainant, who was possessed of a small personal property and of a tract of land, under the value of one thousand dollars. The Ordinary took a guardianship bond from Mr. Calvert, at the time of his appointment, to which the defendants, Wiley Pullam and Saunders Williamson, were sureties.

About February, 1839, Pullam, probably with a view to leave the State, applied to Calvert, his principal, to be released from his suretyship; and in that month Calvert brought the defendant, John A. Burton (who was then largely indebted, and has subsequently proved insolvent, and left the State) before the Ordinary, and laying before him the desire of Pullam to be released, requested that Burton should be substituted in his place. The Ordinary granted the application; ran his pen through the name of Pullam, as a subscriber to the bond, and Burton subscribed and sealed it, as Pullam's substitute. This was done without the knowledge or consent of Williamson.

Calvert was insolvent, and the principal reliance of the complainant was upon the liability of Williamson. He also was insolvent; but it appeared that after the execution of the guardianship bond, he had made conveyances of a large portion of his property to his children.

His Honor, the Chancellor, held that the Ordinary had the power to exchange one security for another. This was substantially what Mr. Taggart did. Instead of giving up the existing bond and taking another from Calvert and Burton as a substitute, he, with Calvert's assent, released Pullam (thereby, in effect, discharging Williamson also) and took Burton in their place. The event showed this was an unfortunate exercise of discretion; but the subject upon which the Ordinary acted, was within his jurisdiction; and his decision, as the judgment of a competent tribunal, was conclusive.

Bill dismissed, as to Williamson and his children.

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*The complainant appealed, and now moved this court to reverse the decree.

1. Because the bond having been taken for the benefit of the minor, and the Ordinary having no interest in it, had not the power to cancel it, or to release the obligors from incurred liability.

2. Because, if the Ordinary had the power to cancel the bond or release the obligors, the act of erasure in this case was done by the Ordinary through mistake; which should be corrected by this court, and the complainant not thereby prejudiced.

3. Because, if the erasure of Pullam's name should be considered a release of him, it should not be so construed as to release Saunders Williamson.

Perrin, for the motion.
Pope, contra.

Curia, per JOHNSTON, Ch. This court is of opinion that Pullam was not discharged, and, of course, that Williamson was not released; and, as to Burton, that he subscribed the bond under circumstances which did not constitute him a co-obligor with the other parties originally bound.

The circuit court seems to have been inconsiderately betrayed into the assumption, that the erasure of Pullam's name was a judicial act. If it had been such, still this court would prefer to reserve the question as to its validity, as a release or discharge of Pullam.

But facts do not seem to warrant us in attributing a judicial character to what was done by Mr. Taggart. It is true, this gentleman, to whom the bond was given, and who had the custody of it, was the Ordinary. But it by no means follows, that whatever he may have done in relation to the instrument, after he had taken it, must be regarded as done in his official character. That must depend very much upon the nature of the acts themselves, and upon the circumstances and intentions accompanying them.

Here Mr. Taggart was called upon to decide nothing, and did, in fact, decide nothing.

Having the bond in his custody, and being the obligee of it, and supposing that, as obligee, he had the right to do so, he erased the name of Pullam. This, in our judgment, was no more a judicial act, than if he had thrown the bond in the fire; and could no more extinguish the beneficiary interests of the complainant in the instrument, than if he had burned it.

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*It is a principle very familiar, even at law, that a promise to one to pay a sum of money to another, creates an obligation to that other. Here, the obligors bound themselves, under a penalty, to certain conditions for the benefit of the complainant. It will

not be contended that the complainant could, in his own name, enforce these conditions at law; because the conditions do not consist in an obligation to pay money, or to do any act the performance of which a law court could compel; but are to be enforced by an account here. This court looks to the substance, and must see that all the substantial interests in the paper were in the infant, although the penalty of the bond by which they were secured, was made payable to Mr. Taggart.

We do not hesitate to say, that he had no power over the instrument, as the mere nominal obligee, to destroy the interests of the true owner; neither can Pullam, a party to the instrument, and who must take his discharge with a full knowledge that it must operate as a fraud upon the infant, for whose benefit he became bound, avail himself of such a release.

It follows, if Pullam is not released, that there is no pretence for the discharge of his co-surety, Williamson.

The next question regards Burton. Is he bound, as an additional party, to the bond? We are of opinion he is not bound. If this point be considered, as between the obligors and the obligee, it is apparent that Burton was intended to become a mere substitute for Pullam. There was no intention to add his responsibility to that of the original obligors, nor was that his undertaking or intention. The substance of the transaction is, as if Burton had said, "Pullam wishes to be released; if you release him, I will take his place." We have said that Pullam was not released; and, therefore, the condition and consideration upon which Burton agreed to be bound has failed.

If the question be considered as between the obligors, the result must be the same. There is no one of them that can show a consideration for imposing an obligation upon Burton to take upon himself any portion of their previous responsibilities; and under these circumstances, we are to look to the facts for the evidence of his intention in subscribing the instrument. The cases quoted in Field v. Pelot, McM. Eq. 395, establish the principle, that evidence may be received to shew the intention with which sureties became bound; and the facts in this instance manifest that Burton did not intend, nor was he requested, to incur a responsibility

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to be accumulated upon that of the *original obligors, but only a responsibility as Pullam's substitute.

The court is, therefore, of opinion, that the bill must be dismissed, as regards Burton; and it is so ordered.

There remains another question in relation to Saunders Williamson, which may be dismissed in a few words. The evidence at the hearing shewed very clearly, that the conveyances of property made by him to his children, (who are defendants here) were purely voluntary; and they must be so far set aside as fraudulent, and the property conveyed so far subjected as may be necessary to satisfy the amount that may be established against him in this case; and it is so ordered.

From that amount, however, must be excluded the value of the complainant's land; an intention to charge him with that having been disclaimed at the hearing, the complainant undertaking to pursue the land itself.

Let the cause be remanded to the circuit court to take the account, so soon as the pleadings are closed in relation to the guardian, Calvert.

JOHNSON, Ch., concurred.

HARPER and DUNKIN, CC. We assent, on the additional ground, that the Ordinary had no authority to discharge the surety.

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1 Rich. Eq. *61

*MILLY GORDON v. ELISHA BLACKMAN, Executor.

(Columbia. Dec., 1844.)

[*Slaves* ⇐22.]

Testator, who died in '39, directed his executors to hire out his slaves, until a sufficient sum should be raised from their hire to pay his debts, then to make application to the Legislature for an Act emancipating said slaves, and if they should fail to procure such an Act, then to convey them to the nearest non-slaveholding State, or to Liberia. Before a sufficient amount had been realized from the hire of the slaves to pay the testator's debts, the Act of 1841, 11 Stat. 154, was passed. *Held*, that after the debts are paid, and in case the Legislature shall fail to pass the Act directed to be applied for, the next of kin of the testator will be entitled to the slaves and their hire.

[Ed. Note.—Cited in Finley v. Hunter, 2 Strob. Eq. 214, 215, 219; McLeish v. Bureh, 3 Strob. Eq. 243; Willis v. Jolliffe, 11 Rich. Eq. 525; Calhoun v. Calhoun, 2 S. C. 306; People's Loan & Exch. Bank v. Garlington, 54 S. C. 427, 32 S. E. 513, 71 Am. St. Rep. 800.

For other cases, see Slaves, Cent. Dig. § 92; Dec. Dig. ⇐22.]

[*Wills* ⇐535.]

If a testator makes no disposition of his property, or if the bequests of his will are void, his next of kin will not be excluded by a clause providing that they shall not enjoy any part of his property. Per Johnston, Chancellor.

[Ed. Note.—Cited in Crossby v. Smith, 3 Rich. Eq. 256; Seabrook v. Seabrook, 10 Rich. Eq. 512; Beaty v. Richardson, 56 S. C. 188, 34 S. E. 73, 46 L. R. A. 517.

For other cases, see Wills, Cent. Dig. § 1157½; Dec. Dig. ⇐535.]

[This case is also cited in Blackman v. Gordon, 2 Rich. Eq. 43, 44 Am. Dec. 241, as to facts.]

Before Johnston, Ch., at Lancaster, July, 1844.

The decree of the Chancellor was as follows:

This is another of those cases, multiplying of late with a fearful rapidity, in which the superstitious weakness of dying men, proceeding from an astonishing ignorance of the solid moral and scriptural foundations upon which the institution of slavery rests, and from a total inattention to the shock which their conduct is calculated to give to the whole frame of our social polity, induces them, in their last moments, to emancipate their slaves, in fraud of the indubitable and declared policy of the State.

The late Samuel McCorkle, of Lancaster District, at his death, in February, 1839, left a number of slaves and a will, duly executed, bearing date the 8th of April, 1837, whereby, after providing respecting his burial expenses, he provided as follows:

"I direct my executors, herein after named, to hire, by the year, all of the negroes, (that is to say, named John, Bob, Lund and Isaac) I am possessed of, for so long a time, and until the hire, or wages, may or shall amount to a sum of money sufficient to pay off all the just debts and demands against me. And it is my desire for my black woman named Lydia, to work for the support of herself with her two children, named Simpson and Harriet, until they shall be able to work; God be pleased!

"After the foregoing directions to my executors, I do further direct, that my executors apply to the Legislature of the State of

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*South Carolina, and use their best endeavors with the same to procure the emancipation of them all, (that is, my negroes,) that is, named Lydia, and her children, named John, Bob, Lund, Isaac, Simpson and Harriet; and should they fail to procure the emancipation of them in this State, then, and in such case, I direct my executors to transport all of them to the nearest non-slaveholding State in the United States, or to the free colony in Africa, if they choose to go there to live. I will that my executors shall hire them out for such length of time as will raise a sum of money sufficient to pay off all reasonable expenses for to accomplish the same, my design, and for to compensate them for their trouble and expense in the execution of this my will and testament.

"Be it remembered, that it is my desire for Lydia, that her children, named John, Bob, Lund, Isaac, Simpson and Harriet, each and all of them, shall help to support their mother, when she is unable to help herself by infirmities, and in her old age, if she lives to be.

"I do further desire, that my black woman Lydia, to have, (and her children after her death,) my bible, my feather beds, my bedsteads, my four quilts, (being of homespun cloth,) my blankets, sheets, pillows, &c. My big spinning wheel, reel, my chests, tables, chairs, tubs and pails, tin canister, oven and hooks, spider, axe, if the law of the State permits it to be given.

"All the other articles, that is to say, my books, (the bible excepted,) my carpenter's tools, that I may have, and sundries, may be sold, to pay off in part of my debts I am due.

"Be it known, that it is my desire that Lydia shall have her child or daughter Harriet, to stay with her, and work, as long as her mother lives.

"I have relations and kindred: but it is not my will that they, or any of them, should enjoy any part of the property I may be possessed of.

"And lastly, I do hereby constitute and do appoint Thomas Small, Senr. Elisha Blackman, Absalom Outain, executors of this my last will and testament."

The wench, Lydia, died before the testator. The plaintiff is the next of kin of the testator, and files her bill against the defendant, the only qualified and acting executor under his will: alleging that he has taken possession of the slaves, together with other property of the testator, and under the guise of a nominal servitude, has allowed, and con-

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tinues to allow, the slaves all the *benefit and privileges of persons of color, while, by their labor, he accumulates large sums of money, which he holds in trust for them.

The bill prays an account of the property received by the defendant, as executor; that the bequests in favor of the slaves, and the benefits intended to be conferred on them by the will, be declared void, and that the executor be declared a trustee of the whole property in favor of the plaintiff, and decreed to deliver the same to her.

I am of the opinion, that the clause of the will which excludes the testator's next of kin from the enjoyment of any part of his estate, is not sufficient to bar the plaintiff of the resulting trust claimed by her in this case, if the provision for the emancipation of the slaves should be deemed invalid. It is not in the power of a testator to oust his next of kin of their rights under the law of the land, but by giving another direction to his property by legal and valid provisions: as, for instance, by giving the property to some other person, or directing that it shall be employed for some lawful purpose inconsistent with the rights of his kinsmen. So strong is their right, that it shall prevail over the claim of an executor, in whom the property vests in his character of an executor, though it yield, as in Dawson v. Clark, 15 Ves. 416, when the bequest is to the executor, not as executor, but in his individual name. Here there is no bequest to the executor, either officially or personally. The law vests the title in him, to enable him to execute the duties and fulfil the powers imposed by the will. In all such cases he takes merely in trust, and can claim no beneficial interest, and no doctrine stands more firmly both upon reason and authority, than that when an intention to create a trust appears

upon the face of the will, or the law vests the title for the purpose of enabling the executor to fulfil a trust, and the trust is either ineffectually declared, or fails from any cause, the executor, to whom no benefit was intended, shall not be permitted to hold for his own profit, but shall be declared a trustee for the next of kin. (Morice v. Bishop of Durham, 9 Ves. 399, 10 Ves. 522.) Striking out of this will all the clauses which have no bearing on this question, the will stands as if the testator had enacted but two clauses, the one excluding the next of kin, and the other appointing executors; and I feel no doubt that the next of kin are not excluded.

The only obstacle, therefore, in the way

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of the plaintiff, is the *provision for emancipating the slaves. Whatever objections I may feel to this, and my repugnance is stronger than I can express, I am so bound by one or two decisions, that I cannot, on the circuit, venture to declare it void.

It is true that the case of Carmille v. Wightman, 2 McM. 454, one of the cases to which I refer, was upon a deed. I think a clear distinction may be drawn between the trust resulting to the next of kin under a deed and under a will, but the opinion delivered in that case is so sweeping as to leave me hardly at liberty, in this court, to draw it: and I think it more expedient to reserve what I may have to say on that point, for the appellate tribunal, to which, I am informed, this case will be carried.

Then, the case of Frazier v. Frazier, (2 Hill Eq. 304,) covers the whole ground. I am hedged in on all sides, and must submit here.

It strikes me, however, that as the right of the plaintiff is good, subject only to the duty of the executor to pursue the course pointed out by the will, which there is no one to compel him to observe, that the proper decree, upon the principles of that case, is to declare the plaintiff entitled to the slaves, and an account of their hire, subject to the powers and duties of the executor under the will, to be exercised by him within a reasonable time, and that the bill be retained to give him an opportunity to do so.

It is, therefore, decreed, that the bill be retained until the further order of the court, to give the defendant an opportunity to procure from the Legislature of this State an Act emancipating the slaves in question in this case, or an Act authorizing the emancipation of said slaves; and that the said defendant do, from time to time, come to an account for the reasonable hire of the said slaves. Whenever it shall appear to the court, upon a suggestion of the same by the plaintiff, by supplementary proceeding, that the Legislature has refused to pass such Act, and that sufficient funds have arisen from the hire of said slaves to transport them to the nearest non-slaveholding State in this Union, or to one of the free colonies of Africa, the plaintiff shall be at liberty to apply for a decree that the defendant do enter into bond, with undoubted sureties, to transport said slaves to such State or Colony, and emancipate them, within a given time, to be fixed by the court, or that he deliver them up to the plaintiff, freed from all other trust, and pay over to her the value

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of their *hire; or for such other decree as the court may, in its discretion, deem proper.

The question of costs to wait said supplementary proceeding.

The complainant appealed from so much of the decree as recognized the validity of the provisions in favor of the slaves, on the following grounds:

1. Because the provisions of the will in favor of the slaves are contrary to the express laws and the settled policy of the State, and therefore void.

2. Because, by the provisions of the will, the executors are only empowered to transport the slaves to a free State, upon the event of a failure to procure the emancipation of said slaves by the Legislature; that there was no proof of any such failure, and therefore there was no proof that the contingency upon which the authority of the executor to act depended, had happened.

3. Because there is no direction or authority in the will authorizing the emancipation of the slaves.

4. Because by the express terms of the will it is left to the choice of the negroes whether they will be taken to a free State or not, and it was expressly proved that they were unwilling to go.

Boyce, for the complainant.
Clinton & Wright, contra.

Curia, per HARPER, Ch. We are of opinion, without entering into several very difficult and important questions raised in argument, that this case must be decided by that of Lenoir v. Sylvester, 1 Bail. 632. In that case, the testator, by his will, gave his slaves to his wife for life, and after her death directed his executors to emancipate them. The testator died in 1808, and by the Act of the Assembly of 1800, (7 Stat. 442,) then governing the subject, the executors might have emancipated them by proceedings before magistrates and freeholders. But before the death of the wife, tenant for life, the Act of 1820 (7 Stat. 459,) was passed, by which it was forbidden to emancipate slaves but by the Act of the Legislature. It was held, that there was no vested right to freedom in the slaves, and as the act of emancipation had become unlawful when the executors were required to execute it, the devise was in this respect void, and a trust resulted for the next of kin. So in the case before us, it had become unlawful, by the provisions

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of the Act of 1841, (11 Stat. *154) for executors to carry slaves out of the State, with a view to their emancipation. By the will, the negroes were to remain slaves until, by hiring them out, a sufficient sum was raised to pay off the testator's debts, and to defray the expenses of their transportation to a northern State, or to Liberia. But it appears from the evidence, and is admitted by the answer, that the testator's debts are not yet paid off. In the mean time, between the death of the testator and the event in which they were to be emancipated, the Act of 1841 has intervened, rendering unlawful the act of the executors to be done for that purpose. The Act provides that every bequest directing slaves to be carried out of the State, with a view to their emancipation, shall be void. A trust must therefore result for the next of kin.

It would be harsh to send these slaves to a new and uncongenial residence, when, as it is understood, they very much prefer to remain in their present situation. With respect to the ground taken in argument, that though the bequest in favor of the slaves be void, yet, whether there be a valid disposition or not, the next of kin are expressly excluded by the terms of the will, it is enough to say, that the question has not been raised by any ground of appeal, and we do not perceive that the justice of the case requires the court to raise it of its own motion.

The decree is so far modified, as that after the testator's debts shall have been paid, and the Legislature shall have refused to pass the Act of emancipation directed to be prayed for, the defendant deliver the slaves to the complainant, and account as directed by the circuit decree.

The whole court concurred.

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1 Rich. Eq. *67

*JOHN KEY and Wife v. SNOWDEN GRIFFIN, Executor.

(Columbia. Dec., 1844.)

[*Wills* ⇐782.]

Testator devised and bequeathed as follows. "I give, devise and bequeath to my wife and her heirs a plantation, slaves," and some other property, "and also two thousand dollars, to be made of my estate, which amount is in lieu of the money due me in right of my wife, by virtue of a decree of the Court of Equity:" and then bequeathed "all the residue of his estate," after payment of his debts, to his children. On the death of the testator, the wife, as survivor, became entitled to the decree. *Held* that the wife was bound to elect, and that, if she accepted the property bequeathed to her, she could not retain the decree, giving up the two thousand dollars only.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2030; Dec. Dig. ⇐782.]

[*Wills* ⇐802.]

Where benefits are given by a will, and some property or interest of the legatee is disposed of to a third person, if the legatee elects to retain his own property, he does not thereby forfeit all benefits given him by the will, but is only bound to make compensation to the third person to the value of the interest given to him. Per Harper, Ch.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2091–2098; Dec. Dig. ⇐802.]

[*Executors and Administrators* ⇐314.]

This being a rule on the commissioner, to shew cause why the money collected on the decree had not been paid over to the wife, the court discharged the rule, but refused to adjudicate the rights of the parties, although the executor of the husband and the wife consented.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1288; Dec. Dig. ⇐314.]

[*Executors and Administrators* ⇐314.]

If the wife had already elected to take under the will, the proper course was for the executor to apply by petition to the court, to have the money paid to him. Semble.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274–1297; Dec. Dig. ⇐314.]

Before Harper, Ch., at Edgefield, June, 1844.

The decree of the Chancellor is as follows.

"The complainants, (husband and wife,) recovered a decree in the right of the latter, in the case stated, after which the husband died. This is a rule on the commissioner to shew cause why the money made under the decree should not be paid over to the surviving wife.

The commissioner shews for cause that the said John Key, by his will, executed after the obtaining of the decree, bequeathed as follows: "I give, devise and bequeath to my beloved wife, Mary Ann, and her heirs, a plantation, slaves," and various other descriptions of property, "and also two thousand dollars, to be made of my estate; which amount is in lieu of the money due me in right of my wife, by virtue of a decree of the Court of Equity for Edgefield district."

"All the residue of my estate, both real and personal, my will and desire is, that the whole thereof be sold by my executors, hereafter mentioned, on a credit of one year, and

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when the pro*ceeds thereof are collected, that all my just debts be paid, and the balance divided into eleven equal portions, one of which I give, devise and bequeath unto each of my following named children," &c. naming them.

It is not questioned but that this is the same decree mentioned in the will. Upon general principles of law, the decree would survive to the wife, but the executor contends that the bequest of the two thousand dollars in lieu of the decree raises a case of election, and that the wife has already elected, by accepting the provision made for her by the will. I take for granted that the amount of the decree is larger than the two thousand dollars,(a) though this is not dis-

(a) The amount of the decree was stated by counsel to be $2500.

tinctly stated. A question was indicated, as arising in the case, which has been much mooted, but does not, in fact, arise in it. It is whether, if benefits be given by will, and some property or interest of the legatee is disposed of to a third person, if the first legatee shall elect to retain his own property, shall he forfeit all benefits given him by the will, or only be bound to make compensation to the disappointed legatee according to the value of the interest given?

The subject is fully discussed, and the cases reviewed, by Mr. Swanston, in his note to Gretton v. Haward, 1 Swanst. 434. He comes to the conclusion, I think fairly and reasonably, that is matter of compensation. But there is no question of forfeiture here. The wife has received the property specifically given to her, and I suppose the two thousand dollars, and further claims to receive to the full amount of the decree.

The testator certainly regarded the decree as his own, and that he had power to dispose of it. He speaks of it as his, though in right of his wife. It is plain that he did not intend the wife to have it. He gives her two thousand dollars in lieu of it. This cannot mean that she may take the decree or the legacy at her option, which seems to be the construction contended for. This would make the provision nugatory. She would, of course, supposing the decree to amount to more than the legacy, take the larger sum. Suppose the testator had given her five dollars, or one dollar, in lieu of the decree, could such construction be supported? Then, according to the rule, and on the footing most favorable for her, if she thinks fit to assert her title to the decree, as survivor, she must make compensation to the persons who would

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be otherwise entitled to the decree, *out of any property given her by the will. This amounts to the same thing as to say that she shall not take beyond the $2000.

A question seemed also to be made, whether the decree in question, regarding it as the testator's own, passes under the residuary clause of the will, or whether the testator must be held to have died intestate with respect to it. But the question cannot be considered, upon this proceeding, by a rule against the commissioner; no order could be made that the executor should pay over a distributive share of the residuary estate in his hands. The children are the proper parties to litigate that question, and they are not parties to this proceeding.

Rule discharged.

The plaintiff, Mary Ann Key, appealed, and now moved the Court of Appeals to reverse the decree of the presiding Chancellor, on the following grounds:

1. Because the decree in favor of the complainants, Key and wife, in right of the wife, survived to her, and therefore she had a right to have the money collected and paid over to her.

2. Because the said decree does not belong to the executor, nor forms any part of John Key's estate, nor is the same disposed of by his will.

3. Because the acceptance by the wife of the devise and bequest to her, under the will of her husband, except the bequest of two thousand dollars, (which she never accepted, nor has she received any part thereof,) is no bar to her right to receive the amount of the decree.

4. Because the widow has a right, by a just construction of the will, to take all that is therein given to her, (except the legacy of two thousand dollars,) and also to collect the decree and receive the money in her own right.

5. Colonel Tomkins, the executor of the will, and who represents all the legatees of that estate, raises the present question through the commissioner of this court, and with his consent, and that of Mary Ann Key, the plaintiff, it was agreed to submit the question for the decision of the court, under a rule against, and a return by, the commissioner.

Bauskett, for the appellant.
Wardlaw, contra.

Curia, per HARPER, Ch. I was mistaken, it appears, in conjecturing that the testator's

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widow had received the two thous*and dollars bequeathed to her by the will. But according to the view I have taken, this is immaterial. If the testator had only given her the land, slaves, &c. and had declared expressly that the decree should form part of his estate, whether to pass under the residuary clause of his will, or to be distributed as property intestate, it is plain that she could not have taken both, without defeating the provisions of the will, and must have elected. He has declared, in very unequivocal terms, that he regards the decree as his own, and in the case supposed, she has already elected, by taking the land, &c. It can make no difference that he has given her a further provision in lieu of the decree. There is no shadow of ground for the construction that he intended to give her the choice between the funds. If she should take the decree she must make compensation out of any property given her by the will, and, by taking the land &c., may be said to have already elected.

It is urged that she had the apparent and only legal title to the money as survivor, and that the court should, as of course, have ordered the money to be paid to her, leaving those who claim it to seek it as they may. But I certainly understood that all parties agreed in the facts, and also agreed in submitting the question. There was, I think,

some irregularity in seeking to obtain the opinion of the court in this summary and collateral way. But the proceeding by rule is an appeal to the equitable discretion of the court, and if there appear any equitable cause, it may, without adjudicating the matter, refuse its interference and leave the parties to proceed by suit. If the commissioner should receive notice that a plaintiff to a money decree had assigned it, it would, I apprehend, be at his own risk if he should afterwards pay the money to the assignor, and the court would not order him to do that which it would be against his duty to do. But if this be a case of election, and the widow has in fact elected, this is equivalent to an assignment. This is no adjudication, nor will the court upon a summary application, order the money to be paid to the executor. If he claims it, he must institute some proceeding to try his right to it. In the case of an assignment it is usual to proceed by petition, making the assignor a party. Motion dismissed.

The whole court concurred.

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1 Rich. Eq. *71

*EX'RS OF THOMAS G. LAMAR v. OLIVER SIMPSON and Others.

(Columbia. Dec., 1844.)

[*Deeds* ⇐106; *Trusts* ⇐136.]

Conveyance of land in fee to one of the Solicitors of the State by name, to himself, "his heirs and assigns, for the State of South Carolina." *Held*, to vest the legal title in the State.

[Ed. Note.—Cited in D. C. Roddy & Co. v. Elam, 12 Rich. Eq. 345; State of South Carolina v. Evans, 33 S. C. 190, 11 S. E. 697.

For other cases, see Deeds, Cent. Dig. § 292; Dec. Dig. ⇐106; Trusts, Cent. Dig. § 179; Dec. Dig. ⇐136.]

[*Alteration of Instruments* ⇐17.]

Where the State, being the legal owner of lands, authorized one of the Solicitors to convey them to H. S. or his appointee, and the Solicitor executed printed blank deeds, and delivered them to H. S. who afterwards filled them up and delivered them to a purchaser—*Held*, that the conveyances were good.

[Ed. Note.—Cited in Reeves v. Brayton, 36 S. C. 402, 15 S. E. 658.

For other cases, see Alteration of Instruments, Cent. Dig. § 129; Dec. Dig. ⇐17.]

[*Estoppel* ⇐37.]

One having a beneficiary interest in lands, mortgaged them, and afterwards acquired the legal title. In the mean time judgments had been obtained against him. *Held*, that the mortgages were entitled to be first paid.(*a*)

[Ed. Note.—Cited in Green v. Niver, 43 S. C. 370, 21 S. E. 263.

For other cases, see Estoppel, Cent. Dig. § 91½; Dec. Dig. ⇐37.]

Before Johnston, Ch., at Edgefield, June, 1843.

The principal object of this bill was to subject certain real property in the town of Hamburg to the lien of a judgment recovered by the plaintiffs against Henry Shultz, in April 1839. The bill alleged that the only property from which the creditors of Shultz could hope to obtain satisfaction of their demands, was his interest in the Fair tract of land, on which Hamburg is principally built. That in pursuance of a decree of the Court of Equity against Shultz, the said Fair tract of land was sold in August, 1830, and at that sale B. J. Earle, the Solicitor of the western circuit, being authorized by Resolution of the Legislature, became the purchaser, for the State, of a part of the said tract, containing about 180 acres, and took a conveyance for the same to himself, "his heirs and assigns, for the State of South Carolina." That the said B. J. Earle sold a part of the land so purchased by him, and paid the proceeds into the treasury of the State, and his actings in the premises were approved by Resolutions of the Legislature, passed in 1830 (Res. of 1830, p. 36) and in 1831 (Res. of 1831, p. 30). That in pursuance of a report and certain Resolutions, adopted in 1838, and more particularly of the 13th sec. of an Act passed in the same year, (6 Stat. 612) the said B. J. Earle, in December 1838, conveyed to Shultz, in fee simple, all the land included in the aforesaid conveyance to himself, excepting only the lots previously sold by him. That the Leg-

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islature, by the 17th sec. of *an Act passed in 1832, (6 Stat. 477,) authorized F. H. Wardlaw and N. L. Griffin to make titles for any such lots in Hamburg as Shultz should think proper to sell; and by an Act passed in 1833, (6 Stat. 504,) continued them as commissioners with the same powers and duties for the year 1834. That the said F. H. Wardlaw and N. L. Griffin, in pursuance of the authority vested in them by the said Acts, on the 24th January 1834, conveyed 55 lots in Hamburg, to Amory Sibley, at the request of Shultz, and to secure Sibley for certain advancements of money made by him to Shultz; and that the larger portion of the 55 lots were reconveyed by Sibley to Shultz in 1838. That the Legislature, by the 16th sec. of an Act passed in 1832, (6 Stat. 477,) enacted, "that the Solicitor of the western circuit be, and he is hereby, instructed, &c. to convey to Henry Shultz, or to such person as he shall direct, for his own use and benefit, all the right and title which the State has in and to the town of Hamburg." That at the date of the passage of the said Act, Waddy Thompson, Jr. was Solicitor of the Western circuit, and continued to exercise the powers and duties thereof until December, 1835, when he resigned the office. That the mode pursued by the said Waddy Thompson, Jr. in the execution of his authority under the said Act was, that in the year 1835 he signed and sealed, in the presence of two witnesses, many printed copies of the formal

parts of a release, but containing no statement or description of the date, the consideration, the grantee, or the parcels of land conveyed, and placed these blanks in the hands of Shultz, to be used at his discretion, in the subsequent sales of lots in the town of Hamburg, but without any specific instructions to Shultz as to what parcels of lands should be conveyed, or to whom the deeds should be delivered, for in fact the contracts for sale, &c. of the lots had not then been made.

That Shultz, having thus received these deeds in blank, in the first place procured the whole of them to be dated, using principally the dates July 22, 1835, and August 3, 1835, and next, while they were yet in blank procured one of the subscribing witnesses to go before some magistrate and make affidavit that he had seen the grantor sign and seal the deed, omitting all notice of delivery. That sometime afterwards, the said Waddy Thompson, finding or suspecting that Shultz had abused or was likely to abuse the confidence he had placed in him concerning

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*these deeds, endeavored to regain the possession of all those deeds in blank having his signature and seal, and did in fact regain many of them, and with an assurance from Shultz that all had been surrendered, but the said Henry Shultz surreptitiously kept some of them, to be used as the emergencies of his affairs might require.

That about November 4, 1835, Shultz and Simpson procured two of the said blank deeds, which bore date the 22d July 1835, to be filled up as conveyances for two lots in Hamburg (Nos. 55 and 156,) to Simpson, and on the same day procured a third deed, which bore date the 3d August 1835, to be filled up as a conveyance in fee to Simpson, for the expressed consideration of four thousand dollars, of a parcel of land in upper Hamburg, known as the Hill. That on the said last mentioned deed there was an indorsement, by Simpson, acknowledging the deed to be a mortgage to secure to Simpson the repayment of four thousand dollars. That about the 12th July, 1837, Shultz and Simpson filled up another of said deeds, which bore the date of July 22d 1835, as a conveyance in fee to Simpson, for eleven of the lots which had been previously conveyed by Wardlaw and Griffin to Sibley, and which were afterwards, in 1838, reconveyed by him to Shultz. On this last deed there was also an indorsement by Simpson, acknowledging the deed to be a mortgage to secure to him the payment of $6,750. The four deeds were recorded. The bill stated circumstances tending to show actual fraud in the transactions between Shultz and Simpson, which it is deemed unnecessary to state, and charged that the said conveyances to Simpson were voluntary and fraudulent, as against the creditors of Shultz. The bill further alleged that in 1839 the said mortgages were foreclosed in Equity, and that at the sales made by the commissioner in December, 1841 and January 1842, Simpson became the purchaser of the property.

The answer of Simpson admitted all the material allegations above stated, but denied all allegations and charges of fraud, and alleged that the conveyances to himself were made in good faith, and for full and valuable considerations passing between himself and Shultz.

Shultz in his answer admitted that the conveyances for lots Nos. 55 and 166 were bona fide; as to the other deeds, he admitted some of the facts charged which went to show fraud, and stated that they were voluntary,

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and that there was an under*standing between himself and Simpson that some of the property was to be held by Simpson in trust for some natural children of Shultz. The answer stated the facts, but it is deemed unnecessary to detail them.

At the trial Shultz was offered as a witness and testified that the facts stated in his answer were true. This testimony was objected to by Simpson.

By the Chancellor. My judgment shall be brief, and confined to what I deem essential to the merits of the case.

If the legal title were in Judge Earle up to the time of his conveyance, as contended by the plaintiffs, it does not appear to me that they must therefore succeed in their application here. If his conveyance gave a good title to their debtor, subject to their executions, they have an ample remedy in their own hands.

But my clear impression is that the title was not in Judge Earle, under the deed executed to him; but that the use was executed in the State.

Grant, however, that the title was in him, and that the interest of the State were merely equitable, I see no reason why the conveyances made by Mr. Thompson were not sufficient to transfer them—to such extent, at least, as to entitle his grantee to hold under an equity equal to the plaintiffs, and of which this court would not, therefore, interfere to deprive him. I say this, upon the supposition that his conveyances were made upon a fair consideration. Upon which point, I shall presently remark.

If Mr. Thompson was authorized to convey—if he conveyed regularly to a person named by Shultz—if Shultz confirmed and approved the conveyance, and it was upon a bona fide consideration passing to him, I do not see why the transaction should be disturbed. I do not perceive why the title subsequently coming to Shultz, should not now accrue to the benefit of the person to whom the conveyances were made, so as to entitle him to have any imperfection cured, if necessary. But especially I do not see upon

what principle this court should interfere to dispossess him. If the plaintiffs have a legal right, let them assert it elsewhere—but if they come here under an equity, they are met by an equal equity, in the case I have supposed.

Then, there is no doubt of Mr. Thompson's authority. The only question is whether he strictly complied with it. My own impression is that he did—that he might convey in parcels, and by separate deeds, as well as by

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one conveyance for the whole. *But I have considered this the less, because I think that it lies only with his principal, the State, and not with strangers and third persons, to draw in question any irregularity in the execution of his power.

That the conveyances were made by the authority and direction of Shultz, is unquestionable. His answer and his testimony establish that, if it did not sufficiently appear by his indorsements on the deeds.

Were the conveyances fair and upon proper consideration? Mr. Shultz, the witness examined to establish the negative, proves that part of them were just and bona fide. He attacks others. But this must stand, upon Simpson's answer, if his testimony is incompetent. It is unnecessary to decide whether the conflicting proof, consisting of circumstances, very forcibly remarked on at the hearing, and particularly the answer of Shultz to Simpson's bill of foreclosure, is sufficient to outweigh the evidence; and I am happy that it is so. I have reflected upon the objections under which Mr. Shultz was heard, and I am satisfied that he is an incompetent witness in the cause. If he stood clear of interest, or indifferent between the parties, he would be competent, although a party defendant in the suit. But he does not. It was plausibly urged that he was indifferent—for that, although his testimony operated to subject the property in controversy to his creditors, the plaintiffs—yet in depriving Simpson of it he subjected himself to an equal liability. And such was my impression at the hearing. I think this was a mistaken view. The liens of the plaintiffs are general—that of Simpson specific. The latter has no general lien. So that if he were dispossessed of his specific lien he would be stripped of property in his possession, and left without any existing remedy. It would appear, therefore, that the witness must be interested in transferring that property to the satisfaction of his general lien creditors, under circumstances of such impunity on the other side.

It is ordered that the bill be dismissed.

The complainants appealed.

Wardlaw, for the appellants.

Bauskett and Carroll, contra.

Curia, per JOHNSTON, Ch. We are unanimously of opinion that the decree must stand. I am myself satisfied, (though there is some difference of opinion among us on this

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point) that, *in holding Shultz to be an incompetent witness, I was mistaken, and that my first impressions on this subject were correct. In supposing that Simpson was possessed of a special lien only, and not of a general lien also, I had reference to the mortgages, but overlooked the decree for the amount secured, which was founded on them. I am satisfied now that Shultz could be no gainer by his evidence. For although it might have the effect of setting aside the mortgages as between Simpson and his execution creditors, and exposing the mortgaged property to sale, for the payment of his debts generally, and of giving the execution creditors the preference, to be satisfied out of the avails; yet when they are all satisfied, Simpson's decree, which must stand as between himself and Shultz, would be entitled to be paid out of the balance. And this is not all. If, contrary to all expectation, there should still remain any balance of the avails, Simpson, and not Shultz, would be entitled to that also. For we must not forget that, as between these two, not only are the mortgages, and the decree of foreclosure, good and conclusive, but the sale made under them, and the purchase of the premises by Simpson at that sale, are also unimpeachable by Shultz, and constitute Simpson the owner of the premises. So that, as owner, he could lay claim to the whole balance of the proceeds of the resale.

But allowing Shultz to be a competent witness, it is the unanimous opinion of this court, that his testimony is not sufficient to entitle the plaintiffs to a decree. This opinion is founded upon the technical rule, which sustains an answer not opposed by more than one witness. In opposition to Simpson's answer there is only this one witness. It is true, that under the same rule, if circumstances conspire with the witness the answer cannot stand. But here, to say the most, the circumstances are on both sides, with a very strong preponderance in favor of the answer. So that allowing Shultz to be not only competent but credible, his evidence, for want of corroboration, fails to outweigh the answer of Simpson.

The bona fides of the deeds to Simpson being thus established, it remains to consider the sufficiency of the instruments themselves.

There is no pretence for the position that the title to the premises was ever in Mr. Solicitor Earle. The deed to him recites that he bought for the State, and the con-

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veyance is to him for *the State. Here is an absence of all those circumstances, such as something to be done by the trustee, and the like, which have been held to detain the title in the trustee, and our own decision of

Ramsay v. Marsh, 2 McC. 252, [13 Am. Dec. 717,] is sufficient to shew that the use was executed in the State.

The title was, therefore, in the State, from the date of the deed to Mr. Earle. It is fair to concede that the conveyance of Wardlaw and Griffin, under their authority of 1832, transferred it to Sibley, as to so much of Hamburg as was covered by the deed, and that it never returned to Shultz until Sibley conveyed to him in 1838.

In the mean time Thompson conveyed to Simpson under the order of Shultz.

The question is upon the sufficiency of this latter conveyance, as against the judgment creditors of Shultz.

Is there any doubt that when the Legislature authorized Mr. Thompson to convey to Shultz, or to his appointee, upon the 16,000 dollars being paid into the treasury, it in effect created in and transferred to Shultz, the entire beneficiary interest in the premises to be conveyed? Can there be any doubt of that; or that Thompson was made a mere ministerial agent to follow his directions? The discretion was with Shultz and not with Thompson. Under these circumstances, Thompson, at his request, subscribed the deeds in blank and delivered them to him. These skeleton deeds were so printed as to recite the authority of the agent, and to confine the property to be transferred within the power. [Duncan v. Hodges] 4 McC. 239, [17 Am. Dec. 734;] [Gray's Ex'rs v. Rumph] 2 Hill Eq. 6; and no property could have been inserted in the blanks, so as to pass under the authority created, but property in the town of Hamburg. The deeds, being in Shultz's possession, could never be filled up, or pass from him without his consent and direction. He did pass them to Simpson, filled up by his direction, and indorsed with a bona fide contract in relation to them, subscribed by himself and securing an interest to himself in the premises, to wit: the right of redemption.

Shall words be multiplied or cases quoted to prove that in this transaction Shultz was really the principal and Thompson his agent? or that, for any supposed irregularity, none but the principal could complain? or that he, being bound by a bona fide contract, should not be allowed to do so?

It is true that as to a portion of the prop-

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erty covered by Thomp*son's deeds, the title, being in Sibley at the time, did not pass. But it passed as far as Shultz could pass it, and when he subsequently acquired it from Sibley, that acquisition enured to the benefit of his prior grantee.

It may be granted, (taking a different view,) that the conveyances to Simpson, indorsed in the nature of mortgages, passed only the equitable interests which Shultz held in the premises. What then? Was not this a specific lien, or contract, which, according to the principle of Finch v. Winchelsea, 1 P. Wms. 282, and of our own case of Massey v. McIlwain, 2 Hill Eq. 482, would be enforced, even as against general liens binding the land, when the title was subsequently acquired by Shultz from Sibley? No doubt of it, and there are cases enough to shew that, if Shultz had simply deposited these deeds by way of pledge for the money advanced on them, that would have created an equity in Simpson which must be satisfied in preference to general creditors, whose liens came in afterwards against the land when conveyed to him by Sibley.

It is ordered that the decree be affirmed.

The whole court concurred.

(*a*) For the maxim, the interest, when it accrues, feeds the estoppel, and an application of it, vide Doe v. Oliver, 5 M. and R. 202; S. C. 2 Smith's Lead. Ca. 417.

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1 Rich. Eq. 78

ANNA MARIA TERRY v. DANIEL BRUNSON and Others.

(Columbia, Dec., 1844.)

[*Perpetuities* ⟸4; *Wills* ⟸499.]

Testator, in separate clauses of his will, bequeathed to each of his five children, one of whom was a son, and four of whom were daughters, certain personalty, to them and their heirs forever. The legacy to Mary, one of the daughters, was a female slave. Another clause of the will was as follows: "It is my will, that if any one or more of my children, above named, should die without issue," "that his or her part or parts should be equally divided between the surviving brethren." Mary died without is-

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*sue, leaving one of her sisters surviving her. *Held*, that the limitation over was not too remote, that the term brethren included the daughters of the testator, and that the sister of Mary, who survived her, was entitled to the slave and her increase.

[Ed. Note.—Cited in Matthis v. Hammond, 6 Rich. Eq. 404; Mendenhall v. Mower, 16 S. C. 314; Selman v. Robertson, 46 S. C. 266, 24 S. E. 187.

For other cases, see Perpetuities, Cent. Dig. § 30; Dec. Dig. ⟸4; Wills, Cent. Dig. § 1067; Dec. Dig. ⟸499.]

[*Husband and Wife* ⟸15.]

A vested right of the wife may be effectually assigned by the husband, but her contingent interest will survive to her against his assignee, even though the assignment was made for a valuable consideration, and with her concurrence.

[Ed. Note.—Cited in Sheer v. Austin, 2 Rich. 331; Reese v. Holmes, 5 Rich. Eq. 565, 567; Duke v. Palmer, 10 Rich. Eq. 386; Shuler v. Bull, 15 S. C. 431.

For other cases, see Husband and Wife, Cent. Dig. § 37; Dec. Dig. ⟸15.]

Before Johnston, Ch., at Edgefield, June, 1843.

The decree of the Chancellor is as follows:

This bill is brought to recover certain family slaves, claimed by the plaintiff, who

is the last surviving child of Joseph Minter, under the will of the said Joseph.

One of the objections to the bill, which I may as well dispose of at once, is, that it states no peculiar equitable circumstances to entitle the plaintiff to a decree in this court for a delivery of the slaves in question. That they are family slaves is sufficient; and besides, after the case of Young v. Burton, McM. Eq. 255, it is no longer an open question, that a mere allegation that the defendant is in possession of slave property, to which the plaintiff is legally entitled, is sufficient to give jurisdiction to this court. It is thrown out in that case, that if the defendant is able to shew equitable circumstances, these may form such a defence as to induce the court to deny its aid to the recovery sought: but these defendants have stated none, and therefore the case stands upon the general rule stated.

The will of Joseph Minter, under which the plaintiff claims, bears date the 18th of April, 1774: the material clauses of which are the following: the third and seventh being those on which the plaintiff rests her claim.

"2. I give and bequeath to my son, John Minter, one negro boy named Abram, to him and his heirs forever.

3. I give and bequeath to my daughter, Mary Minter, one negro girl, named Lidda (Lydia,) to be delivered to her at her marriage, or lawful age, to her and her heirs, forever.

4. I give and bequeath to my daughter, Sally Minter, one negro girl, named Amy, to be delivered to her at her marriage, or lawful age, to her and her heirs forever.

5. I give and bequeath to my daughter,

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Mercy Minter, one *negro boy, named Primus, to be delivered to her at her marriage, or lawful age, to her and her heirs, forever.

6. I give and bequeath to my daughter, Anna Maria Minter, fifty pounds, Virginia money, (to be raised out of the rest of my estate,) to be delivered to her at her marriage or lawful age.

7. It is my will and desire, that if one or more of my children, (above named,) should die without issue, then and in that case, 'tis my will and desire, that his or her part or parts, should be equally divided between the surviving brethren."

It may be proper to state that the testator gave the whole residue of his personal estate to his wife, A. M. Minter, during widowhood, and upon the expiration of her interest, he directed it to be sold, and the proceeds equally divided among his five children aforesaid by name; and then he repeats, by way of limitation, the identical words employed in the 7th clause, with the exception, that after the words part or parts, the words of the above mentioned money, are added.

This will was drawn and executed in the then province of North Carolina. When the testator died, it is uncertain: we have no direct evidence upon the subject. The family emigrated with him to South Carolina, where he died. The widow obtained letters testamentary upon his estate, from the Ordinary of Ninety-six district, the 28th of April, 1783, and on the 17th of June, 1784, caused an inventory and appraisement to be made of personal estate, to the value of £321, styling the testator, late of the district of Ninety-six, planter. This inventory did not include any of the slaves, the subjects of specific legacies in the will, though it embraced eight other negroes.(a)

The children of the testator married. Mary, the beneficiary under the 3d clause of the will, was twice married. In the first instance, she was united to Thomas Yeates, who is reputed to have perished in or near Charleston, during the Revolutionary war. They were married on Saluda, in this State, but when is uncertain. She had no issue by him, but he left several children by a former marriage, and among them, a son named

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*Abram, two daughters, one of whom subsequently married one Green Jackson, and the other one Jedediah Cook. Of the second marriage of Mary we shall speak hereafter. John Minter, the son of the testator, was married, and died leaving issue two sons, Joseph and William. Sarah Minter, one of the testator's daughters, became the wife of Wm. Terry. By her he had several children. Both he and she are now dead, leaving issue. Mercy Minter, another of the testator's daughters, married, in the first instance, one Thomas Jones, by whom she had two daughters, Elizabeth and Diana. After the death of her first husband, Mercy married one Henry Parkman. Both Mercy and Parkman are dead, leaving issue.

Anna Maria Minter, the last of the testator's daughters, and who is the plaintiff in this suit, married John Terry. He died in 1817, and the plaintiff with her son, James Terry, are his administrators. Besides the five children named in his will, the testator was reputed to have had a daughter, Elizabeth, who had become the wife of one Clement, and died in Virginia, leaving a son, Stephen Clement, and a daughter whose name was not stated at the hearing, probably Isabel.

To recur now to Mary Minter, to whom Lydia was given by the 3d clause of the testator's will. After the death of her first

(a) As a matter of curiosity, it may be stated that the eight negroes consisted of 1 fellow, 4 boys, 1 wench and child, and 1 girl, all valued at a sum equivalent in federal money to $1198.-42, making the average value of the slaves $148.-55. In the same view it may be stated that among the articles of property, was a roller for cotton gin, showing the state of the culture of that staple. It was valued at 4 shillings.

husband, Thomas Yeates, (but at what time is disputed) she married one John Elam, a widower, who had several children by a former marriage, who will be noticed hereafter.

A family bible of Elam's was produced, in which are the following entries: "Mary Elam, wife of John Elam, was born the 8th day of June, in the year of our Lord, 1756." "Lydia was born the 12th of March, 1767." "John and Mary Elam were married the 16th November, 1780." The bible in which these entries are made, forbids the supposition that the entry in relation to the marriage of Elam and wife, was made cotemporaneously with the fact. The edition of the book was of the year 1802. This entry, as well as the others, was proved to be in the hand writing of Abram Yeates, who has not been heard from for the last thirty years, and it was contended that he made the entries for the purpose of supporting a claim which he, with the other children of Yeates, set up to an interest in Lydia and her children, in the early part of the present century, and which will be presently stated.

John Elam having by his marriage obtained possession of Lydia, who was in the hands

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of his wife, retained possession of *her and such issue as she had, until about the year 1803. It is probable that Elam had about this time, or shortly before, divided the family of Lydia among Yeates's children, retaining a part for his wife. In this year, a suit in equity appears to have been brought by William and Joseph Minter, (sons of John,) and by Wm. Terry, the husband of Sarah Minter, and John Terry, the husband of the present plaintiff, formerly Anna Maria Minter, against Elam and wife, Abram Yeates and Green Jackson, and Jedediah Cook, the husbands of Abram's two sisters, already mentioned. It will be observed that the wives of the said Wm. and John Terry were not joined as plaintiffs in this suit. No other portion of the record remains, except the sub. ad respondendum, which bears date the 14th of December, 1803, together with an order of Chancellor Rutledge, dated the 1st of the same month; that the defendants give bond with surety in the sum of $3000, "for the purposes in the bill prayed, until the further order of the court," which order purports to have been granted upon reading the bill, and on motion of the late Mr. Dunlap, plaintiff's solicitor.

The sub. ad respondendum was lodged with Mr. Sheriff Butler, the 5th of March, 1804, on which were indorsed an order by Mr. Dunlap, conformable to that of the chancellor, and a return by the sheriff, dated the 8th of March, 1804, that he had by deputy served Elam and wife with copies of the subpœnas. About this time Elam made a statement to Mr. Gantt, who gave the following opinion.

"By the intermarriage of Mary Minter with Thomas Yeates, (which Mr. Elam states to have taken place 27 years ago,) I am of opinion that the negro woman Lydia, bequeathed to Mary Minter, by Joseph Minter, became the property of the said Thomas Yeates, in virtue of his marriage, and that on the death of said T. Yeates, said negro woman Lydia and her increase descended to the representatives of T. Yeates by a former wife, subject to the widow's third. I am also of opinion, that the death of Mary without issue, does not alter the case; the contingency being too remote to support the limitation over to the brethren mentioned in the 7th clause of Joseph Minter's will. R. Gantt."

We hear no more of this suit until the year 1807. On the 5th day of February of that year, Abram Yeates executed a bill of sale, under seal, by which, without stating any consideration, he conveyed to John Terry, with warranty against himself and his heirs and his personal representatives, two ne-

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groes, Lucy *and Ursula, "being the increase of a certain Lydia, which were, by the last will and testament of Joseph Minter, deceased, given to Mary Minter his daughter." On the 9th of the same month Jedediah Cook, by a similar deed, with like warranty and a like omission as to the consideration, conveyed to the said John Terry "three negroes, to wit: Dinah and her two children, the increase of a certain Lydia, which was, by the last will and testament of Joseph Minter, deceased, given to Mary Minter his daughter." On the 12th of the same month, a paper was drawn up, purporting to be a conveyance, without consideration stated, from Joseph and Wm. Minter, William and John Terry, Henry Parkman, Stephen and Isabel Clement, Anna Maria Jones, and Elizabeth Rotan, to John Elam, for six negroes, Lydia, Pat. Bob, Peter, George and Henry; warranting them against the grantors and their heirs and against "any of the surviving brethren of Joseph Minter deceased." It was not sealed, and was subscribed by Wm. and Joseph Minter, Wm. and John Terry, Henry Parkman and Stephen Clement, the others not having joined in it.

On the 21st of the same month, two papers, the first of them under seal, were executed, which, as they are short I shall transcribe. The first was executed by Elam.

"J. Minter & Al.
vs.
John Elam Et Al.

In Equity—Southern Circuit.

Whereas, the matters in dispute between the above parties are amicably settled, I, John Elam, for myself and wife, do hereby release, and forever quit claim of or to certain negroes, sold and transferred by Abram Yeates and Jedidiah Cook, by their several bills of sale, to John Terry, his heirs and as-

signs forever, which said negroes were formerly the property of my wife, Mary Elam, and were part of the negroes in dispute in the above action. Witness my hand and seal, February 21st, 1807.

John Elam, [L. S.]"

Test—David Moore,
Watson Boon.

The second was as follows:

Minter & Al.
vs.
Elam & Al.

In Equity.

Whereas, all matters in dispute between the above parties are finally compromised, I do hereby agree, that I have received full

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*satisfaction for my right to the negroes in question in the above case, and release all and every right to any action or suit which I might have against John Elam, one of the defendants, in consequence of his having had the negroes in possession. Feb. 21, 1807.

David Moore,
Watson Boon.

William Minter,
Joseph Minter,
William Terry,
his
Henry X Parkman,
mark
John Terry,
Stephen Clement,
Is. Clement.

Thus ended this suit. There is no proof that any of Lydia's family had at any time passed out of Elam's possession, except the five named in the conveyance of Abram Yeates and Jedediah Cook, already mentioned. These are not included in the present suit. Elam and his wife, who had before been in the constant possession of the residue, continued to hold them until Elam's death, which took place in 1824.

He left a will, by which he gave his whole estate, real and personal, to his said wife, during her life, at the expiration of which, after giving directions as to his lands and personalty, exclusive of his negroes, he bequeathed them to certain persons, who are defendants in this suit. Then occurs this remarkable clause—"In case any dispute should happen to arise respecting the right of my property, my will is, that my executors shall make any arrangement or settlement that they may think most to the interest of my estate." Lastly, he appointed three executors, of whom Daniel Brunson alone qualified. He is now dead, and his executor is made a defendant in this suit.

Mrs. Elam retained possession of the negroes until her death in 1841. Upon the occurrence of which, they were taken into possession by the representative of her late husband.

She never had issue, and the plaintiff, who is her sister, and the only one of Joseph Minter's children who survived her, claims the negroes which she had in possession when she died, being all of the issue of the slave Lidda or Lydia, and of whom a list is given in the bill. It will readily occur to the mind that this claim is founded on the 7th clause of Joseph Minter's will.

The claim is resisted, on the grounds

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that there are circum*stances warranting the inference that Mary Minter, to whom Lydia was given by the third clause of the will, was married to Yeates in the lifetime of her father, who having provided in his testament that Lydia should be delivered to her on the occurrence of that event, may very naturally be supposed to have executed his testamentary intention, in which case the slaves vested in Yeates, and never fell within the operation of the will. If this was not so, then it is contended that the limitation over is not to the surviving child of the testator, but the surviving brethren, which may mean surviving brethren of the testator, or surviving kindred of the legatees. In the former sense, the plaintiff is not embraced; and if the latter construction be adopted, the limitation is to all the numerous descendents of the five children named in the will, as well as to the plaintiff, and that they must be brought in. It was also argued, that under this latter construction, the limitation did not necessarily imply that the testator contemplated any particular persons, as the persons to take, upon Mrs. Elam's death, but an indefinite succession of persons who might come in by descent; and that this, according to the case of Massey v. Hudson, 2 Meriv. 135, did not repel the idea that the limitation was to take effect upon the indefinite failure of Mrs. Elam's issue; and that the limitation itself, was, therefore, too remote. Finally, the compromise of the suit of 1803, with the papers then executed, and especially those executed by the plaintiff's then husband, were relied on as a sufficient title in Elam, particularly when coupled with the great lapse of time. I do not think that any of these objections can prevail. The most plausible of them relates to the question of fact, whether Lydia was delivered to Mrs. Yeates in the lifetime of her father. If she was, it matters not, whether this took place before or after Yeates's death, the will of her father could not operate on the property. But what have we to warrant such an assumption? We have nothing but conjecture, and this in the face of circumstances raising a strong probability that the fact was otherwise. There seems to have been a constant persuasion on all hands, that the negro, Lydia, passed under the will of Joseph Minter. For a time, and until the circumstances created an opposition to it, Yeates's children seem to have raised this pretension, that their father had reduced this slave to possession. It may be, that Elam was willing to concur with them, and that he allowed Abraham Yeates to make use of his family

bible, in support of a claim by which both

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himself (Elam) and *Yeates's children, were to be benefitted. He would thereby convert a life estate of his wife, in the whole property, into an absolute title in himself in one-third. The entry, as to Lydia's birth, was a very unusual procedure, and may warrant a suspicion. But when the pretension came to be contested, how did it stand? If the fact was so, that Joseph Minter actually gave Lydia to his daughter, in his lifetime, was it not easy to prove this in 1803; the daughter being then alive to suggest the testimony of the fact? And if neither she, nor Elam, nor the Yeates', could prove it then, are we to conjecture it now? So far as Abram Yeates and Jedediah Cook were concerned, they coincided in the deeds of the 5th and 9th of February, 1807, that the fact was otherwise; and that Lydia and her increase were Mrs. Elam's, by virtue of the will of her father. Elam refers to these deeds in his release of the 21st of the same month; and was very guarded in the conveyance made to him on the 12th, to have a special warranty against the surviving brethren mentioned in Minter's will. The circumstances shew that, at that time, when the facts were fresher and better known, there was a general persuasion contradictory to the facts we are now asked to believe. And this did not stop there. What was it that induced Elam, as late as 1824, to apprehend that his title to some portion of his estate might be contested? Why, if his title was not questionable, did he specially authorize his executors to compromise it upon the best terms they could? Is this no ground for a conjecture, contrary to that now suggested, that there was a secret conviction in his mind, that Lydia passed under the will? I do not use these circumstances as proof that she did, but as fully authorizing and requiring the court to reject a fact merely supposititious and conjectural. We may surely appeal to the conduct of interested parties, and the inferrent evidence of circumstances, for this purpose, and they generally develope the real truth. As to the arguments drawn from the fact, that the executrix of Joseph Minter did not include Lydia in the inventory, made by her in 1784; this cannot weigh against the circumstances I have mentioned. If this fact proves that Joseph Minter had delivered Lydia in his lifetime, the same fact exists as to all the specific legacies, and proves that all of them were so delivered. But is it not more reasonable to conclude, that the remission of all was owing to the further fact, that the widow and executrix was the residuary legatee, and charged with the debts of the testator, and that being so responsible,

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and *having assets, she deemed it unnecessary to inventory the specific legacies, in which the creditors had no interest?

The next question is, upon the proper construction of the will. I cannot suppose that the limitation is too remote, whatever meaning may be attached to the word brethren. Be the persons who they may, that come under the designation, they were to take as survivors of Mrs. Elam, and were, therefore, intended to have a personal enjoyment of the property limited.

The case of Massey v. Hudson does not apply. There, the limitation was to the survivor, his heirs and assigns. The latter would take, according to the terms, although the issue of the first taker should fail, at an indefinitely remote period. No personal enjoyment by the survivor was certainly contemplated or intended by the benefactor; and this being the case, as Sir Wm. Grant said, the objection of remoteness was not at all obviated by such a limitation. Again, I do not believe the testator intended by the surviving brethren, either his own brethren, or the next of his kin to the legatees named in the will, who might happen to be alive at the happening of the contingency. These constructions are resorted to, only from the supposed difficulty of applying the words to the survivors among the legatees named in the will. There is no other ground for this, but that of necessity. The legatees were, one male and four females. Now, it was argued, that among these there were no brethren, (in the plural) to take. That the word was masculine, and could not be naturally applied, and was not, therefore, intended to be applied, to the females, and it was asked, if John Minter, the brother, had died first, and without issue, how could the four sisters have presented themselves as his brethren? But do not all these difficulties apply to the construction contended for? We do not know that the testator had any brethren. But suppose he had one brother and several sisters, and that these had survived Mary Elam. Would the brother be excluded, because he was not brethren? or the sisters, (if they alone survived,) because there was no brethren among them? And so of the next of kin of the legatees themselves, which is the other construction contended for. That it is unusual and rather unnatural to employ the word brethren, as it is employed in this will, to designate a class of persons, such as the legatees named, is admitted. But that it was intended to designate the survivors among these legatees is very apparent. It is employed correlatively. The survivors has refer-

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ence to the children above *named; implying that the survivors should be from among them. The contrast is between those among them who should die, and those who should survive. Nor is the philological criticism upon the word brethren so strong as to forbid its application in the sense contended for by the plaintiff. This application of it is legitimate, although unusual. We hear from

the highest authority of the words men and brethren, both masculine, having been employed in addressing mixed multitudes, and we learn from the same sacred source, that a whole nation was invoked as brethren of the stock of Abraham. The word is a noun of multitude, and may, undoubtedly, be so employed.

Another objection is founded on the transactions, already related, of February, 1807. But there is nothing in these to bind the plaintiff. She was no party, nor was her present right then in existence, much less concluded either by the suit, the compromise, or the deed. What the suit was, we do not certainly know. That it was brought by persons entitled to no claim whatever to the negroes, appears from the list of the plaintiffs. Even John Terry, the husband of the plaintiff, who was one of them, had no right; for it could not then be foreseen that the right of survivorship would ever rest in his wife. How could any one claim as survivor of Mrs. Elam, who was then alive, and lived twenty-eight years afterwards? The probability is, that some claim was set up, under one of the constructions now contended for by the next of kin; and that the suit was intended to secure the property against some apprehended danger of loss or removal. The compromise is sought to be supported as a compromise of family rights, and as a family arrangement. But how can it affect the plaintiff, who was no party, and whose right, having then no actual existence, could not be transferred by her husband?

The deed, as it has been improperly called, of John Terry and others, of the 12th of February, 1807, has no more effect than their release of the 21st. Suppose a consideration to have passed, and that Elam actually purchased the slaves from the persons who signed the paper, and paid them for them. It is not supposed that the plaintiff is bound by the acts of any of the vendors, except those of her husband. But neither is she bound by his. Marriage is not a sale of all the wife's choses, but only confers upon the husband a right to reduce them. His sale or assignment cannot invest the assignee with any greater right than that possessed by the hus-

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band. A vested right of the *wife may be effectually assigned by the husband; but her contingent interest will survive to her against the husband or his assignee, even though made with her concurrence, and for a valuable consideration. This is emphatically true with us, since, according to Ewing v. Smith, 2 Dess. 417, [5 Am. Dec. 557,] and Magwood v. Johnston, 1 Hill Eq. 228, the coverture forbids the wife's concurrence from being regarded as her contract. The very ground of a wife's equity is to protect her against the acts of her husband; a ground which applies with all its force to any attempt on his part to bargain away her reversionary or contingent interests. Upon this principle it is, that the husband cannot assign the wife's annuity beyond his own life; the law allows him to assign that which he has opportunities to reduce, but beyond this it allows to the wife the benefit of all contingencies.

I do not think the plaintiff's claim is to be affected by the unguarded expressions into which she seems to have been betrayed, by a want of sufficient advice as to her rights. It seems from them, that she felt a reluctance to press her claim, from moral considerations. She said Elam had bought the negroes, and ought to have them. But this was no release. She received no consideration. If, on the faith of these observations, any creditor or purchaser under Elam had been defrauded, they should weigh against her. But the defendants are volunteers occupying Elam's place.

It is decreed, that the plaintiff is entitled to the slaves mentioned in the bill, with their increase since the filing thereof, if any, and to an account for the hire of them since the death of Mrs. Mary Elam, formerly Mary Minter, and that the personal representative of John Elam do deliver said slaves to her, and account to her for said hire. The costs to be paid out of John Elam's estate.

The defendants appealed from the decree of the Chancellor, and now moved to reverse the same, on the following grounds.

1. Because it was satisfactorily established by the proof, that the negro woman Lydia was delivered to Mary Minter, (afterwards Mrs. Elam,) before or upon her marriage with Thomas Yeates, in the lifetime of the testator, Joseph Minter, and therefore never fell within the operation of the will.

2. Because the limitation over, in the 17th clause of the will, is void for remoteness and uncertainty.

3. Because the limitation over is not to the plaintiff, as she is not embraced in the terms,

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"surviving brethren," or if the *terms "surviving brethren" mean surviving kindred of the legatees named in the will, then the other persons in that behalf mentioned in the pleadings and proof, are entitled as well as the plaintiff, and ought to be brought in and made parties to this suit.

4. Because the sale by the husband of the plaintiff of the negro woman Lydia and her children in 1807, to John Elam, is a bar to the present claim, affirmed and assented to, as said sale was, by the plaintiff, after the death of her husband.

5. Because the settlement of the suit in equity, in 1807, resulting in the various sales or releases of the parties, show that it was a compromise of family rights and disputes, and in that aspect should now be supported, especially after the lapse of nearly forty years, and the repeated declarations of plaintiff, since the death of her husband.

that the negroes belonged of right to John Elam, under that compromise.

6. Because the plaintiff failed to establish any good and sufficient title to the negroes in dispute, and the decree was against law and the evidence.

And the defendants failing in those grounds, respectfully asked an issue at law to be directed, to try the questions of fact, whether the negro woman Lydia was given and delivered to Mary, the daughter of Joseph Minter, in his lifetime, and whether John Elam surrendered the negro woman Lydia to John Terry, and afterwards bought her in 1807.

Griffin and Carroll for the motion.

Wardlaw and Bauskett, contra.

PER CURIAM. We concur in the decree of the Circuit Court. It is therefore affirmed and the appeal is dismissed.

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1 Rich. Eq. *91

*ARCHIBALD McDONALD v. EXECUTORS OF PETER MAY.

(Columbia. Dec., 1844.)

[*Trusts* ⇐35.]

Where a person agreed with a debtor, whose property was about to be sold at sheriff's sale, to purchase the personal property and allow the debtor the benefit of a resale to be made on credit, and he accordingly purchased it at an under value—*Held*, that he was bound, under the agreement, to account to the debtor for the proceeds of the resale or the value of the property.

[Ed. Note.—Cited in Bath South Carolina Paper Co. v. Langley, 23 S. C. 145; Fairy v. Kennedy, 68 S. C. 256, 47 S. E. 138.

For other cases, see Trusts, Cent. Dig. §§ 45–50; Dec. Dig. ⇐35.]

[*Limitation of Actions* ⇐99, 102.]

Such agreement and purchase, making an express technical trust, is not within the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 477, 499; Dec. Dig. ⇐99, 102.]

[*Trusts* ⇐17, 18.]

Parol evidence is inadmissible to prove such an agreement in relation to lands.

[Ed. Note.—Cited in Harrison v. Bailey, 14 S. C. 337; Coney v. Timmons, 16 S. C. 384.

For other cases, see Trusts, Cent. Dig. §§ 15–24; Dec. Dig. ⇐17, 18.]

[*Fraudulent Conveyances* ⇐176.]

If a purchase, whether of lands or personalty, be made at sheriff's sale by one representing himself to be acting under an agreement with a debtor and for his benefit, when in fact there was no agreement, the advantages thus obtained will be taken away from him, on the ground of fraud; but a bill for that purpose, if not filed within four years, will be barred by the statute of limitations.

[Ed. Note.—Cited in Schmidt v. Gatewood, 2 Rich. Eq. 177; Kinard v. Hiers, 3 Rich. Eq. 428, 55 Am. Dec. 643; Parham v. McCravy, 6 Rich. Eq. 144, 146; Cox v. Cox, Id., 283; Johnston v. La Motte, Id., 355; Coney v. Timmons, 16 S. C. 385; Lamar v. Wright, 31 S. C. 71, 73, 75, 9 S. E. 736.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 541; Dec. Dig. ⇐176.]

Before Johnston, Ch., at Cheraw, February, 1843.

By the Chancellor. This is the revivor of a bill filed by the plaintiff against May, the testator of the defendants, which lapsed by his death after he had put in his answer. The defendants confess their ignorance of the transactions upon which the case was founded, and refer to the answer of their testator, which they believe to be true. The case stands, therefore, upon the original bill and answer, and the proofs taken at the hearing.

The bill charges that the plaintiff, being much indebted and embarrassed, under sundry judgments and executions in the office of the sheriff of Chesterfield, where he resided, and by other debts which were pressing him, and reposing confidence in May, the defendants's testator, made an agreement with him, that the said May should purchase, at sheriff's sale, the whole of the plaintiff's property, real and personal; should resell it on a credit of one and two years, apply the proceeds of the resale, in the first instance, in extinguishment of his advances, and then to such executions, &c. as might still remain unsatisfied, including executions in favor of or owned by May himself; and lastly, pay over whatever residue of said resale might remain, to the plaintiff. That in pursuance of this agreement, May attended sheriff's sales of the plaintiff's property, in the years 1830 and 1831, and stated that his purpose was to purchase for the benefit of the plaintiff, whereby others became dis-

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inclined to *compete with him; and bid off nearly the whole of the plaintiff's property at under rates; and that other persons who had effected purchases, in consequence of his statements delivered up to him the property they had bid off, at the amount of their bids, to be taken and disposed of by him, according to the terms of his aforesaid undertaking.

That May declines to account with the plaintiff for the property thus unjustly obtained by him, or for the profits he has made by resales thereof, and denies his undertaking.

The answer of May denies the existence of any agreement whatever between the plaintiff and himself touching the property purchased by him, or that he ever represented himself as having come under any agreement with him, such as is represented in the bill, except in relation to 14 slaves, mentioned in the answer, which were sold by the sheriff under or subject to a mortgage, and purchased by the said May; for the resale of which slaves he admits his accountability.

He denies that he received any property purchased by other bidders, at their bids, upon the terms mentioned in the bill; but asserts that he bought certain slaves from certain of the purchasers, at their bids, which he conceives to have been full prices, and for which he paid the sheriff in lieu of the other purchasers themselves.

It appears by the testimony, that the purchases of May were made at two sales, made by the sheriff in May and August, 1830. At the first of these sales, he bought the 14 slaves mentioned in his answer, who were bound by the mortgage, at the sum of $470, which slaves he subsequently sold for $3125. At this sale he also bought a tract of land for $150, which he sold again for $1750, a considerable portion of which he received, although the person to whom he sold it is now insolvent, and unable to pay the balance.

At the sale in August he purchased several slaves himself, and he took several off the hands of other purchasers at their bids, or nearly so. At this sale he bought a tract of land, part of which he resold at a trifling advance.

The slaves which he got at these sales were permitted by him to go back to the plantation of the plaintiff, where they remained, cultivating and gathering the crop, until the end of the year.

The plaintiff appears to have been unable, from permanent disease, to attend either of these sales.

The sheriff (Mulloy) testifies, that at the

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sale in May, when *the first tract of land was sold, he was inclined, from the small number of persons attending it, to put off the auction, but May, to whom he communicated his purpose, replied "Go on. I am going to buy it for the benefit of McDonald, (the plaintiff,) and he shall have the benefit of a resale." He made no farther representations, nor said any thing in relation to any other portion of the property, and this conversation was a private one between May and the sheriff.

Another witness (Evans) says, that May told him he did not intend to injure the plaintiff, and that he would give him credit for whatever the property he had bought would bring by a resale, and that he, May, had told the plaintiff so. This witness says, however, that May did not say there was any agreement between himself and the plaintiff before his purchases.

A third witness (Duncan Leslie) states, that May appeared to be busy during the sale which took place in August, and he thinks he said he was acting for the benefit of McDonald. After the sale was over, he said he had made an arrangement, with the Camden creditors, of McDonald's business to his satisfaction. He sold two of the negroes purchased by him the same evening.

Miller, who was McDonald's overseer in 1830, testifies that the August sale took place on Tuesday. The witness had brought the negroes to the Court House. The night before, May came to the camp where they were, and in the course of conversation said he would buy the negroes if he could, and if he succeeded in doing so, they must go back, and the crop must be taken care of. They were sent back accordingly, after the sale was over, and remained on the plantation to the end of the year.

On the other hand, testimony was given for the defendants.

Col. Craig thinks the sale in August was an open sale. There were many bidders. Heard nothing of May's bidding for McDonald. Witness was anxious that the property should bring its value. There was a general bidding among the creditors. Witness's father, who was an execution creditor, bid off a large number of the negroes, and offered them to May at his bid, who did not accept the offer for some time, nor without hesitation. Two of these negroes were the best bargains of the day. Three negroes bought by Mr. Robinson were the next best. The negroes were sold for fair prices.

Mr. Robinson, speaking of the same sale says, that considering that the terms were cash, and that the sale was made in the

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*summer, the property sold well; and thinks he and Mr. Craig got the best bargains. Witness was security for McDonald on one of the largest judgments, on which May had made some payments before the sale.

It appears from other parts of the defendants's evidence, that May became the owner of three executions, held by McNeill, Johnson and DeLeon, of Camden. The sheriff thinks he obtained them on the day of sale in August, perhaps after the sale was over. Col. Craig saw May in the sheriff's office in conversation with Johnson, before the sale began; and assisted in calculating the amount due on Johnson's and DeLeon's executions, and found it not to exceed $300. These were old executions.

Mr. Robinson says May was a man of business, and Col. Craig, that he possessed much of McDonald's confidence, who generally applied to him in cases of emergency.

I have reflected much upon the circumstances of this case, and my impressions of it have changed. At the trial, I saw much that led to suspicion, but I did not perceive how the answer could be gotten over. I am not sure that I am now right in supposing that it must give way to the circumstances and evidence of witnesses, but I feel confident the justice of the case is with the plaintiff. This may incline me too far; if so, I shall be liable to correction.

It appears to me, the testimony goes to establish the probability of such an agreement as is stated in the bill. May admits there was such an agreement in relation to

the 14 mortgaged negroes. Evans's testimony tends to the same point, as regards all the property; for although he says May did not, in words, declare there was an agreement, yet he said that he had told McDonald he would give him the benefit of a resale of the property he purchased, and he intended to do so. We are not to strain this testimony unnaturally, by construing it that he told McDonald so after the purchases. It is capable of being referred to a time either before or after the sales, and the true construction appears to me to be that which harmonizes with the other circumstances. The statement of Mr. sheriff Mulloy at the first sale, the activity displayed at both sales, the conversation with the overseer preceding the sale in August, the statement testified to by Leslie, all go to strengthen the presumption that he was buying under some understanding beneficial to McDonald as well as to himself. This is further strengthened by the return of the slaves after the purchase. The relations of

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confi*dence between the parties, the condition of utter helplessness on the part of McDonald, rendering it improbable that he should not have made application to some friendly agent, and more readily to May, whom he most trusted; coupled with the fact that, to some extent, he had certainly employed him in saving his property, and the further fact, that McDonald said he was acting for him; all these go to increase the probability that there was an understanding between these two parties.

But circumstances will not do. The answer of May must be positively contradicted. This is done by Mulloy. It is not a sufficient objection to this, that Mulloy's testimony relates to the land, to which point it is said parol evidence will not apply. Let the inapplicability of parol to establish an agreement as to land be conceded, this does not appear to me to touch the point under consideration. The evidence may nevertheless be sufficient to contradict and discredit the answer. It is further contradicted. The answer denies that May ever represented himself as acting for McDonald. In addition to Mulloy, Leslie is a positive witness to the contrary.

But the establishment of an agreement is not the essential feature of this case. Let it be admitted that there never was an agreement of any description between the parties. The bill not only charges that there was an agreement, but that May was enabled to make his purchases by his statements that he was acting for McDonald. The proof of such statements, therefore, is applicable to the frame of the bill, and I think the case made out, entitles the plaintiff to relief. This evidence is applicable not only to the personalty, but to the real estate. The statute of frauds, it appears to me, has no application here. This branch of the case does not proceed upon the contract—does not look to an execution of the contract, but founds the remedy upon a fraud, by the practice of which the purchaser obtained possession of the plaintiff's property. Can it admit of a doubt, that if a bidder at sheriff's sale, either of real or personal property, represents that he has contracted to purchase in the property for the debtor's benefit, when in fact there never was such a contract, and in consequence becomes the purchaser, he shall not be allowed to retain the advantage he has thus unjustly obtained?

It seems to follow, that all purchases made by May himself, must be deemed liable to a trust in his hands. For although it appears that no proof can be made that his representations drove off any particular competi-

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tor, and it is proved that the majority *persisted in bidding, and made the property bring a pretty full price, proof of actual injury is not necessary when actual fraud is established. Here an alternative is presented, which I do not perceive how the defendants can get over. If there was no fraud, that can be solely upon the ground that there was a contract. They must choose between the contract or the fraud; and whichever they choose, it seems to me, the plaintiff must prevail.

I must therefore conclude, that a trust attached upon all the purchases made by May personally.

With respect to the property bought by others, and which they let him have, there is more difficulty. If those purchasers had paid for the property and retained it, it cannot be doubted that the purchases would have been good in their hands. I suppose it clear, too, that if, after paying for it, they, the innocent purchasers, had sold it to May, he might have protected himself under their title. But although this may have been the case, in some instances, it was not so, according to the proof, in at least one instance. Mr. Craig did not complete his purchase; his bid was transferred to May, and the case stands as if May himself had been the original purchaser. In taking the accounts which I shall order, the commissioner will be governed by the distinction just mentioned.

It is decreed that an account be taken, in which the estate of May shall be charged with the amounts he may have received by a resale of the property purchased by him, or taken off the hands of other bidders, and for which he and not they paid the purchase money, with interest thereon, and with the value of other property not resold by him, with interest, or hire, as may appear most equitable on the reference; and that credit be allowed on the other hand, for all sums advanced by him to the plaintiff, or in satisfaction of the plaintiff's liabilities and debts, with interest, and also for all debts

due by the plaintiff to him, with interest; and that the commissioner report the account to this court.

As the defendants have not admitted assets of their testator to pay the balance, if any, which may be due to the plaintiff, it is also ordered, that in case the defendants do not admit assets for that purpose, upon the reference, an account be taken of the assets chargeable to them, and the nett balance thereof applicable to the plaintiff's demand.

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*It is further ordered, that the costs be paid out of the estate of the defendants's testator.

The defendants now moved the Court of Appeals to reverse the decree of the Chancellor, on the following grounds:

1st. Because the answer denied positively the allegations in the bill, (except as regards the 14 mortgaged negroes,) and not having been contradicted by two witnesses, or by one witness and strong corroborating circumstances, the bill should have been dismissed.

2d. Because there was no proof of fraud.

3d. Because, as the answer positively denied the alleged agreement, upon which alone the plaintiff sought relief, the bill should have been dismissed, even if fraud had been proved.

4th. Because, as it was affirmed in the answer that, at the instance of plaintiff and defendants's testator, the accounts between them had been made up by their attorneys, and that plaintiff fell in debt, which was uncontradicted, the bill should have been dismissed.

5th. Because the plaintiff's claim, if he ever had any, is barred by the statute of limitations, and the bill should have been dismissed.

And failing in that motion, then that the decree be reformed, on the following grounds:

1st. Because the Chancellor erred in decreeing defendants to account for the land, as parol evidence was inadmissible when the alleged agreement was denied by the answer.

2d. Because the Chancellor erred in decreeing defendants to account for the personalty bid off by other persons, and taken by defendants's testator at their bids.

3d. Because the Chancellor erred in decreeing the costs to be paid out of the estate of defendants's testator.

Hanna, for the motions.

Sims, contra.

Curia, per JOHNSTON, Ch. It appears that the statute of limitations which was pleaded, was overlooked in the circuit decree.

This court is of opinion that the evidence was entirely sufficient to make out the existence of the agreement charged in the bill. There is no difficulty in applying the evidence to the personalty, to the full extent for which May is made liable by the decree; and in relation to that, it makes out a case

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of express *technical trust by agreement, to which the statute of limitations has no application.

With respect to the lands purchased, parol evidence of the agreement was not receivable. The case, in that respect, stands, therefore, as if no agreement had been made.

We are satisfied with the view taken by the Chancellor, that if purchases be made by one representing himself to be acting under an agreement with a debtor, and for his benefit, when, in fact, there was no agreement, the advantages thus obtained should be taken away from him, on the ground of fraud; and this doctrine we think properly applicable in the case before us, so far as the lands are concerned; there being no suitable evidence of an agreement, and, therefore, no agreement, in relation to them.

But the fraud here was perpetrated in 1830, and the bill was not filed until 1837. The remedy, with respect to the lands, was, therefore, barred before the suit was brought.

It is therefore ordered, that the decree be reformed, by excluding from the account the lands purchased by May. In all other respects, the decree is affirmed, and the appeal dismissed.

HARPER and JOHNSON, CC., concurred.

DUNKIN, Ch., concurred in the result.

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IN THE COURT OF ERRORS.

PRESENT.

HON. DAVID JOHNSON,
" WILLIAM HARPER,
" JOB JOHNSTON,
" B. F. DUNKIN,
" J. S. RICHARDSON,
" J. B. O'NEALL,
" J. J. EVANS,
" A. P. BUTLER,
" D. L. WARDLAW,
" EDWARD FROST.

1 Rich. Eq. *99

*JAMES SHIELDS, ELIAS HARREL, WILLIAM COLLINS, JAMES GARDNER, CORNELIUS GARDNER, S. D. KIRKPATRICK, JOHN CALCUT, and HENRY BAILEY, Attorney General, v. JOSEPH A. JOLLY.

(Columbia. Dec., 1844.)

[*Charities* ⟸20.]

The testator bequeathed the whole of his property, both real and personal, to his wife for life, and after her death "to the Methodist Church of which she may be a member at the time of her death, to be appropriated to the uses and purposes which the Conference may deem most advantageous for said church; more especially for the support of Sunday Schools, for the purchase of Bibles and religious tracts, and the distribution of the same among the destitute, and for the support of Missionaries." *Held*, that the bequest to the Methodist Church, of which the tenant for life was a member when she died, was valid, and that the uses thereof could be enforced in Chancery.(*a*)

[Ed. Note.—Cited in Bates v. Taylor, 28 S. C. 481, 6 S. E. 302; Dye v. Beaver Creek Church, 48 S. C. 452, 454, 455, 456, 458, 26 S. E. 717, 59 Am. St. Rep. 724; Snider v. Snider, 70 S. C. 558, 559, 50 S. E. 504, 106 Am. St. Rep. 754.

For other cases, see Charities, Cent. Dig. § 27; Dec. Dig. ⟸20.]

[*Charities* ⟸43.]

The statute 43 Eliz. c. 4, in relation to charitable uses, has never been adopted in this State; but, independently of any statute, the court of Chancery has jurisdiction to enforce all charitable uses, except, perhaps, a charity at large, the power to enforce which, probably, belongs to the Legislature.

[Ed. Note.—Cited in Snider v. Snider, 70 S. C. 561, 50 S. E. 504, 106 Am. St. Rep. 754.

For other cases, see Charities, Cent. Dig. § 84; Dec. Dig. ⟸43.]

[*Trusts* ⟸160.]

[If the object of a trust be lawful, and sufficiently definite to enable the court to execute it, it will not be permitted to fail for want of a trustee.]

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 204; Dec. Dig. ⟸160.]

Before Harper, Ch., at Marion, January, 1843.

The case will be sufficiently understood from the decree of the Chancellor, which was as follows:

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*John Burnet, of the district of Marion, by his will, executed in 1832, devised as follows:

"I give, devise and bequeath the whole of my estate, both real and personal, to my wife, Elizabeth Burnet, during the term of her natural life. After her death, I give, devise and bequeath the whole of my said estate, both real and personal, to the Methodist Church of which she may be a member at the time of her death, to be appropriated to the uses and purposes which the Conference may deem most advantageous for said church; more especially for the support of Sunday Schools, for the purchase of bibles and religious tracts, and the distribution of the same among the destitute, and for the support of missionaries."

He appointed his wife executrix, who qualified on the will, and kept possession of and enjoyed the property till her death, in 1837. The defendant, Joseph A. Jolly, took out administration on her estate. The object of the bill is to have an account of the estate, which was given to her for life. The bill purports to be filed by certain persons, on behalf of themselves and others, alleging themselves to be members of the

(*a*) Vide Gibson v. McCall, 1 Richardson's R. Rep. 174.

Methodist Church called Liberty, of which it is also alleged that the said Elizabeth Burnet was a member at the time of her death. The devise in question is claimed to be a charitable devise, under the statute 43 Eliz. c. 4, giving effect to gifts to charitable uses, which would have been void if they had been on any other trusts. It is also claimed, that independently of the statute, the State, as parens patriæ, succeeding to the prerogative of the king, has the disposition of such devise, and may make it, by the intervention of the Attorney General, through this court. The Attorney General is named as a party complainant to the present bill.

The defendant by his answer admits the fact of the devise, and his own character of administrator. He contends that the devise is void, and that a trust results to the next of kin of the testator, who have assigned their respective interests to the defendant, for valuable consideration. The case of the Baptist Association v. Hart's executors, 4 Wheat. 1, [4 L. Ed. 499.] is fully in point, as to several of the questions involved in this case. That was a devise "to the Baptist Association, that, for ordinary, meets at Philadelphia annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." The testator was a cit-

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*izen of Virginia; after making the will, and before the death of the testator, the Legislature of Virginia passed an Act repealing all English statutes, including that of 43 Eliz. c. 4. The Baptist Association was a regularly organized body, meeting annually at Philadelphia, for many years before the making of the will. In 1797, it was incorporated by the Legislature of Pennsylvania. The court determined, first, that the bequest could not be taken by the individuals who composed the Association, at the death of the testator, on the ground that no private advantage was intended for them. Nothing was intended to pass to them but the trust, and that they are not authorized to execute as individuals. It is the Association forever, not the individuals who at the time of his death might compose the Association, and their representatives, who are to manage this "perpetual fund." And, secondly, that the subsequent incorporation of the Association before bill filed, did not enable them to take on general principles. The legacy was, therefore, void. The Statute of Eliz. being repealed, it could not be sustained as a charitable devise under that. It was contended, however, that at common law, and independently of the statute, when there was a devise to charitable uses, which was void for vagueness or other causes, the king, as parens patriæ, had the disposition of the fund or property, and that the disposition was to be made through the Court of Chancery, on the information of the Attorney General. The question is ably and elaborately considered by Chief Justice Marshall, who comes to the conclusion that the law of charitable devises in England depends altogether on the statutes; and that a devise to charitable uses, which is void at law, stands, apart from the statutes, on the same footing as a void devise to any other uses. It would be superfluous to add anything to the reasoning of Chief Justice Marshall, which is full and conclusive. A doubt is also suggested, whether, supposing such a power to exist in the king as parens patriæ in England, it could be exercised in the court of this country. Indeed, it was conceded in argument, that this could not be enforced as a charitable use, unless under the statute. This devise being then void, and standing on the footing of any other void devise, it follows that a trust results for the next of kin, unless it can be supported under the statute. It is contended that the statute of Eliz. must be regarded as of force in this State, from the words of our Act of the Legislature of 1721, 7 Stat. 163.(*b*) which is quoted from Trott's Laws, 369, and of

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*which we find a portion in 1 Brev. Dig. 198, n. That Act empowers the Governor of the Province for the time being, and the majority of the honorable members of his Majesty's Council, from time to time subsisting, to hold a Court of Chancery, and to have, exercise and use the same jurisdiction, power and authority, in granting and issuing forth all original and remedial writs and other process whatever, and in hearing, adjudging and determining all causes and suits in equity, in as full and ample manner as any Chancellor, or Court or Courts of Chancery in America, may or ought to do. From the case of the Baptist Association v. Hart's executors, it appears that the stat. 43 Eliz. was in force in Virginia until 1792, and it is to be presumed was in force when our Act of 1721 was passed. The argument is, that powers as ample were granted to the Governor in council, as those possessed by any Court of Chancery in America. That the courts of Virginia were possessed of this jurisdiction under the statute, and that the courts of this State must be therefore vested with a similar jurisdiction. The Governor and Council constituted a Court of Chancery before the passing of the Act of 1721, and taking the clause I have quoted alone, I should not suppose that it was intended to confer any new or original jurisdiction, but to give ample powers in exercising the jurisdiction which the court already possessed. The Act of 1712, (2 Stat. 413,) making English statutes of force, provides that the honorable the Governor and Council of the prov-

(*b*) Vide also Act of 1746, 7 Stat. 192.

ince, for the time being, shall have all the power and authority, relating to the execution of the said enumerated statutes, as by the same, or any other the laws of England, are given to the Lord Chancellor, or the Lord Keeper of the great seal of England. It would hardly be contended, that by this clause any special jurisdiction was given, created by any English statute not enumerated in the Act, although it provides that the court shall have all the power and authority given to the Chancellor by the enumerated statutes, or by any other laws of England. Construing the two Acts in pari materia, I should take one to be framed in reference to the other. This may be further illustrated by the tenth clause of the Act of 1721, which provides that "the said court shall proceed, adjudge and determine in all causes brought into the said court, as near as may be according to the known laws, customs, statutes and usages of the kingdom of Great Britain; and also, as near as may be, according to

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known and established *rules of his Majesty's High Court of Chancery in South Britain." But the Act of 1721, conferring jurisdiction on the court, provides for its authority in granting all original and remedial writs, and other process whatsoever, and in hearing and adjudging and determining all causes and suits in equity. Certainly, the court has never exercised the jurisdiction of issuing original and other writs, and the proceeding under the stat. of Eliz. is not a cause or suit in equity. It belongs to the extraordinary jurisdiction of the Chancellor of England, apart from the general chancery jurisdiction. Blackstone, (3 vol. p. 48,) after enumerating the various objects of the Chancellor's extraordinary jurisdiction, adds, "He is the general guardian of all infants, idiots and lunatics, and has the general superintendence of all charitable uses in the kingdom. And all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the Court of Chancery." And, as quoted by Chief Justice Marshall from Cooper, "the jurisdiction, however, in the three cases of infants, idiots or lunatics, and charities, does not belong to the Court of Chancery, as a court of Equity, but as administering the prerogative and duties of the crown." He adds, that it would be a waste of time to multiply authorities to the point, because the principle is familiar to the profession. By attending to the provisions of the stat. of the 43 Eliz. as I find them stated, 6 Com. Dig. 457, tit. Uses, (n. 14,) it will be apparent that the legislature could not have had in view the adoption of the statute. It provides that the Chancellor may award commissions to the Bishop of the Diocese, his Chancellor and others, &c. or any four of them, to inquire of charitable gifts, by the oaths of twelve men, &c. and to make decrees as to the method of administering the charities: which decrees were to be certified into Chancery, and to stand good until altered. It is hardly necessary to say that the Legislature could not have contemplated a commission to a Bishop in a country where there were no Bishops, and consequently no officers of the Bishops. It is true, that Courts of Chancery in this State, whether with or without the warrant of express law, have exercised this extraordinary jurisdiction over infants, idiots, and lunatics. But this may have arisen from the exigency of the case, as the courts have assumed the jurisdiction of granting divorces a mensa et thoro, from the practice of the English courts, in the time of the Commonwealth. But however well matured, and established by practice, may be the jurisdiction of the court in these

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in*stances, there has been no such practice with regard to charitable uses, and the inference necessary to be drawn is, that the court has no such jurisdiction. The devise in question, then, being altogether void, the bill must be dismissed, and it is ordered and decreed accordingly.

The complainants appealed, on the following grounds.

1. Because the will of the testator indicates, with sufficient certainty, the trustees to whom he has devised and bequeathed his estate, and the trusts which are to be executed; and the intention of the testator should, therefore, be executed.

2. Because the uses intended by the testator being distinctly declared by the will, became charged upon the property in the hands of the tenant for life, and rebut any presumption of a trust for the next of kin: and that the representative of the tenant for life, or any other person taking the property, holds the same subject to the said uses, and the circuit decree ought to have declared accordingly.

3. Because the Methodist Church, to whom the bequest is made, is averred to have had legal existence as a corporate body for more than twenty years before the period at which they were to take, and to have exercised corporate franchises; and, by presumption of law, must be held duly entitled to take and hold the property.

4. Because the said Methodist Church was a religious society of Protestant Christians, duly existing before the Constitution of 1789; that the Constitution of 1778 duly constituted the same a church, and entitled it to assume and exercise corporate power, upon complying with certain forms. That the complainants aver that these forms were pursued, and that ever since that period the said church has had legal existence. That the Constitution of 1789 expressly protected the rights thus acquired, and that thereby

the said Methodist Church hath acquired legal existence, and is entitled to hold and enjoy the benefits given by the testator's will.

5. Because the Court of Chancery of South Carolina is invested, by the Act of 1712, with all the powers granted by any law of England to the Lord Chancellor of England; and, again, by the Act of 1721, with every power exercised by any Court of Chancery in America; that the jurisdiction over charitable uses was exercised, not only by the Lord Chancellor of England, but also by various Courts in the United States, at the date of the said Acts, and long subsequent

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thereto, and must, therefore, of *right, now belong to the Court of Chancery of South Carolina.

6. Because the Governor and Council of the province of South Carolina, as a Court of Chancery, administered the prerogative of the crown of England, whether as parens patriæ, or as acting through the extraordinary jurisdiction of the Court of Chancery; that by this means the Court of Chancery of South Carolina acquired jurisdiction over infants, idiots and lunatics, and exercised the same, and that in the same manner the same court acquired jurisdiction over charitable uses, and can, of right, exercise the same whenever occasion calls for that exercise.

[For subsequent opinions, see 2 Strob. Eq. 379.]

Memminger and Moses, for the appellants.

Dargan, contra.

Curia, per HARPER, Ch. This is a case in which I take great pleasure in reversing my own judgment, and it is perhaps fortunate that the decision has been delayed until the subject has undergone so thorough an investigation as it has done in the cases of Sarah Tayne's will, determined in the Circuit Court of the United States for Pennsylvania, by Mr. Justice Baldwyn, and in that of Vidal v. Girard's Executors, in the Supreme Court of the United States, 2 Howard, 127, [11 L. Ed. 205]. The extent of learning and laborious research with which those cases were examined would make it matter of affectation to go over the same ground and comment on the same authorities. It will be sufficient to state briefly their results.

The former case seems to be precisely in point. Among various bequests which were in question, it will be sufficient to mention several made to different yearly or monthly meetings of friends, unincorporated societies; to vest funds and pay the proceeds, in one instance, "as an annual subscription into yearly meeting stock," and in another, "towards the relief of the poor members belonging thereunto." These bequests were held to be good, and the fund directed to be paid to the individuals who respectively composed the several societies. In the case of Vidal v. Girard's Executors, the devise was to the Mayor, Aldermen and Citizens of the city of Philadelphia, in trust to erect a College and make various improvements in the City. This may seem not precisely in point, as the devise was to a corporation, capable of taking in succession. But the whole subject was considered, and the opinion of the court was plainly intended to overrule the case of the Baptist Association v. Hart's Executors. The very able argument of Mr.

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Binney, and the *lucid opinion of the court, delivered by Mr. Justice Story, embrace every point which could be made in the case before us. It was held, that the statute of wills, disabling corporations to take by devise, was not of force in Pennsylvania; that the City might take property in trust, in the same way as natural persons; that if the trust be repugnant to or incompatible with the purposes for which the corporation was created, the devise is not void, but the court will substitute a proper trustee; and that there is no positive objection to the corporation's taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them. It adds to the authority of the decision, that Mr. Webster in his argument does not controvert the principles which were contended for and established as applicable to charitable uses, but insists that the use in question could not be regarded as a charitable one, in consequence of the prohibition of any clergyman's entering the College and of any particular religious opinions being taught.

I understand these principles to be settled by the decisions referred to. If there be a bequest to a society, by that name, the individuals composing it, who may be identified by evidence, take as natural persons, in the same manner as if each had been particularly named; and that if it be upon a lawful trust, they will be compelled to execute it. There was some difficulty in England, from the circumstance that a gift of land, made in such terms, gave only a life estate, for want of words of inheritance. But with us, where no words of inheritance are necessary, I do not perceive why a society by that name should not take the fee. I suppose that such an estate would not come within our Act of 1791, (5 Stat. 162,) providing for the distribution of intestates's estates, but that the descent must be according to the course of the common law. Justice Baldwyn observes that incorporations were originally established to enable religious societies, the individuals composing which were regarded as men dead in law and incapable of taking as natural persons, to take in succession. There was never need of a charter to enable societies to purchase chattels.

It is decided that devises to charitable uses will be established and enforced, when similar devises for other purposes would be void for vagueness or uncertainty. By very elaborate research it is shown that such charitable uses were familiar to the law

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*from its earliest records, and the subject of chancery jurisdiction before the statute 43 Eliz. and independently of it. In a note to Vidal v. Girard's Executors, more than 50 cases are referred to selected from a calender of chancery decisions made up by a commission, from records in the Tower of London, which were decided previously to the statute 43 Eliz. of bills to enforce charitable uses. Mr. Justice Story observes, in relation to these cases, that "they establish in the most satisfactory and conclusive manner, that cases of charities, where there were trustees appointed, for general and indefinite charities, as well as for specific charities, were familiarly known to and acted upon and enforced in the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but as far as we can gather from the imperfect statements in the printed records, there were also cases where either no trustees were appointed, or the trustees were not competent to take." They shew very conclusively, also, that persons having only a general and indefinite interest, such as the complainants have as members of the religious society, may sustain the bill and enforce the use.

It appears very satisfactorily that, supposing the jurisdiction not to have existed before the statute 43 Eliz. it has grown up since, and become so firmly established as to be authoritative with us, and this not by virtue of the Chancellor's authority in administering the King's prerogative, but of his own proper chancery jurisdiction. The statute only authorized a proceeding by commission directed to the ordinary and his officers, and gives the chancellor only appellate jurisdiction. But many cases are found of an original proceeding by bill, and where the Chancellor set aside the judgment of the commissioners, as being beyond their jurisdiction, or gave relief by virtue of his proper and original jurisdiction. That the jurisdiction is not dependent on the statute is very variously illustrated. The statute provides only for twenty one sorts of charitable uses, while forty six are recognized by the cases as capable of being enforced. Many uses, as in favor of towns, colleges, &c., are expressly excepted out of the statute, but the jurisdiction of chancery to administer them has never been doubted. There were various English statutes prior to the 43 Eliz. providing for the execution of charitable uses, when the societies which administered them had become extinct. Mr. Justice Story refers to the opinions and decisions of Sir

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John Leach, Sir Joseph *Jekyll, Lord Northington, Lord C. J. Wilmot, Lord Redesdale, and of Lord Chancellor Sugden, in opposition to the dictum of Lord Loughborough, on which the case of the Baptist Association v. Hart's Executors was principally decided. Mr. Justice Story quotes the opinion of Lord Redesdale that the statute "only created a new jurisdiction. It created no new law. It created a new and ancillary jurisdiction," &c.

There can be no doubt that a trust for the support of religion is a charitable use; and with us, where all sects of the Christian religion stand upon an equal footing, there can be no question with respect to a superstitious use.

In the argument of the present case, decisions were quoted, from nine of the States of the Union, establishing such charitable uses. Contrary decisions have been made in Virginia and Maryland, and they are supposed to have been made in conformity to the decision in the Baptist Association v. Hart's Executors. As the State of Virginia had actually repealed the statute 43 Eliz. on which charitable uses were supposed to depend, it might seem to have repudiated such uses.

There seem to be several distinct kinds of charitable uses, requiring a different method of proceeding. First, there is what is called a charity at large, where there is a gift simply to purposes of charity, without the appointment of any trustee. This sort of use I do not understand to have ever appertained to the jurisdiction of the Chancellor as a Court of Equity, but to have been enforced by him under the authority of the King's sign manual and by virtue of the prerogative. I do not think that it would be within the jurisdiction of this court to set up such a charity as this, and devise a scheme for carrying it out. It would probably appertain to the Legislature, on which most of the royal prerogative has devolved, such as the granting of charters and franchises, &c. Another instance is, where trustees are appointed, but the objects are so vague and indefinite, that if the gift were to any other purpose than charity, the court must declare the trust void for uncertainty; as in the instance of Moriee v. The Bishop of Durham, 9 Ves. 399, where the trust was to such objects of benevolence and liberality as the Bishop of Durham should approve. To a bill for setting up a charitable use of this sort, I think the Attorney General ought to be a party, to aid the court in devising the specific scheme for carrying it out. The third class comes under the general rules applicable to all trusts whatever, whether for

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charitable or any other purposes. *It is the well known and universal rule of the court, that if the object of the trust be lawful, and

sufficiently specific and definite to enable the court to execute it, it shall never fail for the want of a trustee. To a bill of this sort the Attorney General is not a necessary party, and the present seems to me to be a case of this sort. The devise is not merely to such purposes as the Conference may direct, but specifically to support Sunday Schools, buy and distribute bibles, &c. These trusts the court can execute.

Admitting the individuals composing the congregation of the Liberty Methodist Church to be capable of taking in trust, yet it is manifest that they are entirely unsuitable for exercising it. Our courts have, I believe gone further than most courts of chancery elsewhere, in changing trustees as the exigency of cases may require. An individual, or a limited number of individuals, are better adapted to carry out the views of the testator. I think the congregation, however, ought to be permitted to select their own trustees, and I believe it is competent for us to give such direction.

It is therefore ordered and decreed, that the circuit decree be reversed, that the congregation of Liberty Methodist Church in Marion district be at liberty to elect a trustee or trustees (not exceeding three in number) at any time before the next sitting of the Court of Chancery for the said district, and that, upon such election being made and certified to the satisfaction of the commissioner, he report upon the fitness of such appointment, or that if the said congregation shall fail to elect, he report upon a suitable person to be appointed trustee, and whether such trustee or trustees ought to give security for the faithful discharge of his or their trusts; that if any vacancy of the office of trustee shall hereafter occur, it may in like manner be filled by election, subject to the confirmation of the court. And it is further ordered, that upon the appointment of such trustee or trustees the defendant, Joseph A. Jolly, account before the commissioner, and pay and deliver over to the said trustee or trustees all the estate, real and personal, and the issues and profits thereof, which was of the testator John Burnet deceased, and which came into the hands of the said defendant, to be held by him or them in trust to appropriate the issues and profits of the estate paid and delivered over, to the uses and purposes which the Methodist Conference to which the said Liberty Church is attached, may deem most advantageous for said

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Church, more especially for *the support of Sunday Schools, for the purchase of bibles and religious tracts, and the distribution of the same among the destitute, and for the support of Missionaries; and that such trustee or trustees account annually before the commissioner. As the defendant states that the next of kin of the testator have assigned their claims on the estate to him, and he has litigated for his own benefit, he must pay the costs, and it is ordered accordingly.

The whole court concurred.

CHARLESTON, JANUARY, 1845.

CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
" WM. HARPER,
" JOB JOHNSTON,
" B. F. DUNKIN.

1 Rich. Eq. *111

*DANIEL A. BURLESON & OTHERS v. SUSAN E. BOWMAN & OTHERS.

(Charleston. Jan., 1845.)

[*Wills* ⇐498.]

Testatrix bequeathed the interest of £500 to S. for life, and after her death the said £500 to "the issue of S. to be equally divided amongst such issue, share and share alike, and their issue; and in case of only one child her surviving, then to such only surviving child." *Held*, that the term issue, meant children, and that grandchildren of S. whose parents were alive at her death, were not entitled.

[Ed. Note.—Cited in Risher v. Adams, 9 Rich. Eq. 249.

For other cases, see Wills, Cent. Dig. § 1088; Dec. Dig. ⇐498.]

[*Wills* ⇐498.]

The term issue, generally includes all lineal descendants, but this signification may be controlled by the context.

[Ed. Note.—Cited in Glenn v. Glenn, 21 S. C. 311; Gourdin v. Deas, 27 S. C. 492, 4 S. E. 64.

For other cases, see Wills, Cent. Dig. §§ 1087–1089; Dec. Dig. ⇐498.]

Before Johnson, Ch., at Charleston, February, 1843.

By the Chancellor. Margaret Hamilton, by her last will, gave £500 to trustees, in trust to suffer and permit her niece, Sarah Burleson, to have and take the interest for life, and from and after her decease, "then in trust to permit and suffer the issue of my said niece, Sarah Burleson, by her first and second marriages, to have, receive and take the said principal sum of £500, and all other residue, to be equally divided amongst such issue, share and share alike, and their issue; and in case of only one child her surviving, then to such only surviving child." Sarah Burleson, the niece, left three children, the issue of these marriages, Daniel A. Burleson, Mary A. Tyson, and Susan E. Bowman, living, at the time of her death. At that time, Daniel A. Burleson had two, and Mary A. Tyson had three sons living,

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but the *defendant, Susan E. Bowman, had no child, and the question raised by the pleadings is, whether the legacy of £500 is to be divided equally amongst Daniel A. Burleson, Mary A. Tyson and Susan E. Bowman, the children of the first taker, Sarah Burleson, or between them and the five children of Daniel A. Burleson and Mary A. Tyson, living at the time of the death of Sarah Burleson.

The word issue, in its general acceptation, unquestionably, includes all lineal descendants, and must, necessarily, receive that interpretation, unless connected with something which controls its general signification; and if the limitation over had been to the issue of Sarah Burleson, share and share alike, without more, the grandchildren, as well as the children, would be entitled to take; but the limitation over to one child, in case Sarah Burleson left but one surviving her, demonstrates, I think, clearly, that in the use of the word issue, she meant children; nor is it helped by the limitation over to the issue, and their issue, of Sarah Burleson, for the issue of her issue are but her lineal descendants, and are equally contracted and limited by the limitation over to her only surviving child, if she died leaving but one. The case of Swift v. Swift, 11 Cond. Eng. Ch. Rep. 378, cannot, I think, be distinguished from this. There, Edmund Swift, by articles entered into before his marriage with Mary Daly, agreed to assign to trustees certain money funds, to which he was entitled, in trust to permit him to receive the interest during his life, and to permit her to receive it, in case she survived him, during her life, and, after the death of the survivor, the funds to go to the issue of the marriage, in case there should be any issue of the marriage living at the time of the death of the survivor, in such proportion as the said Edmund Swift should, by deed or will, appoint, and for want of such appointment, then to such issue, share and share alike, and if but one, then the whole to go to such only child. The marriage was had, and the wife,

Mrs. Swift, died, leaving an only child, and that child died leaving a daughter, and the question was, whether that child was entitled to take under the agreement. The Vice Chancellor held that the expression "and if but one, the whole to go to such only child," is demonstrative that the word "issue," means children, and, consequently, that the father was entitled to the trust funds. Dalzell v. Welch, 2 Cond. Eng. Ch. Rep. 434, has been relied on as authority for the complainants, and one of the provisions of the will

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in that *case was, in terms and effect, very similar to those in this case. There, in a bequest of chattels, the testator directed that the profits should be paid to his daughter during her life, and "in case she should leave any issue living at her death, that the said shares and produce of the lease should be disposed of, and the produce thereof paid and applied to and amongst the said child or children, at such time or times, and in such shares and proportions as Frances Dalzell (the daughter) should appoint, and in default of appointment, to and amongst such issue, if more than one, in equal shares and proportions, as tenants in common, and if there should be but one child, the whole to be paid to such one," &c. And the Vice Chancellor seemed to think that the word issue ought to be taken in its general sense, but the case turned upon another provision of the will, in which the limitation over was to issue generally, and the case cannot be received as authority in the question here.

Other clauses in this will have been referred to as tending to show that the testatrix intended to use the word "issue," in its most extended sense. Thus, she gives to the children of her niece, Mary Baldy, £500, "to be equally divided between them, share and share alike, and their issue." In another clause, she gave £500 to her niece, Jane Polhill, with power to dispose of the principal sum amongst her children, in such portions as she might think fit, and in default of such appointment, "to be equally divided amongst her issue, share and share alike." Again, in another clause she gives "to the children of Captain Tristam Cary, £200." The shares of the minors, if any, to be paid to them at the age of twenty-one or days of marriage, and to Elizabeth Monteith, "or her issue," she gives a legacy of £20 sterling. But I do not see how these cases can aid in the construction of the clause under consideration, for there is nothing in them to restrict the interpretation of the term issue, as here, to children, and of course it must have its general signification. We may look into all the provisions of a will, to arrive at the intention of the testator in using particular terms, but here there is nothing to guide us in the interpretation of the word issue, as used in the clause under consideration, but what we find in it, for it differs from all the other dispositions of the will, and none of them are in the same terms, and differ in their legal effect. Thus, in the bequest to Mary Baldy's children, the legacy is to be divided between them and their issue, but in the bequest of Jane Polhill, the limitation over is

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to her issue, *and the bequest to Elizabeth Monteith, is to her or her issue; that to Captain Tristam Cary's children, is directly to them. The grandchildren of Sarah Burleson cannot take, as legatees, under the bequest of Margaret Hamilton, in question, and the fund must be divided equally between Daniel A. Burleson and Mary A. Tyson, complainants, and Susan E. Bowman, defendant, and it is so ordered and decreed. The costs of all parties to be paid out of the fund before division.

The complainants appealed, and moved the Court of Appeals to reverse the decree, and to order the fund in question to be divided among all the complainants and the defendant, Susan E Bowman, that is, one-eighth thereof to each of them.

McCrady, for the appellants.

————, contra.

PER CURIAM. We concur in the decree of the circuit court. Appeal dismissed.

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1 Rich. Eq. 114

JOSEPH CUMMING v. CATHARINE BERRY and Others.

(Charleston. Jan., 1845.)

[*Equity* ⇐⇒87.]

A court of equity is bound to apply the bar of the statute of Limitations to a legal demand, in the same manner as a court of law would apply it.

[Ed. Note.—Cited in Mobley v. Cureton, 2 S. C. 145; Bolt v. Dawkins, 16 S. C. 212.

For other cases, see Equity, Cent. Dig. §§ 212–244, 395; Dec. Dig. ⇐⇒87; Limitation of Actions, Cent. Dig. § 168.]

[*Limitation of Actions* ⇐⇒87.]

The sec. 19 of the stat. 9 Anne, c. 20, preventing persons who were beyond seas when the cause of action accrued, from pleading the statute of Limitations, does not apply to foreigners constantly residing abroad, but to citizens of this State.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 458; Dec. Dig. ⇐⇒87.]

[This case is also cited in Alexander v. Burnet, 5 Rich. 201, and distinguished therefrom.]

Before Dunkin, Ch., at Charleston, June, 1843.

The facts of this case will be sufficiently understood from the decree of the Chancellor, which is as follows:

In August, 1825, the complainant, a merchant of Savannah, shipped to Wilmington, North Carolina, a quantity of bagging for sale. It was consigned to J. A. Berry & Co.

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commission *merchants of that place, and was invoiced at one thousand, eight hundred and forty-eight dollars, 60 cents.

A letter was introduced in evidence from James A. Berry to the complainant, dated 14th Nov. 1825, in which he says, among other things, "Your bagging arrived and was disposed of prior to my failure, which was sudden and unexpected, owing to failures at the North, &c. I am now reduced, with a young family, to penury and distress, and am divested of every cent I had in my possession, by my creditors." He concludes by saying, that he has now nothing else to offer but his body, which he is willing at any time to surrender.

On the 26th August, 1828, James A. Berry forwarded a written notice to the complainant, as one of his creditors, of his intention to apply to the Court of Pleas and Quarter Sessions, of New Hanover county, North Carolina, to be admitted to take the oath prescribed for the relief of Insolvent Debtors, by the Act of 1822, in order that the complainant might, if he thought proper, attend, and show cause why the benefit of the Act should not be extended to him.

By a transcript from the records of the court above mentioned, it appeared that at the September sessions, 1828, James A. Berry and William A. Berry were both admitted to the benefit of the Insolvent Debtors' law; a jury having found that they were not worth forty shillings, and had been guilty of no fraud, or concealment of property, and they having taken the oath prescribed by the law.

Soon after the failure of James A. Berry, he removed into the country, and in the latter part of his life to Smithville, N. C. where he was employed as a clerk by the engineer on the public works, and died in November, 1832.

Some five years after the death of James A. Berry, certain proceedings were instituted in the Court of Chancery for Charleston district, touching the title to certain real estate, in the city of Charleston, and for partition of the same. In that suit, Edward D. Winslow and others were plaintiffs, and the heirs of the said James A. Berry and others were defendants. The cause was heard by Chancellor Harper, in January, 1839, and by his decree it was determined, among other things, that by the deed of marriage settlement, executed May, 1809, between Edward Winslow and the mother of James A. Berry, a remainder in fee in one-fifth of the premises vested in the said James A. Berry, expectant on the life of his mother, who survived her son, but

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*departed this life in 1837. Neither the complainant nor any other creditor of James A. Berry was party to this decree, nor does it appear necessary that they should have been.

By a subsequent order of this court, a sale of the premises was directed for the purposes of partition, and by the answer or statement of Mr. Gray, one of the Masters, it appears that the share of the proceeds to which the heirs of James A. Berry are entitled, amounts to about six thousand dollars.

The bill charges that no part of the complainant's demand against James A. Berry has been paid or satisfied; that his interest in this real estate in the city of Charleston was improperly withheld from the knowledge of his creditors, when he was admitted to the benefit of the Insolvent Debtors' Act in North Carolina, and that the same should be subjected to the payment of his just debts; and prays, among other things, that the amount due to complainant may be declared a debt binding on the estate of the said James A. Berry deceased, and may be decreed to be paid out of that which has been so declared by the decree of this court, or that it may be paid by the defendants, who are the heirs at law of the said James A. Berry deceased.

The answer of Catharine Berry, the widow of James A. Berry, states, among other things, that her husband transacted business with his brother, William A. Berry, as commission merchants in Wilmington, N. C. under the name of J. A. Berry & Co., from the Spring of 1824 until the firm was dissolved by insolvency, in September, 1825, but she denies any knowledge or belief of his having transacted any separate business. She states further, that the books of J. A. Berry & Co. have been lost or destroyed, so that she can give no information which they might be supposed to contain.

Several grounds have been taken in opposition to the prayer of the bill, which it may be as well to consider in their order.

It is said that the contract of the complainant was with James A. Berry & Company, and that William A. Berry, one of the firm, is still alive.

Although it was admitted at the hearing, that the original consignment was to J. A. Berry & Co. it is very doubtful whether, after the letter of James A. Berry to the complainant, in November, 1825, and the notice in August, 1828, he, or any person claiming under him, would be permitted to question his individual liability for the proceeds of the consignment.

The terms of that letter have no reference

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to the firm, its re*sponsibility or resources, but amount to a distinct admission that the property of the complainant had been sold by the writer, who recognized his obligation, and regretted his inability to discharge it. But apart from this, it is very clear from the testimony, that in the Spring of 1824 William A. Berry was little more than nineteen years of age. "When one of two contracting parties is an infant, the action may

and should be brought against the adult only." Ch. on Cont. 34. In Burgess v. Menill, 4 Taunt. 468, the court says, "This a binding contract as to the adult, though void as to the infant; and it is extremely proper to say that the plaintiff may safely overlook the privity of the infant, as to whom the contract is nugatory, and may describe it as a contract made by the adult contractor only." "We are of opinion that the demand must be overruled, and that the action is well brought against the adult only."

Then the defendants insist that, as the complainant was no party to the decree of 1839, he cannot derive any benefit from it, but must prove the title to the premises in James A. Berry.

Without inquiring how far it is competent for the defendants now to call in question the matter adjudicated by the decree, the court is of opinion that the evidence adduced in that cause established the title of James A. Berry, and that his mother was well barred of her inheritance by the deed of 1809, and the decree of the court, sanctioning the settlement, to which decree she must, for the reason stated in the judgment of Chancellor Harper, be presumed to have been regularly a party.

It is further urged that, "upon the case stated in the bill, the complainant has a plain and adequate remedy at law, by an action of debt or assumpsit against the defendants, as heirs of James A. Berry."

By the Act of 5 Geo. 2 c. 7, A. D. 1732, it is declared that "the houses, lands, negroes, and other hereditaments and real estates situate or lying within any of the said plantations, (his Majesty's plantations and colonies of America,) belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands, of what nature or kind soever, owing by any such person to his Majesty or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the laws of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process, in any court of law or equity in any of the said

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plantations respectively, for seizing, *extending, selling or disposing of any such houses, lands, negroes, and hereditaments and real estates, towards the satisfaction of such debts, duties and demands, &c. in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts." 2 Stat. 570.

By the law of England, the heir is as much debtor upon the bond as the obligor, "because," says Mr. Plowden, "the obligor has bound as well his heir as himself." An heir must be charged in the debet as well as in the detinet; and if judgment be entered against him by default, it may be personally. Davy v. Pepys, Plowd. 440; Kinaston v. Clark, 2 Atk. 204. But on a judgment recovered against the ancestor, or a cognizance acknowledged by him, the heir is chargeable as tenant of the lands, and not as heir, and an action of debt does not lie against him on the judgment or recognizance, as it does on the bond of his ancestors, but a scire facias only to have execution of the ancestor's lands in his hands.

Another reason given is, that the heir is not named either in the judgment or recognizance. 2 Saund. 7, n. 4. Although the heir could not plead assets in the hands of the executor where suit was brought on the bond of the ancestor, yet he might, by proceeding in the court, be reimbursed from the personal assets; and for this reason, as remarked by the Chancellor in Vernon v. Ehrich's Ex'rs., 2 Hill Eq. 260, "suits against the heir appear to have been more common in equity than at law."

It may be observed, that the Act of Geo. 2 gives no action expressly against the heir, but declares the real estates of the debtor to be liable for all his debts, in like manner as real estates by the laws of England are liable for debts by bond or other specialty, and are liable to like process in any Court of Law or Equity, for seizing, &c. in like manner as personal estates may be seized, &c. for the satisfaction of debts.

If it were necessary for the decision of this case, I should hold that under the true construction of the Act, this was the complainant's proper forum, and that the lands in the hands of the heir could only be made available in the same manner as personal estates in the hands of legatees or distributees, to wit: by showing a deficiency of assets in the hands of the personal representative, or his insolvency, or some such cause. See Trescott v. Trescott, 1 M'C. C. R. 430. It may be added that in England the heir is one person, but in this country they are

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*numerous, and the estates derived in different proportions, and this would be the appropriate tribunal to fix the extent of their several liabilities.

But the complainant has no remedy at law. The real estate embraced in the deed of 1809 was all sold by the order of this court, in February, 1841, about three months before filing this bill, for about the sum of twenty-five thousand dollars. Of the proceeds the master states the heirs of James A. Berry are entitled to $6,390. He also states that they were purchasers to an amount exceeding their share. I do not think this latter circumstance material. They are entitled to the fund—and whatever portion they have bought, whether the whole or a part, they hold as any other purchasers at the Master's sales, and not as heirs. The defendants all reside beyond the limits of

this State, and this fund, while in the custody of the law, could hardly be regarded as the subject of attachment. Bowden v. Schatzell, Bail. Eq. 364.

But, at the common law, if the heir had bona fide aliened the lands which he had by descent, before an action was commenced against him, he might discharge himself by pleading that he had nothing by descent, at the time of suing out the writs, and the obligee had no remedy at law, though in equity the heir was responsible for the land. 2 Saund. ut supra. Coleman v. Winch, 1 P. Wms. 777. To remedy this, the Act 3 and 4 W. and M. c. 14, was passed, by which the heir was rendered liable, by an action of debt, for the value of the land as aliened. But the Act of 5 Geo. 2 renders only the land liable, and if the land has been aliened before suit brought, the party is left to the same remedy as he had in the case of a debt by specialty prior to the Act of 3 and 4 W. and M., to wit, his bill in this court.

The remaining objection to the plaintiff's recovery is that "the debt, duty, or demand, which the complainant seeks by this bill to recover, accrued, if at all, more than four years before the filing of this bill;" and the defendants, therefore, rely on the statute of limitations of this State and of North Carolina, in the same manner as if the same were set forth by plea.

In answer to this plea or defence, the stat. 9 Anne, c. 20, 2 Stat. 432, was brought to the view of the court. But the provisions of the exception manifestly refer to persons who have left the State, were absent when the action accrued, and afterwards returned to the State. The Act allows the same time

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to *bring suit "after their return from beyond seas," as was originally allowed from the time of action accrued. Neither the original debtor, nor the defendants, could fall within the purview of this Act, nor is the case within the terms or the reasons of the exception.

But proceedings in the Court of Equity are not within the terms of the statute of limitations, and the court adopts the rule of the statute only by analogy. In Bond v. Hopkins, 1 Sch. and Lef. 428, Lord Redesdale says, "the positive enactment has nothing to do with the case." The question is whether it (the statute,) shall operate in a case not provided for by the words of the Act, and to which it can only apply so far as it governs decisions in the Courts of Equity; that is, whether it shall prevent a Court of Equity from doing justice according to good conscience, when the equitable title is not barred by the lapse of time, although the legal title is so barred.

In Nov. 1825, the debtor acknowledged his indebtedness, avowed his utter destitution, and inability to satisfy the complainant, and in September, 1828, still recognizing the complainant as his creditor, he was admitted to the benefit of the insolvent laws of North Carolina, on taking the oath that he was not worth forty shillings. He lived afterwards in a subordinate situation as a clerk, and died in November, 1832. The answer of his widow states that he left no will, and that there had been no administration. The insolvent law of North Carolina was not, it is believed, brought distinctly to the notice of the court, but it would seem, from Griffith's Law Reg. 3 vol. 209, that after taking the poor debtor's oath, the person or body of the debtor was protected from arrest at the suit of any creditor to whom notice was given.

Doubtless it was true, as stated in Berry's letter, that "his creditors had received all that he was possessed of," and the finding of the jury may have been correct in reference to the matter submitted. They were certainly sufficient to satisfy the complainant of the inutility, if not cruelty, of any legal proceedings for the recovery of his debt, if he had been at liberty to resort to them.

In October, 1837, the life tenancy of Mrs. Winslow terminated. The fee, which J. A. Berry had, vested in possession. If he had been alive, had filed a bill for his share of the estate, and in January, 1839, a decree in his favor, declaring his rights, had been pronounced, it seems difficult to contend that

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this pro*perty would have been protected, or that the claim of the complainant could have been successfully resisted on the plea of the statute of limitations. His omission to surrender this property to his creditors in 1828, his representation, substantially, that he had no such property, whether he was conscious of it or not, had all the effect of a fraud on his creditors, and would at least be sufficient to render it against conscience that he should now avail himself of the statute of limitations. I do not perceive that his heirs can be in any better situation. It may well, I think, be inferred from the statements, that the complainant was ignorant of the fact on which his claim to relief arises, until the decree of 1839, and if it be not sufficiently averred, the court would permit him now so to amend his bill. Prescott v. Hubbell, 1 Hill Eq. R. 217; McMullin v. Brown, 2 Hill Eq. 161.

It is ordered and decreed that one of the masters take an account of the amount due to the complainant, and that the same be paid from the share of the proceeds of the real estate in the custody of the court, to which the heirs of James A. Berry, deceased, have been declared entitled.

The defendants appealed, on the following grounds.

1. That the plaintiff's remedy was at law.

2. That William A. Berry should have been joined as a defendant.

3. That the plaintiff is barred by the statute of limitations.

4. That James A. Berry was not seized of a vested estate in remainder.

Petigru, for the appellants.
A. G. Magrath, contra.

Curia, per JOHNSTON, Ch. Without considering the other points in this cause, we are of opinion the bill should be dismissed on the statute of limitations alone.

The debt due the plaintiff is the only ground of the equitable relief claimed by him, and if that is barred the remedies consequent upon it must fall to the ground.

This debt being a legal demand, the statute must be applied not by analogy but directly, in the same manner as a law court would apply it, if the debt were sued on in that tribunal.

The statute makes no distinction between demands due by persons resident abroad and those owing by citizens resident in this State, and to draw such a distinction would

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be to create an *exception where the statute draws none, and that, in this case without reason or propriety.

Nothing need be added to the remarks of the Chancellor, to shew that the statute of Anne was not intended to apply to foreigners constantly residing abroad, the tribunals of whose countries afford a continual and unembarrassed opportunity to their creditors, but to citizens forsaking the tribunals to which they are naturally amenable, and where they might be expected to be found, and going abroad, probably without establishing any fixed domicile where they might be impleaded. These, when they return to their own forums, shall not take advantage of the suspension wrought by their own dereliction. But no such reasoning applies to those who never owed amenability to our courts.

There was never, so far as we can see, any impediment in the way of the plaintiff's establishing his demand against James A. Berry in North Carolina, and thus imparting to it a rank which would have freed it from the operation of the statute; for although, by taking the benefit of the insolvent law of that State, he seems to have escaped a liability to be arrested, he was liable to be sued.

When these privileges were open to the plaintiff for upwards of seven years during the life of Berry, and he neglected them, and when to this neglect he has added the omission to take any step from the date of his debt, a period of now nearly twenty years, the court sees such evidence of laches as to fully authorize it to apply the bar of the statute. It feels, at least, that the circumstances are not such as should induce the application of the statute of Anne, by an equitable construction, to the case of a foreign debtor, and thus create an exception to the statute of limitations which is not made on its face.

It is ordered that the decree be reversed and the bill dismissed.

The whole court concurred.

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1 Rich. Eq. *123

*WILLIAM H. SMITH, and CAROLINE, His Wife, v. MAYNARD E. CARRERE, Administrator of Caroline C. Follin, and Others.

(Charleston. Jan., 1845.)

[*Executors and Administrators* ⊂⊃120.]

An administrator de bonis non can only recover from the personal representative of the deceased executor or administrator, such chattels or personal estate of the testator or intestate, as remain in specie, and has no right to call him to account for any part of the estate wasted or converted by the deceased executor or administrator.

[Ed. Note.—Cited in Villard v. Robert, 1 Strob. Eq. 411, 413; Tillman v. Walkup, 7 S. C. 62; Kaminer v. Hope, 18 S. C. 576; Gary v. People's Nat. Bank, 26 S. C. 545, 2 S. E. 568, 4 Am. St. Rep. 733; Shell v. Boyd, 32 S. C. 363, 11 S. E. 205; Redfearn v. Craig, 57 S. C. 545, 35 S. E. 1024.

For other cases, see Executors and Administrators, Cent. Dig. § 488; Dec. Dig. ⊂⊃120.]

[*Executors and Administrators* ⊂⊃438.]

The creditors, legatees or distributees of the person whose estate has been wasted or converted, may proceed directly against the representative of the deceased executor or administrator, to recover their demands; and to a bill filed for that purpose, an administrator de bonis non is not a necessary party.

[Ed. Note.—Cited in Villard v. Robert, 1 Strob. Eq. 416.

For other cases, see Executors and Administrators, Cent. Dig. § 1785; Dec. Dig. ⊂⊃438.]

Before Johnson, Ch., at Charleston, February, 1843.

This was a bill by one of the distributees, for an account of the estate of Doctor John Sen Trescot. The bill stated that Doctor John Sen Trescot died intestate, in 1820, leaving a considerable estate, both real and personal, and leaving as his distributees, his widow, Caroline C. Trescot, afterwards Caroline C. Follin, and two infant daughters, of whom the complainant Caroline was one. That Mrs. Trescot took out letters of administration on his estate. That she continued to cultivate the plantation, to dispose of the crops, to collect sums of money due to her intestate, and to pay his debts, until the year 1830, when, by leave of a competent tribunal, she sold all the personal estate. That in 1832 she accounted before the Ordinary for all her actings and doings, up to the last day of December, 1831; at which time there appeared to be a balance in her hands as administratrix, of about ten thousand dollars. The bill further stated, that Mrs. Trescot afterwards intermarried with one Charles Follin, and removed to New Orleans, where

she died in 1833; and that in 1842 letters of administration upon her estate were granted to the defendant, Maynard E. Carrere. The bill then charged, that there were no creditors of the estate of Dr. John Sen Tres ot, and prayed "that the said Maynard E. Carrere, the administrator, as aforesaid, of the said Caroline C. Follin, may set forth a full, true and particular account of the actings and doings of his said intestate, as administratrix of the said John Sen Trescot, and of the moneys, chattels and effects which came to her hands, as such administratrix,

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to be administered; and also, that the *said Maynard E. Carrere may set forth a full, true and particular account of his own actings and doings as administrator, as aforesaid, of the said Caroline C. Follin, deceased."

The defendant, Maynard E. Carrere, as to so much of the bill as sought an account of the estate of John Sen Trescot, demurred, on the ground, "that it appears, by the complainants's said bill, that a personal representative of the said John Sen Trescot, resident within the jurisdiction of this honorable court, and amenable to its process, is a necessary party to the said bill, inasmuch as no person but a personal representative of the said John Sen Trescot can have any title to call upon this defendant to render an account of the administration by the said Caroline C. Follin, of the estate and effects of the said John Sen. Trescot; nor is there any privity between the complainants and this defendant, which can entitle them to call upon him for such account, or to have any relief against him by reason of the said estate and effects, unless the personal representative of the said John Sen Trescot is a party to the suit praying such account and relief; and yet there is no personal representative of the said John Sen Trescot made a party to the complainants's said bill, praying such account and relief against this defendant. And this defendant is advised, and respectfully submits, that no person but the personal representative of the said John Sen Trescot can be received to admit or deny the allegations in the complainants's said bill, that the debts of the said John Sen Trescot have been all paid."

The presiding Chancellor overruled the demurrer, and the defendant, Maynard E. Carrere, appealed, and now moved this court to reverse the chancellor's decision.

Bailey, for the motion,
Memminger & McCrady, contra.

Curia, per HARPER, Ch. Upon the opening of this case, the principles on which the decree is founded struck me as being of a new impression, but upon examination I am satisfied that nothing is more perfectly settled by authority, without any conflict of authorities whatever. The points to be considered are:

1. What are the rights and remedies of an administrator de bonis non, as against the personal representative of a deceased executor or administrator?

2. Is it competent for creditors or legatees to proceed directly to recover their demands against the legal representative of the deceased executor or administrator?

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*3. If they may, is an administrator de bonis non a necessary party to such suit?

The case of Coleman v. McMurdo, 5 Rand. 51, decided by the Supreme Court of Virginia, and that of Hagthorp v. Hook, 1 Gill and Johns. 270, by Chancellor Bland of Maryland, are directly in point. The former of these cases was examined with an elaborate research, to which it would be difficult to add any thing. The general principle is, that an administrator de bonis non can only recover from the representative of the deceased executor or administrator, such chattels or personal estate of the testator or intestate, as remain in specie, and has no right to call him to account for any part of the estate sold, converted, or wasted by him.

This is founded on the nature of his commission, which gives him a title to all the goods which remain unadministered. Before the statute of distributions, the executor was entitled to the whole personal estate, subject to the payment of debts and legacies. When, therefore, he sold or converted any part of it, this was understood to be a seizing or taking possession in his individual right, as an executor or administrator may now assent to his own legacy. The goods were said to be administered, and no longer in his possession as executor or administrator. If he failed to retain enough of the estate to meet the claims of creditors and legatees, he was liable for a devastavit, as of his own personal debt; and it is certain that the rule of law has not changed since the statute. As quoted from the Attorney General v. Hooker, 2 P. Wms. 340, "as to what has been urged, that if an executor dies intestate, all the personal estate, the property whereof is not altered, shall go to the administrator de bonis non, &c. and not to the next of kin of the executor, this is true, because from the time the executor dies intestate, the first testator dies intestate also, and it was the executor's own fault that he did not, as he might, alter the property." If the administrator de bonis non might recover the whole of the estate, or its value, the right of the first executor might be defeated, and the estate indefinitely transmitted from administrator de bonis non to administrator de bonis non. This is different from the case of a temporary administrator durante absentia, &c. whose commission extends to the whole estate, and who is said to hold for the proper administrator. So it is where administration is revoked.

It would be superfluous to go over all the

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English cases in *detail. There are various modifications of the principle which serve to illustrate it. As where an executor or administrator takes a note to himself as executor, or lets a term reserving rent to himself, though it would be different if he took the note or reserved the rent to himself in the character and by the name of executor or administrator. This would amount to a declaration of trust, and shew his intention not to convert to his own use. So, if receiving money, he lays it aside by itself as money of the estate; Wankford v. Wankford, 1 Salk. 306. So, if he fraudulently aliens to a person who knows the property to belong to the estate, the administrator may set aside the sale and recover the property from the purchaser. Cubbidge v. Boatwright, 1 Russ. 549. So, if he changes the investment of stock. 1 Wms. on Ex'ors. 595, where the authorities are collected. There is nothing like this in the case before us. The whole estate is charged to have been sold, and it is not known how the proceeds were disposed of. The sale was by proper authority, and there is no question of the title of the purchasers. The statute 30 Car. 2, c. 7, 2 Stat. 529, enlarged and perpetuated by 4 and 5 W. and M. c. 24, P. L. App. 14, somewhat differently quoted in the Virginia case, is very conclusive of this matter. That statute recites "whereas, the executors and administrators of such persons who have possessed themselves of considerable personal estates of other dead persons, have no remedy by the rules of the common law, as it now stands, to pay the debts of those persons whose estate hath been so converted by their testator or intestate," &c. and enacts for remedy, "that all and every the executors and administrators of such persons, who as executors, or executors in his or their own wrong, or administrators, shall, from and after the 1st day of August next ensuing, waste or convert any goods, chattels, estate or assets of any person deceased, to their own use, shall be liable and chargeable in the same manner as their testator or intestate would have been if they had been living." Now, if the administrator de bonis non might have an account and recover for the assets wasted or converted, it could not be said that the creditors of persons whose estates had been wasted, were without remedy. He would be bound to pay their debts and would be personally liable if he did not. This is confirmed, if confirmation were necessary, by the absence of all authority to the contrary. After reviewing the authorities, one of the judges in the case of Coleman v. McMurdo, says,

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"to meet this formidable array, what *is there on the other side? Not one single case; not the dictum of a single Judge, not the assertion of an elementary writer, that the administrator de bonis non, either at law or in equity, can support an action or file a bill for an account against the representative of a delinquent executor or administrator."

The next question is, whether the creditors, legatees or distributees of the person whose estate has been wasted, may proceed directly against the representative of the executor or administrator. In the case of creditors, where the estate has been wasted by an administrator, the statute, as I have quoted it, is conclusive. Some of the cases to which I have referred, relate to the case of waste by an executor and to distributees. There are other cases to the same effect, to which I shall have occasion to refer. In the American cases, to which I have referred, the cases of executors and administrators, creditors and legatees, or distributees, are considered indiscriminately, as standing on the same footing. The doctrine is laid down, and the manner of proceeding by creditors, pointed out, in Wheatly v. Lane, 1 Saund. 216.

But it is clear that the Court of Equity exercised jurisdiction, to relieve in such cases, before, and independently of, the statute. In Coleman v. McMurdo, the cases of Chamberlain v. Chamberlain, 1 Ch. Ca. 257, Vanacres case, 1b. 303, (a) and Prince v. Morgan, 2 Ch. Ca. 217, are cited. In the last case it is said that "although, by the common law, where the executor wastes, his executor shall not be liable, because it is a personal wrong, it is otherwise here; and the common law will come to it at last." It may be observed, that it was by statute that the executor of an executor was made to represent the first testator. As it is clear that the administrator de bonis non cannot sue, legatees and distributees, or creditors, in case the executor who wastes does not appoint an executor, must be entirely without remedy, unless this court can afford relief. The equity of legatees stands on precisely the same footing with that of creditors. If it were a new case the court would assume jurisdiction, on the familiar general principal that where there is a clear right, and no remedy in any other jurisdiction, this court will take jurisdiction, provided it afford effectual relief according to its ordinary methods of proceeding. The right to be satisfied out of the estate of the defaulting executor or administrator cannot be questioned. To give an account of as-

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sets *wasted is the familiar method of proceeding in the case of the executor or administrator himself, and is equally applicable in the case of his administrator.

Then, is it necessary, in a suit by a creditor or legatee against the administrator of an administrator or executor, that an administrator de bonis non should be a party? I infer

(a) Cited in 1 Bridg. Dig. (2d ed.) p. 757, Executors VI 260.

that it is not necessary. The statute 30 Car. 2, giving a remedy, does not require it.

In many of the decided cases, in which the suit was against the representative of an executor or administrator, it does not appear that such administrator was a party. The same point was considered in Coleman v. McMurdo. One of the Judges in that case says, "as in the case of an executor de son tort, it is said, 'There is no precedent in the Court of Equity of a decree against him, without setting up an administration, for if there should be an administrator, and the defendant pay the money, he would be liable to the administrator.' Bunb. 36, yet in the numberless cases cited in argument, in which the legatees and distributees prosecuted suits against the representatives of deceased executors or administrators, for the assets converted, the administrator de bonis non was not a party, nor was the necessity of his being a party suggested. 11 Vin. Ab. 420, pl. 4; Ib. 427, pl. 11; Ib. 423, pl. 18; Orr v. Kames, 2 Ves. Sen. 194." I have verified the references made by the Judge. In Orr v. Kames, the bill was said to have been against the representative of a deceased executor, from which it seems to be inferred that it was an administrator, and not the executor of the executor.

In the proceeding by a creditor, as authorized by the statute, at law, it is of course impracticable to make an administrator de bonis non a party. The idea seems to be that you cannot pronounce a judgment affecting the estate of the original testator or intestate, without having that estate represented in the cause. The administrator de bonis non is said to be the only person competent to defend that estate. But this is a misconception. Where there is a judgment at law against an executor or administrator upon a devastavit, the judgment is against the individual, as for his own personal debt. So when it is against his representative, it is for the personal debt of his immediate testator or intestate. It is true, as explained in the cases, that he may defend the estate of the original testator or intestate, by shewing that the debt was not due, or the party claiming

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is not *entitled, but this is only incidental to the defence of the estate of his proper testator or intestate, and practically, having every thing in his hands, papers, &c. he is better qualified to make such defence than an administrator de bonis non would be. So, when this court decrees against an executor or administrator, for assets converted, it is for his personal debt. And in like manner for the debt of his testator or intestate when it decrees against the representative. It is plain that the various cases cited in argument, Davis v. Rhame, 1 McC. Eq. 195, Gregory v. Forrester, Ib. 324, Farley v. Farley, Ib. 506, Bradford v. Felder, 2 McC. Eq. 170, laying down the rule generally, that a creditor cannot sue the person in possession of the estate without administration, have no application to the matter we are considering. The complainants are suing the administrator of their proper debtor. Besides, I believe they were all cases in which there was no original administration: and if the rule were otherwise, the necessity of administration would be dispensed with altogether.

In Holland v. Prior, 1 Mylne and Keene, 237, the bill was against an administrator de bonis non, to which the representative of a deceased executor was made a party, charging that the latter had in his hands assets of the original testator unadministered. The question was whether this latter was properly made a party. The administrator de bonis non is the proper party to recover unadministered assets, and in general the administrator represents all persons interested in the estate, and is alone to sue or be sued. The case was held to make an exception, on a like principle as where there is a collusion between the executor and a third person, or where there is a partnership to be settled. He was held to be a proper party, because it was necessary that he should be so, in order to do complete justice between all the parties, and put an end to litigation. And I can conceive if there were an existing administrator de bonis non, who, besides the liability for his testator or intestate's estate, might be supposed to have assets in his hands, the court might require him to be made a party; certainly he would be a proper party. Or if there were assets of the original estate unadministered in the hands of the representative of the deceased executor or administrator, which the administrator de bonis non alone could recover, the court might require administration to be taken out. But there can be no doubt of the general rule, that in bills for relief, it is not necessary to make a party against whom

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you *can have no relief. But in the present case, the allegation is that the original administratrix converted the whole estate. If this be true, and it must be taken to be so, it is impossible that an administrator de bonis non could have any assets in his hands, or be entitled to recover any. Can it be said, then, that he is a necessary party, to enable the court to do complete justice and put an end to litigation?

The decree is affirmed.

JOHNSON, Ch., concurred. JOHNSTON, Ch., absent.

1 Rich. Eq. 130

JOHN W. SMITH v. JESSE SMITH.

(Charleston. Jan., 1845.)

[*Specific Performance* ⇐43.]

Payment of the purchase money, and continuance in possession by the complainant for several years, who but for the agreement was a trespasser, *held* to take a parol agreement for the sale of lands, out of the statute of frauds.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 130; Dec. Dig. ⇐43.]

[*Frauds, Statute of* ⇐129.]

Payment of the purchase money is not of itself sufficient to withdraw such an agreement from the operation of the statute.

[Ed. Note.—Cited in Mims v. Chandler, 21 S. C. 492.

For other cases, see Frauds, Statute of, Cent. Dig. § 311; Dec. Dig. ⇐129.]

[*Frauds, Statute of* ⇐129.]

Possession, it seems, will only be construed as part performance sufficient to take the case out of the statute, when the party in possession might be treated as a trespasser, unless evidence were admissible of the agreement.

[Ed. Note.—Cited in Prothro v. Smith, 6 Rich. Eq. 334; Coney v. Timmons, 16 S. C. 385.

For other cases, see Frauds, Statute of, Cent. Dig. §§ 307, 319; Dec. Dig. ⇐129.]

[*Judgment* ⇐622.]

[A defendant in a suit at law presented, in set-off, a claim on a contract for the sale of land, on which a set-off was allowed. *Held*, that this was an adjudication on the claim binding on defendant.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1136; Dec. Dig. ⇐622.]

Before Harper, Ch., at Georgetown, January, 1842.

Bill for specific performance, and to restrain the enforcement of a judgment at law. The facts of the case are so fully detailed in the opinion of the Court of Appeals, and in the former report of this case, (see McM. Eq. 126) as to render any statement here unnecessary.

The decree of his Honor the Chancellor is as follows:

The case made by the bill of complaint is fully stated in the former decree of Chancellor Johnson and the opinion of the Court of Appeals. The statute of limitations is no longer in question. Of the agreement alleged

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by complainant to have *been made in 1832, that if he would become defendant's surety in his bond to the sheriff, and pay him thirty-one dollars, defendant would convey to him the land on which he lived, and of which he had been put in possession by his father, complainant has furnished no proof, unless it be inferred from the fact that he did become defendant's security. The sheriff's deed was put in complainant's possession, but that was for all the land of the estate, and might have been intended as an equitable mortgage to counter-secure him. Defendant positively denies any such agreement by his answer; though he admits that he offered another agreement, to wit:—that if complainant would become his surety, and pay him (as I understand) the amount for which this particular tract of land was bid off, he would make him a title. In this he is supported by the testimony of the witnesses, so far as it goes, and the allegation is more reasonable and probable in itself. It appears from the evidence, that the tract of land claimed by complainant was of much greater value than any portion of land which his father put into possession of his other children, or perhaps than all the rest of the landed estate.

It appears, from an account of the sales furnished by the clerk of the court, that the tract in complainant's possession, together with one of 95 acres, in possession of Isaac Hardee, sold for considerably more than the residue of the landed estate, amounting to 1569 acres. The witness William Smith, stated that the land claimed by complainant is three times as valuable as Hardee's, and Hardee himself, that it is much more valuable. Regarding himself as making partition of his father's undivided landed estate, it is not probable that defendant would have agreed that complainant should take nearly the half of it in value, paying only as much as if he had received no more than each of the other eight heirs. If the complainant had established his title by the statute of limitations, and had then claimed anything further from his father's estate, he must have accounted for the actual value of this land.

Then, as to the agreement alleged to have been made at the trial of the action brought by complainant in 1833, that if complainant would admit a discount of thirty-one dollars, which the court had rejected, defendant would make a title to the land. This, too, is fully and explicitly denied by the answer, and the contrary is proved but by one witness—a very respectable one, to be sure, (Mr. Munro,) whose evidence is distinct and positive. But though there are some circum-

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stances, it might be difficult *to say there are strong circumstances, to corroborate the witness. I am of opinion, however, that admitting the agreement to be proved, there has not been such a part performance of it as will induce the court to enforce it. The admitting of the discount could amount to no more than the payment of so much money. It was, in fact, a payment of so much money. It was, in fact, a payment, by deducting so much from the amount which complainant was about to recover, and I cannot perceive what difference it makes, that by his consent the payment was directed by the court. Then, I take it to be settled by the later authorities, that the payment of he purchase money will not amount to such a part per-

formance as will induce the court to enforce it. As is said by Lord Redesdale, in Clinan v. Cook, 1 Sch. & Lef. 41: "Nothing is considered as a part performance, which does not put the party into a situation that is a fraud upon him, unless the agreement is performed; for instance, if upon a parol agreement, a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser, if there be no agreement."—"Payment of money is not performance, for it may be repaid; and then the parties will be just as they were before, especially if repaid with interest." See also what is said by the same Chancellor, in Lindsay v. Lynch, 2 Sch. & Lef. 4, and by Lord Rosslyn, in Foster v. Hale, 3 Ves. 712. The older cases which have been relied on to shew that payment of money may constitute a part performance, generally say that any payment, like the payment of earnest on the sale of goods, or the payment of a substantial part of the purchase money, may amount to part performance. With respect to earnest, the statute, as the cases say, makes an express exception in that case, of goods, and how can the court extend this by construction to the sale of land, where no such exception is made? And the reasoning of Sir William Grant, in Butcher v. Butcher, 9 Ves. 393, with respect to illusory appointments, is equally applicable to shew the vexatious uncertainty which would be introduced into the law, if it should be said that it is necessary to shew the payment of a substantial part of the purchase money. He held himself bound, in that case, by an uncontradicted and uniform train of decisions; but there is not such uniformity of decision in the present instance.

The cases are collected by Sugden, Treat. on Vend., p. 87, et seq.

The letting into possession constitutes a

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part performance, *for the reasons given in the cases. But, as is said by the Master of the Rolls, in Morphett v. Jones, 1 Swanst. 181, "if the party is in possession at the date of the agreement, and only continues in possession, this amounts to nothing."

The act of part performance, to be effectual, must have reference to the agreement, and have been intended to be in execution of it.—Anderson v. Chick, 1 Bail. Eq. 124. It must be an act which would be prejudicial to the party seeking performance, if the agreement were not enforced. But complainant's continuing in possession had no relation to this agreement. He claimed, and still claims, to keep possession by a distinct title, and would, no doubt, have equally retained it, whether any agreement had been made or not.

There might be some grounds for compelling the defendant to submit to a new trial of the action to try title at law, on the ground that the verdict was obtained by fraud or surprise; as in Coddrington v. Webb, 2 Ver. 240. Defendant received a title from the sheriff, Sessions, for the land sold under the writ of partition, and though he states by his answer that the tract of land in question was not included in the deed, and a copy of the deed was not furnished me, yet this fact does not seem to have been questioned at the hearing. There is an inherent improbability in supposing that it was omitted. This deed was put into possession of complainant, or his agent, Mr. Bryan. In 1835, defendant applied to sheriff Beaty, the successor of Sessions, stating that he had never received a title, and requesting him, as successor of Sessions, to execute one, which was done. Now, this representation was false, and the obvious conclusion would be, a fraudulent one. For complainant being in possession of Sessions' title, and having no notice to produce it on the trial at law, might well have concluded that it would be impossible for the defendant to make out his case, and have neglected to prepare the defence which he might otherwise have made. But I am satisfied that it would be of no advantage to the complainant that such new trial should be granted. For though it seems to me, from the circumstances, that he had acquired a good title by the statute of limitations, previously to the proceedings in partition, yet he would be excluded by these proceedings from setting up such title. He was a party to these proceedings; it was proved that he was served with a summons; the evidence shews that he knew that the commissioners had recommended

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the sale of this specific tract of land, *and either acquiesced or made no objection. Or, if otherwise, he was bound to know what was done in a suit to which he was a party, and if the land was not subject to partition as part of the estate of his father, but was his own by an independent title, to make that defence, by answering or excepting to the return of the commissioners. This specific tract was recommended by the commissioners to be sold, and it was ordered to be sold, and I suppose, of course, the report of sales confirmed. This constituted a judgment of the court, and every party to a suit is bound by the judgment.

It is ordered and decreed, that upon the defendant refunding to the complainant the sum of thirty-one dollars, with interest from the date of the judgment of 1833, the bill be dismissed.

From this decree the complainant appealed, and now moved that the same be reversed.

Munro, for the motion.
Harllee, contra.

Curia, per DUNKIN, Ch. The decree of the circuit court refers to the previous de-

crees in this cause for the statement of facts.

The complainant and defendant are sons of Jesse Smith, who died intestate about the year 1826. In 1813 or 1814 he had given to the complainant a tract of land containing about 321 acres, of which he put him in possession. He assisted him in erecting a dwelling house, &c. on the land, which the complainant has ever since continued to occupy. A year or two afterwards the father caused a resurvey and plat of the lands to be made by W. Hemingway, in which the boundaries of the complainant's tract, and also of two other tracts, were defined. The defendant's answer says that these two other tracts were intended for his two other sons, but the father never made titles to either of the three.

After the death of the intestate, and in the year 1828, proceedings in partition were instituted in the Court of Common Pleas for Horry District, for a division of the real estate among the heirs. After much delay a writ was issued in 1831. It was testified by the defendant's witness (W. Smith) that when the commissioners came to divide the land, the complainant, on being asked if he gave up his land, replied, "I know not what else to do, I have no more title than the rest." The commissioners recommended a sale. Accordingly, in December, 1831, all

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the *lands of the intestate, comprising 2364 acres, were sold by the sheriff and bid off by the defendant for $490.25.

The allegation of the bill is, that defendant was unable to comply with the terms of sale by giving bond and security, and the sheriff was about to re-sell the lands;—that in the mean time he and the complainant had an interview, in which he stated that he had not bid off the lands for himself, but for the benefit of the heirs to whom they had been given. That it was then proposed that if the plaintiff would become surety on the bond of the sheriff, and would pay his proportion of what was necessary to make up the widow's portion, to wit, thirty-one dollars, that he, the defendant, would execute a title to him for tract No. 1 as sold by the sheriff, which included the complainant's land and that of Isaac Hardee, another heir. That the complainant accordingly executed the bond to the sheriff as surety, some time prior to May 1832, but the defendant afterwards refused to execute the deed.

That the defendant being indebted to the complainant on a note for $123.68, being complainant's share of the personal estate of his father, of whom defendant was administrator, a suit was instituted for the recovery of the amount, in 1833. That the defendant set up as a discount the amount which he, the complainant, was to have paid under the above stated agreement. That after some discussion, the discount was fixed at thirty-one dollars, which was so accordingly entered on the verdict. That the defendant renewed his promise to execute a deed to the complainant, but that he had since refused.

The verdict on the note was rendered at Fall Term, 1833. The complainant continued in possession of the land. Some years afterwards, but at what precise time is not stated, the defendant instituted a suit against the complainant to try the title to the land, and a judgment was rendered against him at Fall Term, 1838, for the land, with sixty dollars damages, and costs. On which he has taken out an execution of habere facias possessionem, &c.(a)

The object of the bill is to restrain proceedings at law, and compel the defendant to a specific performance of his agreement.

The defendant, among other things, relied on the statute of frauds. The Chancellor was of opinion, and this court agree with him, that payment of the purchase money

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is not of itself *sufficient to withdraw the agreement from the operation of the statute, and for the very satisfactory reason, that the money may be recovered back at law.

But in addition to this the complainant insists that the defendant, being unable to comply with the terms of sale, the sheriff was about to re-sell, when the complainant would have purchased his own tract at any price, and that, under these circumstances, he agreed to become surety for the defendant, and did become his surety for the whole amount of the purchase, on condition of receiving from him a title for his own tract at the price stipulated. If the complainant, after having complied with his part of the contract, and the refusal of the defendant to execute his part, had immediately applied to this court, there might be more difficulty in applying the bar of the statute. But the complainant was not disturbed in his possession, certainly until after September, 1835, and perhaps for a longer period. Does this possession of the complainant preclude the defendant from relying on the statute of frauds? All the authorities shew that possession may, or may not, take the case out of the statute, according to circumstances. "The delivery of possession," says Lord Rosslyn, in Wills v. Stradling, 3 Ves. 382, "by the person having possession to the person claiming under the agreement, is a strong and marked circumstance, but the mere holding over by the tenant, which he will do of course if he has no notice to quit, would not of itself take the case out of the statute." So in Morphett v. Jones, 1 Swanst. 181, (the authority cited in the decree) "between landlord and tenant, when the tenant is in possession at the date of the agreement, and only continues in possession, it is properly

(a) Vide the report of this case in Rice Rep. p. 232.

observed that, in many cases, that continuance amounts to nothing." But there may be other, or additional, circumstances, even as between landlord and tenant, as the Master of the Rolls proceeds to shew, where it would be a fraud to permit the party to avail himself of the statute. "The acknowledged possession of a stranger (he says) in the land of another, is not explicable except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorize an enquiry into the terms; the court regarding what has been done as a consequence of contract or tenure." In Clinan v. Cook, 1 Sch. & Lef. 41, Lord Redesdale states that possession is only construed as part performance, where the party might be treated as a trespasser, unless evi-

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dence were *admissible of the parol agreement. See also 2 Story Eq. § 763. This is perhaps the most satisfactory test. Let it be applied to the circumstances of this case. After December, 1831, or the Spring of 1832, a stranger (the complainant) is in the acknowledged possession of the defendant's land. The possession is continued for several years. He is then treated as a trespasser, and damages are recovered against him at law as a trespasser, because, in the language of Mr. Justice Story, "his parol agreement is deemed a nullity." The complainant at no time after the sale in December, 1831, occupied the position of a tenant who would hold over of course unless he had notice to quit. His possession is only explicable, in the language of Morphett v. Jones, "upon the supposition of an agreement," and is sufficient to authorize an enquiry into the terms of that agreement. It would be a fraud on the complainant to permit him to continue in possession, and then recover damages for the rents and profits. This court would not permit the defendant to shut out investigation under the plea of the statute.

Then, as to the terms of the contract. The defendant denies no substantial part of the alleged agreement, except as to the price to be paid. On this point he says in his answer that he told the complainant that, "if he would pay his proportional part of the bid, or let his proportional part be deducted, and that also of the overplus, he might take the land. That he told the complainant at the time what the surplus was, and that it exceeded, with the costs and all, considerably, the sum of thirty-one, or thirty-six dollars." That afterwards, when the bond was executed to the clerk of the court, he told the complainant, "he might take the land at his bid, if he would pay his portion of the costs and sign the bond as surety; which complainant agreed to do, and signed the bond with him." Again, he says, he "offered to let the complainant have the lands, if he would settle according to the clerk's and sheriff's papers, which complainant refused." From all this, it is not very clearly to be inferred what was the price at which the defendant agreed, or was willing, to let the complainant become the purchaser of the lands. But the answer further admits that, in the trial of the suit by the complainant against the defendant, on the note, in 1833, he, the defendant, "set up as a discount the sum of one hundred and seventy-one dollars, being what he (the defendant) had paid for the land—the amount he regarded as the overplus, which complainant ought to have paid him." It is hardly necessary to say, that

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this is precisely *the same as if the defendant had instituted a suit against the complainant, alleging or declaring that he had sold the land to the complainant at the price or for the sum of one hundred and seventy dollars, and that this sum was due to him on that contract. It appears by the record in the case, that the jury allowed the discount of the defendant, to the amount of thirty-one dollars, thereby affirming the contract of sale as alleged by himself, but also fixing the price, or the amount then due on the purchase, at thirty-one dollars, the sum which the complainant alleges he agreed to pay, and which, being allowed by the verdict and deducted from the note, was thus in fact paid to the defendant.

There are some circumstances which in themselves corroborate the allegations of the bill. The lands of the intestate were sold in several tracts or parcels, and all were purchased by the defendant. No. 1, as has been stated, included two tracts, the complainant's and Hardee's. For these a separate deed was executed by the sheriff to the defendant. The boundaries of the land were filled up by one of the witnesses to the deed, at the instance of the defendant. It is alleged that this deed was put in the possession of Bryan, (since dead) for the purpose of drawing a deed of complainant's land, to be executed by the defendant. Isaac Hardee was the defendant's witness. He had married his sister and held one of the tracts of land from his father-in-law under the same tenure. His tract was bid off at ninety-four dollars. He testified that he had given up his land "to be divided as old Jesse Smith's property. That he had paid thirty dollars and kept his piece of land." That the defendant had not yet made him a title, but he considered him paid by the receipt. That his land and the complainant's were included in No. 1.

Delivering an abstract of the title, or giving instructions to prepare deeds, will certainly not take a case out of the statute. But where the court is at liberty to seek for evidence of an agreement, such circumstances may be of no slight importance. The defendant bought four or five tracts. A separate

deed is taken for two of the tracts, which are in possession of two persons, claiming under an agreement or understanding with the defendant. Both the witnesses to the deed testify their belief that the defendant was present at the execution thereof. Another witness testifies that he was present when Mr. Bryan mentioned to the defendant, or to others in presence of the defendant, that the defendant had delivered this deed to him

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(Bryan) with *instructions to draw a title to the complainant. The defendant never afterwards had the deed; but, nearly four years after the sale of the land, applied to a succeeding sheriff, and, as the Chancellor says, on the false representation that he had never received a title from his predecessor, induced him to execute a deed for the tracts No. 1, including the complainant's and Hardee's land. This latter deed bears date 4th September, 1835, and was the evidence of the defendant's title on which the verdict at law was obtained.

But the testimony of Mr. Munro appears to the court to harmonize with the other facts as detailed by the witnesses, and to establish the existence, as well as the terms, of the agreement, beyond reasonable doubt. He testified that he was the attorney of the complainant in the trial at law on the note. That the discount offered by the defendant was overruled by the presiding Judge, on the ground that he was not entitled to set up the discount, until he had proved that he had conveyed the land to the complainant. After the discount had been overruled, Mr. Bryan brought the parties together in the bar, the Judge suspending the cause, in order to allow time to effect an arrangement. That Mr. Bryan recapitulated, in presence of both parties, that defendant had purchased the land for the heirs. That complainant had become surety on the bond. That sheriff Sessions had executed a title, which was delivered by defendant to him (Bryan) with instructions to draw a title to the complainant. The witness went on to say, that the defendant then agreed, that if complainant would allow the thirty-one dollars, he would execute a title to him. That it (the discount,) was so entered on the verdict. That the defendant then instructed his lawyer, Mr. Cohen, to prepare the title, which he promised to do, that night, at his lodgings. The witness furtner said, that the amount of discount for which the defendant contended was more than thirty-one dollars; his ground was that complainant should pay what the land sold for, and on this subject a good deal of testimony was introduced. Mr. Hardee and some of the heirs all got into the bar together. Jesse Smith (the defendant) agreed to it, and the witness wrote the verdict in his and Mr. Cohen's presence. It seems to the court, that the uninterrupted possession of the premises by the complainant after the sale in December, 1831; his possession of the title deed; the testimony of the defendant's witness, Hardee, and the verdict of the jury, all unite in confirmation

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of the statement of *this witness. They establish an agreement to convey, payment of the purchase money, and a continuance in possession, of which no explanation has been attempted, but in reference to that agreement.

The court is of opinion that the defendant should execute a title to the complainant, according to the terms of their agreement, and that he should be restrained from enforcing his judgment at law; and it is so ordered and decreed.

JOHNSON and JOHNSTON, CC., concurred.

IN THE COURT OF ERRORS.

PRESENT.

Hon. DAVID JOHNSON,
" WILLIAM HARPER,
" JOB JOHNSTON,
" B. F. DUNKIN,
" J. S. RICHARDSON,(a)
" J. B. O'NEALL,
" J. J. EVANS,
" A. P. BUTLER,
" D. L. WARDLAW,
" EDWARD FROST.

1 Rich. Eq. *141

*ALFRED J. LEMACKS & Wife v. DR. HENRY C. GLOVER & Others.

(Charleston. Jan., 1845.)

[*Wills* ⇐610.]

Testator bequeathed 'the use of' personal property to his sister Jane, and after her death, bequeathed 'the same to the heirs of her body, to them and their heirs and assigns forever.' *Held*, (1) that the words 'heirs of the body' were words of purchase; (2) that all who answered the description of heirs of the body at the death of Jane were entitled; and (3) that they took per capita and not per stirpes.

[Ed. Note.—Cited in Lawton v. Hunt, 4 Strob. Eq. 15; Templeton v. Walker, 3 Rich. Eq. 549, 550, 551, 55 Am. Dec. 646; Danner v. Trescot, 5 Rich. Eq. 358; McIntyre v. McIntyre, 16 S. C. 295, 296; Kerngood v. Davis, 21 S. C. 207; Lott v. Thompson, 36 S. C. 45, 15 S. E. 278; Dukes v. Faulk, 37 S. C. 265, 266, 267, 16 S. E. 122, 34 Am. St. Rep. 745; Tindal v. Neal, 59 S. C. 16, 17, 36 S. E. 1004; Rembert v. Vetoe, 89 S. C. 211, 212, 71 S. E. 959; Adams v. Verner, 102 S. C. 11, 86 S. E. 212.

For other cases, see Wills, Cent. Dig. § 1380; Dec. Dig. ⇐610.]

[This case is also cited in Verdier v. Verdier, 12 Rich. Eq. 142, without specific application.]

Before Dunkin, Ch., at Colleton, February, 1843.

The Chancellor. The will of Peter Sinkler bears date in December, 1791, and was proved in February, 1792. So much of it as is important in this case is in the following terms, viz:

"The one moiety of the rest and remainder of my personal estate, I give and bequeath to my wife Mary, in lieu of her right of dower, to her and her heirs and assigns forever. The other moiety of my said personal estate, I give and bequeath to my son James, when he attains the age of twenty-one years or day of marriage, to him and his heirs and assigns forever; in case my son James should die under the age of twenty-one years, or before marriage, I then give

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and bequeath to my God-*son, William Walter, ten negroes, to be taken in families, to him and his heirs and assigns forever; and the rest and residue of my personal estate, I leave the use of to my sister, Jane Glover, and after her death, I give and bequeath the same to the heirs of her body, to them and their heirs and assigns forever."

James Sinkler, the son, died under age and unmarried. After paying the debts, and delivering to William Walter the negroes bequeathed to him, the executors delivered to Mrs. Jane Glover the residue of the negroes, about sixteen in number, being those included in the moiety held by the executors for the son, James Sinkler. Mrs. Jane Glover survived the testator, Peter Sinkler, about fifty-one years, having departed this life on the 5th Dec. 1842. By the residuary clause of her will, she bequeaths as follows, viz: "The balance, if any, that may be collected together, with all my household and kitchen furniture, and all other property, real or personal, that I may have any right, title and interest in, I give to my beloved son, Dr. H. C. Glover, to him, his heirs and assigns forever."

Dr. H. C. Glover, who was appointed executor, proved the will, and qualified thereon, and took possession of the negroes bequeathed to his mother by the will of her brother, Peter Sinkler, which negroes are now forty-two in number. It appears that

(a) During part of the term.

at the death of Peter Sinkler. Mrs. Glover was a married woman, with two children, to wit, Dr. H. C. Glover and his brother, Sinkler, which latter died soon after in infancy. At the death of James Sinkler, the son, Dr. H. C. Glover was the only child of his mother. She afterwards had four other children, to wit, Peter S. Glover, Wilson Glover, Elizabeth, (afterwards Mrs. Jones,) and the complainant, Jane M. Lemacks—of these four children, all, except Mrs. Lamacks, died before their mother. Peter S. left three children, Wilson left two children, and Mrs. Jones left three children, all of which children, with Dr. H. C. Glover, are parties defendants.

The proceedings are altogether amicable between the parties, and were promptly prepared, with the assent and co-operation of the executor, for the purpose of having their several rights ascertained and declared by the appropriate tribunal.

It may be as well first to notice the interest of the son, James Sinkler. It is said this was an absolute estate, defeasible on his death under age and unmarried. This seems a mistake, although it might not vary the result. The bequest is to James, "when he attains the age of twenty-one years, or day of

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marriage." In *Seabrook v. Seabrook, McM. Eq. 210, the rule is stated: A direct bequest to A, "payable at, or [to be paid" at or] when he shall attain twenty-one years of age, is a vested legacy; but if these words are omitted, and the legacies are given at twenty-one, or if, in case of, when, or provided, the legatee attain twenty-one, these expressions annex the time to the substance of the legacy, and make the legatee's right depend upon his being alive at the period fixed. In the same case it was held that, on the death of the legatee previous to the period fixed, the legacy would fall into the residuum and pass to the residuary legatee. See Cambridge v. Rous, 8 Ves. 25.

Then, it is said the limitation to the heirs of the body of Mrs. Glover is too remote, and that she consequently took an absolute estate; whether this proposition, if correct, would benefit the defendants, must depend upon the solution of another inquiry, hereafter to be made. If Mrs. Glover took an absolute estate, the property vested in her husband, who lived for many years afterwards, and his personal representative should be a party. But let us consider the effect of the clause; generally, the words 'heirs of the body' are words of limitation, and not words of purchase, and a bequest of chattels to A. or to A. for life, with such a limitation, vests an absolute estate in the first taker. So it was held by our courts in the early case of Dott v. Cunnington, 1 Bay, 455, [1 Am. Dec. 624,] and the rule itself is not questioned. But these words may be construed words of purchase, where the intention of the testator is clearly ascertained that, by the term 'heirs' the children were to take (individuals were to take per capita in their own rights, and not, as heirs, successively and by descent,) then the word heirs will be considered the same as the word children, 1 Rop. Leg. 86. So if no property in the bequest is given to A. and the money is bequeathed to his 'heirs,' then, if there be nothing in the will shewing the sense in which the testator made use of the word 'heir,' the next of kin of A. are entitled to claim under the description, as the only persons appointed by the law to succeed to personal property. 1b. 85. In Hodgeson v. Bussey, 2 Atk. 89, and in Doe v. Ironmonger, 3 East, 533, the words "heirs of the body" were construed words of purchase, on the plain intent of the testator that they were to constitute a new stock of inheritance, and not to take as heirs by descent and successively. In the case of Dott v. Willson, 1 Bay, 457, the bequest was to "Sarah Baker during her life, (without the control of her husband,)

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and at her death, to the *heirs of her body, and their heirs and assigns forever." It was held by the court that, although by themselves the words "heirs of the body" would create a perpetuity, and the limitation be void, yet the generality of the expression was so qualified by the superadded words "their heirs and assigns," as to shew the intent of the testator, and the children were declared to take as purchasers. The decision of the court was made on the qualifying terms stated, although they thought that if any doubt existed on that clause, it was removed by the language used in the proviso.

It appears to the court, that these rules of construction must control the bequest contained in the will of Peter Sinkler, the use of the residue of his personalty is given to his sister, Jane Glover, "and after her death, I give and bequeath the same to the heirs of her body, to them and their heirs and assigns forever." There is no direct bequest of property to his sister—"the rest and residue of my personal estate I leave the use of" to my sister, &c. Again, when an estate in personalty is given "to A. and her children forever," these words are supposed only to express the amplitude of the estate, and the first taker holds absolutely; Shearman v. Angel, 1 Bail. Eq. 351, [23 Am. Dec. 166.] But the bequest is not to "Jane Glover and the heirs of her body," but a provision is made that his sister shall have the use of the property, and then the will declares, after her death, I give and bequeath the same to the heirs of her body, to them and their heirs and assigns forever. The heirs were not to take through Jane, to whom he had given nothing but the usufruct, but they were to take as a class of persons who, after her death, might bring themselves within the description, and to these persons he bequeaths the absolute estate, and with apt words to

carry his intention into effect. "Unquestionably," says the master of the Rolls, in Holloway v. Holloway, 5 Ves. 401, "it is competent for a testator, if he thinks fit, to limit any interest to such persons as shall, at a particular time named by him, sustain a particular character."

This construction is confirmed by reference to other clauses of the same will, in which the same words are manifestly used as words of purchase, and could be intended in no other sense. The plantation called Bluford was devised to his son James. It is afterwards provided, in case of the death of his son, as above, as follows: I give and bequeath my plantation called Bluford, &c. "to the heirs of the body of my sister Elizabeth DuBose, to them and their heirs and assigns forever."

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No previous *estate whatever had been given to his sister, Elizabeth Dubose, and the heirs of her body could only take as answering the description, as purchasers, and not by descent. And so in regard to the plantation called Lifeland. His son dying under age and unmarried, the use of the plantation is devised to the testator's wife during her life, and after her death, "to the heirs of the body of my sister Jane Glover, to them and their heirs and assigns forever." His sister had no interest in Lifeland, and the term "heirs of the body," could only have been intended as descriptio personarum.

The court is of opinion that the estate in Mrs. Glover was not absolute, but that this is a good bequest to a class of persons who, after her death, should answer the description of "heirs of the body." It is not confined (as was suggested in argument) to her children living at the death of the testator, or those living at the death of the son, James Sinkler, but to those who might be heirs when the bequest was to take effect, to wit, after the death of Mrs. Glover. "In all cases of legacies payable to a class of persons at a future period, the constant rule has been, that all persons coming in esse, and answering the description at the period of distribution, shall take; and the same rule must be applied to persons excluded." Matthews v. Paul, 3 Swanst. 339.

It remains, then, to enquire which of the parties answer this description. On the part of the complainant, Mrs. Lemacks, and of her brother Dr. H. C. Glover, it is contended that when the words "heirs of the body" are construed words of purchase, they mean children; and that they being the only children of Mrs. Glover at the time of her death, are entitled to the whole. There are certainly many cases in the books in which the words "heirs" has been construed to mean "children," but in all these cases it was clearly intended only to declare that the parties were to take as purchasers and not as heirs in the technical sense of the term. On the other hand, "heirs" is a word sometimes construed to mean "next of kin," as in the quotation from 1 Rop. Leg. 85. But the point is not open for discussion. In Campbell v. Wiggins, Rice Eq. 10, the legislature had made a grant to "the heirs at law" of Blake Baker Wiggins deceased, and it was held that the grand-children, as well as the children, were entitled. In this case, the description is restricted to "heirs of the body." This includes all the lineal descendants of Mrs. Jane Glover, who were also, at the time of her death,

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ner "heirs" ac*cording to the laws of the State; and, it may be added, it includes only such lineal descendants as are also heirs. In the language of Matthews v. Paul, the rule must be the same both as to persons excluded, as well as those included. They must answer the entire description at the period fixed.

In itself, this rule seems just enough, but when applied to the circumstances of this case, and considered in connexion with the proportion in which the distribution is to be made, the court is constrained to doubt whether the intention of the testator is not sacrificed (perhaps necessarily sacrificed,) in deference to an established rule. Dr. Glover is the only child of Mrs. Glover who could possibly have been known to the testator, and might have been a particular object of his bounty. He has now a family of several children. His brothers and a sister have been since born, and have died, leaving children who fall directly within the description of "heirs of the body" on the principle stated, while the children of Dr. Glover, though in the same degree, not being heirs, are excluded. But in Campbell v. Wiggins, it was further held that when heirs take as purchasers, the distribution must be per capita and not per stirpes, and that children and grand-children share equally. The consequence is, that the son and daughter of Mrs. Jane Glover take, respectively, the same share with each of her eight grand-children. The court can only add, in the language of Lord Eldon in Lady Lincoln v. Pelham, 10 Ves. 175, that "it is better to adhere to a settled construction, than to come to a decision having a tendency to shake that which forms a rule of construction, and which may, in practice, have been acted upon in many cases."

Let a writ of partition issue to divide the negroes set forth in the pleadings, upon the principles of this decree. Each party to pay their own costs.

From this decree Dr. Henry C. Glover appealed, on the following grounds.

1. Because his Honor the Chancellor erred in deciding that Mrs. Jane Glover took only an estate for life in the property bequeathed to her by the will of Peter Sinkler; and the appellant submits that she took an absolute estate therein.

2. That even admitting that his Honor was

correct in his decision on the above point, it is submitted that the property vested, on Mrs. Jane Glover's death, absolutely in Dr. H. C. Glover, the only child of Mrs. Jane Glover living at the time of the death of Peter Sinkler and James Sinkler; or at fur-

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thest, in *such children of Mrs. Jane Glover alone as were living at her death, to the total exclusion of all her grand-children.

3. That even if his Honor was correct in deciding that some of the grand-children of Mrs. Jane Glover were entitled to take, that he erred in excluding the other grand-children of Mrs. Jane Glover, to wit. the children of this appellant and of Mrs. Jane Lamacks, from a participation in the division, inasmuch as all her grand-children were equally the heirs of her body.

4. That even if his Honor was correct in deciding that the children of Mrs. Elizabeth Jones, Wilson Glover, and Peter S. Glover, were entitled to take under the will of Peter Sinkler, as heirs of the body of Mrs. Jane Glover, it is submitted that the distribution should be per stirpes, and not per capita, as decided by his Honor.

5. Because the decree is, in other respects, contrary to law.

The case came before the Court of Appeals at Charleston in January, 1844, at which Term the following proceedings took place.

On 22nd January, 1844, the court pronounced the following opinion, viz:

The court concur in the decree of the Circuit Court. Appeal dismissed.

DAVID JOHNSON,
J. JOHNSTON,
BENJ. F. DUNKIN.

HARPER, Ch., dissenting. It seems hardly to be questioned, that the words "to the heirs of her body, to them, and their heirs and assigns, forever" are to be regarded as words of purchase. In addition to the cases referred to by the Chancellor, the cases of Doe v. Laming, 2 Burr. 1100, and Loddington v. Kime, 1 Ld. Raym. 203, are authority that after a devise to "heirs of the body," or "issue," the superadded words "and to his or their heirs," have the effect of converting the former into words of purchase. In Kinch v. Ward, 2 Sim. and Stu. 409, after such words, the estate was limited over in case the first taker should die without issue, and on this it was distinguished from Hodgeson v. Bussey, when the words were without such issue.

"Heirs of the body" are sometimes regarded both as words of purchase and of limitation—not only to denote the individuals who are to take in the first instance, but the quality of the estate and the entire succession of the heirs of the body. So it is in England, when there is a devise to the heirs of the

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body of a *deceased person. The words here signify not only the persons who are to take, but that they are to take an estate tail—they include the indefinite succession of heirs of the body. But in the present case, it is plain that the words must be regarded as words of purchase only, and not words of limitation. The words of limitation are added, "their heirs and assigns forever," denoting that the former words signify merely the persons who are to take in the first instance, and do not include any succession. The persons who are to take, are to take in fee, or absolutely. So it was in the cases of Doe v. Laming, and Loddington v. Kime, to which I have referred.

The words "heirs of the body," then, being used merely to signify individual persons, the enquiry is, who are the persons meant by them? It was argued that they have been taken sometimes to mean children, sometimes issue, or next of kin, but have never had the signification attributed to them by the Chancellor's decree. A difficulty might have been apprehended from the circumstance, that in England the heir at law is a different person from those who are to take personal estate under their statute of distribution. But I do not find such difficulty upon examining the cases. The words "heirs of the body," then, plainly import the lineal descendants upon whom the law would have cast the descent of lands, if the ancestor had died intestate—and with us, these are identical with the persons who would take personal estate under the statute of distributions. When, in the English cases, they are made to signify something else, e. g. "children," it is because there are other words which qualify the obvious meaning. In Hodgeson v. Bussey, the devise was of a term, a chattel, to Grace Bussey, and the heirs of her body, their executors, administrators and assigns, and for want of such issue, &c. It was said that the eldest son of Grace Bussey must have taken under this devise, if she had had issue. Doe v. Laming was a devise of gavel kind land to Anne Cornish, and the heirs of her body, as well females as males, and to their heirs and assigns forever, in which "heirs of the body" was held to mean children. But this was upon the additional words, "as well females as males," and but for these, it is plain, from Lord Mansfield's reasoning, (vid. p. 1110,) that only the sons, the heirs at law in gavel kind, would have taken. In Doe v. Ironmonger, the words heirs of the body were said to mean children, upon the superadded words "without any respect to seniority of age, or priority of

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birth." That was a devise of a *term to S. for life, and from and after her death, to the heirs of her body, their heirs and assigns, forever. S. had issue, one son and two daughters. The son died in the lifetime of his mother, leaving a son, and it was contended that he alone was entitled, as heir

of the body of S. The question principally debated, was, whether the words created a joint tenancy, or tenancy in common. It was held that it was a joint tenancy, and the son having died before the severance of the joint tenancy, his interest survived to his sisters—otherwise it is plain, though the word children is used, that the grandson would have been entitled in right of his father. In the present case there are no qualifying words, and the terms "heirs of the body," must mean, as the Chancellor has taken them to do, those lineal descendants of Mrs. Jane Glover who would have taken her land by descent if she had died intestate.

But I have more doubt with respect to the manner in which they are held to take, to wit, per capita. Though I concurred in the case of Campbell v. Wiggins, it was with doubt, and reflection has satisfied me that the construction in that case is calculated to defeat the intention, as it is admitted to do, to a great extent, in the case before us. I suppose it to be well settled by the English cases, that if there be a devise to a class, or classes of persons, as to A. and the children of B., to the children of A. and the children of B., and so to children, and grand children, they take per capita; Blackler v. Webb, 2 P. Wms. 383; Phillips v. Garth, 3 Bro. C. C. 64; Lady Lincoln v. Pelham, 10 Ves. 175. In the first of these cases, Lord King, who decided it, expressed great doubt; in the second, Justice Buller disapproved of Lord King's decision, but followed it, on the principle of stare decisis.

In Lady Lincoln v. Pelham, Lord Eldon says, "I am not sure that my decision does not defeat the intention." But with us, it can hardly be said to be doubtful whether we do not defeat the intention. I would not depart from the English cases when they apply, but I think that our statute of descents and distributions, making the distributees of personal estate identical with the heirs of land, makes a new case, and admits and requires a different construction. In England, the heir at law is, in general, a single individual, and the plural "heirs of the body," serves to denote the succession. When these words, therefore, are held to denote a class, or classes of persons, it may be said that there is nothing on which to found the no-

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tion of represen*tation, or that the parties are to take otherwise than per capita. With us, certainly, it is competent for a testator to give to his own, or mother's lineal descendants, in such shares and proportions as they would have taken land by descent, in case of intestacy. And when he describes them as "heirs of the body," nothing can more plainly express this intention.

They are to take as heirs in every respect that they can so take, only it is by purchase instead of descent. In England, when taken to mean a class of persons, these cannot, in any manner or respect, take as heirs, or heirs of the body. Whether construed children, issue, or descendants, next of kin, etc. they must always be different persons from the heirs. It is said in cases of coparcenary, or gavel kind, that all the individuals who take, make up but one heir. But with us, the heir is made up of component parts, in different proportions. In the present case I think he consists of two individuals, each entitled to one-fifth of the estate, of six persons, each entitled to one-third of one-fifth, or one-fifteenth, and of two persons, each entitled to one-tenth. So they would have taken any land of which their mother had died intestate. And this agrees with what the law supposes to be the rule of affection, by which children are preferred to grand-children, and nearer kindred to the more remote.

A few days after, Chancellor JOHNSON delivered the following opinion.

The opinion of the Court of Appeals, in the case of Campbell v. Wiggins, Rice's Eq. Rep. 10, overruled my decision on the circuit, that the estate should be divided amongst the heirs of Blake Baker Wiggins, in the proportions prescribed by the Act providing for the distribution of intestates's estates, but neither the decision in that case, nor the argument in this, has operated to change my views of the question.

In the consultation of the court, after the argument of this cause, Chancellor HARPER expressed, in strong terms, his disapprobation of the decision in Campbell v. Wiggins, but in the end, I supposed that all my Brothers had come to the conclusion, that it was proper to adhere to it for the present, and in that belief I wrote and signed the concurrence in the Circuit Court decree; and in that, it seems, I was mistaken. It happened that I was not present when it was read, nor was I informed that my Brother HARPER had prepared a dissenting opinion. If I had, I should not only not have concurred in the decree of the Circuit Court, but should have concurred in the dissenting opin-

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ion; and *the effect would have been, to refer the cause to the Court of Errors, on account of a division of the court.

Now, I cannot consent that a mere mistake of mine should work a prejudice to the defendants, or put them in a worse condition than they otherwise would have been; and that must be the effect, as the only remedy will be a petition for a re-hearing, which will involve expenses to some of the parties, and on which the division of the court, on that question, might forever conclude the defendants.

During the sitting of the court, its judgments and proceedings are always under its control, and in the application of the power we have an example emanating from the Court of Appeals, then consisting of all the

law Judges and the Chancellors, in which, after an opinion had been delivered on the authority of a majority of the court after consultation, a majority were convinced by, and concurred in, a dissenting opinion delivered by my Brother JOHNSTON, and that opinion became the judgment of the court. That occurred in the case of Picket v. Picket, reported in 2 Hill Ch. 470, and although these facts do not appear in the report, they are well known to all the Judges and Chancellors. Under these circumstances, I feel it due to myself, as well as the parties, to express my dissent to the Circuit Court decree, and my concurrence in the dissenting opinion of my Brother HARPER, and have given this explanation, that it may be put on the file of the proceedings in the cause.

On 3d February, 1844, the court made the following order.

The order of the court of the 22d January last, confirming the decree of the Circuit Court in this cause, and dismissing the appeal, having been made by mistake. It is ordered that the case be reinstated on the docket for further consideration.

Subsequently an order was made, that the case be referred to this court, to consider the question on which the Court of Appeals was was equally divided; and now the cause came on to be heard.

H. A. Desaussure, for Dr. H. C. Glover. The general rule is, that 'heirs of the body,' are words of limitation and not of purchase. If, therefore, the gift had been to Mrs. Glover and the heirs of her body, without the superadded words, her estate would have been absolute. But because the corpus of the property was not given to Mrs. Glover, but merely the use, and because of the superadded words, "to them, and their heirs and assigns," the Chancellor decided, and his deci-

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sion has been con*firmed by the Equity Court of Appeals, that Mrs. Glover took only a life estate in the property, and after her death it vested in such of the heirs of her body as would have been entitled under the statute of distributions to any lands of which she may have died the absolute owner; and the question now for this court is, in what proportions are the heirs of the body entitled to take? Do they take per capita or per stirpes? Are the grand-children to take equally with the children, or do they take only their parents's shares? Is the estate to be divided into five, or into ten, parts?

We contend that the distribution must be per stirpes. If the words 'heirs of the body,' mean, as the court has decided, such heirs as would be entitled to lands under the statute, and not descendants or issue, because those words would include Dr. Glover's children, does it not follow that the heirs must take in the proportions prescribed by the statute? Will the court resort to the statute to ascertain the persons who are entitled to take, and not follow the provisions of the statute in dividing the estate?

Heirs at law quoad the personalty mean next of kin, and when the next of kin take, the distribution must be according to the statute; 5 Ves. 402; 4 Ib. 649; 1 Jac. and W. 388; 1 Rop. Leg. 128; 6 Eng. Cond. Ch. R. 480; 7 Ib. 270; 8 Ib. 227. In this last case Phillips v. Garth was overruled; 2 Wms. Ex'ors. 726, 731.

R. De Treville, contra, contended that the distribution must be per capita, in conformity with the decision in Campbell v. Wiggins.

Before Mrs. Glover's death, the limitation over, quoad the persons, was contingent. 2 McC. Ch. 440; 1 H. Ch. 322. Being contingent, the grand-children could not take under their parents, who transmitted nothing. They take directly under the will; 10 Ves. 176. The statute therefore cannot apply, because that relates only to cases of intestacy; 2 P. Wms. 384; 1 Ib. 343; 4 Ves. 768; 3 Ib. 257; 7 Ib. 127; 1 Leigh Rep. 74.

The cases in which the gift was to the next of kin do not apply. No such distinction can be made here as the term 'next' or 'nearest,' implies. The gift is not to the next heirs or the nearest heirs, but simply to the heirs of the body, and grand-children are as much heirs of the body as children. He cited 4 Cond. Eng. Ch. R. 273; 1 H. Ch. 152; 2 Ib. 42.

He submitted that the case of Campbell

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v. Wiggins was *conclusive of the question. That case settled a rule of property which it was dangerous to interfere with. Estates had been divided in conformity with it, and purchases made on its faith.

Bailey, same side, urged the policy of adhering to the maxim stare decisis, especially where the decision laid down a rule of property.

The principle that the distribution must be per capita, has been applied in all cases where persons take as a class, and no distinction has ever been made between cases where technical words, as heirs, are used, and when the words are not technical, as issue, or children. In all such cases the probability is that the testator meant the same thing. Where the word next is used a different rule may well prevail, because the term next imports a difference. Yet in Phillips v. Garth it was held that the division must be equal. Does this case constitute an exception to the general rule, that the division must be per capita? The court has decided—it is the foundation of the Circuit Court decree—that 'heirs' was not, in this will, used in its technical sense, but simply as a descriptio personarum; 1 P. Wms. 666; 1 T. R. 197. It is conceded by the decree, that if the intention was to give to the heirs, as heirs, then the limitation would have failed under the rule in Shelly's case, (1 Coke,

104.) which has been applied to personalty; 1 Prest. Est. 273. Yet it is contended that they must take in the same proportions as if they had inherited the estate. It is true the court must resort to the statute to ascertain what persons are heirs, but when that is ascertained, the meaning of the word 'heirs,' is satisfied. If the court goes beyond this, it destroys the very foundation on which the decree rests.

Petigru, in reply. The true rule is, what did the testator mean? That his intention was not according to the decree, no rational being could doubt. If the intention is abandoned and a technical meaning given to the words 'heirs of the body,' then Mrs. Glover took an absolute estate. It is because of the superadded words, which, ever since Archer's case, (1 Coke, 66,) have been held sufficient, and in deference to the intention of the testator, that the technical sense of the words is not adopted. What, then, was the meaning of the testator? If he meant issue or kin, then Dr. Glover's children are entitled. But it has been decided that they do not take, because they are not heirs in

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the technical *sense of the word; and yet, in common parlance, how often are children, during the father's life, called heirs. The issue who are not heirs in a technical sense do not take, and yet, it is said that those who are heirs in a technical sense cannot take in the proportions of heirs. There is a glaring defect in this argument. It is inconsistent with itself. It goes to the statute, for the meaning of the testator quoad the persons, and yet repudiates the statute quoad the distribution of the property.

The construction contended for would never enter into the imagination of any man not acquainted with the rules of law. He might suppose that 'heirs,' meant descendants, or he might suppose that it meant such persons as the statute points out; but he never could adopt such a mongrel construction as is here contended for, made up partly of the law and partly of the intention. What the testator meant is, that the issue of Mrs. Glover should take, in the same way as if she had died intestate, the property being vested absolutely in her; and why should not that intention prevail?

The case of Campbell v. Wiggins, he said, was not absolutely in point. The presumption that the party was inops concilii, did not there exist, and yet it would be in vain to deny that a contrary decision will shake, if not overrule, that case.

We are of opinion that the defendant's motion to reverse the decree of the Circuit Court ought to prevail, and concur in the opinion expressed by Chancellor HARPER, on the hearing in the Court of Appeals.

Signed by JOHNSON and HARPER, CC., and O'NEALL, EVANS and WARDLAW, JJ.

We are of opinion, on the question submitted to the Court of Errors, that the appeal ought to be dismissed.

Signed by JOHNSTON and DUNKIN, CC., and RICHARDSON, BUTLER and FROST, JJ.

PER CURIAM. The Court of Errors having been equally divided on the grounds of this appeal, the appellant can take nothing by his appeal, and it is ordered and decreed that it be dismissed.

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1 Rich. Eq. *155

*THOMAS O. LOWNDES, and EDWARD R. LOWNDES, Executors of James Lowndes, v. HENRY L. PINCKNEY, JAMES JERVEY, THOMAS WATIES, AND ORLANDO S. REES, Executors of Hon. Thomas Waties, and Others, Devisees of the Said Hon. Thomas Waties.

THE SAME v. THOMAS O. ELLIOTT, Administrator of Benjamin Elliott, Deceased.

(Charleston, Jan., 1845.)

[*Equity* ⇐396.]

Whenever a master or commissioner takes charge of funds or estates, under an order or decree of the court, he shall be held to act officially, and the sureties to his official bond will be liable for his acts, unless he has, by the order or decree, been expressly appointed a receiver, and has given bond and security as required by the Act of 1821.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 860; Dec. Dig. ⇐396.]

[*Officers* ⇐131.]

Where a commissioner took a bond payable to himself, for property sold by him under the order of the court, and retained the bond more than twenty days after the date of his successor's commission, and received payments thereon after he went out of office, *Held*, that the failure to deliver the bond to his successor was a breach of the condition of his official bond, and that his sureties were liable for the amount of such payments.

[Ed. Note.—Cited in State v. Bird, 2 Rich. 100; Black v. Ramey, 4 Strob. 79, 83; Whitmire v. Langston, 11 S. C. 390.

For other cases, see Officers, Cent. Dig. § 229; Dec. Dig. ⇐131.]

[*Equity* ⇐395, 398.]

A master or commissioner is not authorized to make sales of property after his term of office expires, and for the proceeds of such sales his sureties are not liable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 854, 862; Dec. Dig. ⇐395, 398.]

[*Principal and Surety* ⇐194.]

Where one surety on an official bond was sued at law, and judgment recovered against him for a demand for which, as surety, he was not liable, *Held*, that he could not call on his co-sureties for contribution.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 605-623; Dec. Dig. ⇐194.]

[*Principal and Surety* ⇐200.]

Where a co-surety is sued for contribution, he may resist the demand, on the same principles and in the same way that he could have resisted it if the suit had been by the creditor.

[Ed. Note.—Cited in Alsobrook v. Alsobrook, 14 S. C. 176.

For other cases, see Principal and Surety, Cent. Dig. § 643; Dec. Dig ⇐200.]

[*Equity* ⇐398.]

[A surety upon the official bond of a commissioner is liable for interest upon money which the commissioner fails to pay over.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 863; Dec. Dig. ⇐398.]

[*Executors and Administrators* ⇐537.]

[An acknowledgment by a court commissioner that there were funds in his hands belonging to an estate after the expiration of his term of office is prima facie evidence against his sureties.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2567; Dec. Dig. ⇐537.]

[*Principal and Surety* ⇐197.]

[A judgment against a surety, as such, in a suit to which his co-surety was not party, is not conclusive upon such co-surety in a suit for contribution.]

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 632; Dec. Dig. ⇐197.]

Before Johnson, Ch., at Charleston, January, 1842.

The Chancellor. In December, 1821, the late Benjamin Elliott was elected Commissioner in Equity for Charleston district, and on the 28th day of the same month entered into bond to the State in the penalty of $30,000, with a condition that it should become void if the said Benjamin Elliott, his heirs, executors and administrators, should well and truly account for and pay over, (whenever lawfully required,) all such sums of money, evidences of debt, and other securities, as should come into his hands by virtue of his said office; and should well and faithfully discharge and perform the duties of his said office during the whole time that he might continue therein. Defendants, Henry L. Pinckney and James Jervey, were sure-

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ties to this bond, *as were also the late James Lowndes, the complainants's testator, and the late Hon. Thomas Waties. Immediately thereupon, the said Benjamin Elliott entered on the duties of the said office, and continued therein for the space of four years, but in the end failed to account for divers sums of money which came into his hands in virtue of his said office, whereby the condition of the bond was broken.

Benjamin Elliott died in 1836, and administration of his estate has recently been granted to the defendant, Thomas O. Elliott.

In 1834 a suit was commenced on the said bond against James Lowndes, complainants's testator, for a breach of the condition by the said Benjamin Elliott, in not paying over to Mrs. Mitchell certain moneys which he had received to her use; and at May term, 1837, judgment was rendered against him for debt, interest and costs, amounting to $1861.13, which sum was paid by complainants's testator.

Benjamin Elliott is supposed to have died insolvent, and the bill prays that an account may be taken to ascertain the extent of the liability of the sureties for breaches of the condition of the bond, and that if any should prove insolvent, those who are solvent may contribute equally.

The defendant, Thomas O. Elliott, exhibits with his answer an account of the estate of his intestate which came into his hands to be administered, and of his liabilities; from which it appears that there were judgments against him in his life time for $9253.26, and of course entitled to precedence of this demand, and that the assets amounted only to about $1400.

Defendant, James Jervey, insists in his answer that the complainants are bound to shew the insolvency of Benjamin Elliott, before they can call on their testator's co-sureties for contribution; and he states that in 1820 the said Benjamin Elliott conveyed to the complainants's testator, James Lowndes, real estate of considerable value, in trust for the use of the wife of the said Benjamin Elliott, for life, remainder to the use of the children of the marriage, and that the conveyance was purely voluntary; and insists that this estate ought to be exhausted before complainants could call on the co-sureties for contribution. No evidence was offered on this part of the defence, and no notice was taken of it in the argument. I shall not, therefore, again recur to it.

This defendant joins in the prayer of the

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bill, that an account *should be taken to ascertain the extent of the liability of the sureties, and admits his liability to contribute rateably.

Defendant Henry L. Pinckney, in his answer insists, that in the event of the sureties being held liable, he ought to be credited with certain sums of money which he had been compelled to pay as one of the sureties.

The Hon. Thomas Waties died in 1828, and Thomas Waties, one of his executors, died before the filing of the bill; and Orlando S. Rees, the surviving executor, states that himself and his co-executor had fully administered the estate of their testator, and made distribution of both his real and personal estate, according to the directions of his will, in 1833, and that he had no notice of the liability of his testator, or of this demand, until 1837; and he insists on these circumstances as a bar to his liability.

The devisees of the Hon. Thomas Waties, who were subsequently made parties, insist that the statute of limitations is a bar to their liability, as they had been more than

four years in possession of their legacies before they were made parties to this bill.

At June term, 1839, an order was obtained directing Gray, one of the masters of the court, to take an account of the debts and assets of Benjamin Elliott, the late Commissioner, and give notice to his creditors to prove their demands. To enquire particularly into the amount of debts due and owing by him on his official bond as Commissioner of the court. To enquire also, and report, what sums had been paid by his sureties to the said bond respectively, and in what manner they should be charged, in order to an equal distribution towards the satisfaction of the bond.

In pursuance of this order, the master caused notice to be published calling on the creditors of Benjamin Elliott to come in and establish their demands; and he reports that official debts to the amount of $15333.93, for which the sureties to his bond were liable, were established, and an account of his assets and other private debts, from which it appears that the assets amount to about $1840, and his private debts, principally on judgments, to $3964.97–100.

No exception has been taken to the master's report on assets or the private debts of Benjamin Elliott; but the sum of his official debts is made up of several separate demands, most of which have given rise to much-contested questions brought up in the form of exceptions to the report. These I shall proceed to consider in the order they

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are set down in the report, refer*ring as well to the evidence as to the report for the facts out of which they arise, beginning with Elliott's account as Commissioner, with—

1st. The estate of the late Rev. Doctor Donald M'Leod.

It seems that many years ago Dr. M'Leod intermarried with Elizabeth Bailey Seabrook, the widow of John Seabrook. Previous to the marriage, a settlement was entered into, by which a considerable estate, consisting of a plantation and negroes, was limited to their joint use during their joint lives, then to the survivor for life, remainder to the issue of the marriage in fee, and in default of issue over, &c. and William Seabrook and Joseph James Murray were nominated trustees of the settlement, but it seems that they never accepted or acted upon the trust. In 18— Dr. M'Leod sold the plantation to Joseph James Murray, and his wife joined in the conveyance. Mrs. M'Leod died in 18— leaving a daughter, Sarah, the only issue of the marriage, now the wife of Dr. J. B. Whitridge. Dr. M'Leod died in 1820, having previously made his will, by which, after many pecuniary legacies, he gives all the residue to his daughter Sarah, and nominates her executrix, and C. G. Capers and another, executors. The will was proved by Capers, who qualified on 24th February, 1821, and Sarah, the daughter, qualified on the 29th of the same month, she being then a minor. Some time after, she intermarried with Dr. Whitridge, and thereupon it seems they filed two separate bills in this court to ascertain their rights under the marriage settlement and the will of Dr. M'Leod; but all the original records have been lost, and all that can now be ascertained of their contents and object are found in the journals, orders and decrees of the court. From these it may be collected with reasonable certainty, that one of the bills was against William Seabrook and Joseph James Murray, the trustees of the marriage settlement, and that the object was to avoid the conveyance from Dr. M'Leod and wife to Murray for the plantation mentioned in the marriage settlement; and the other against C. G. Capers as executor, and others, persons entitled to the specific pecuniary legacies under the will of Dr. M'Leod—the object of which seems to have been to enable Mrs. Whitridge to elect to take under the marriage settlement instead of the will of Dr. M'Leod. It does not appear at what time these bills were filed, but the answer of the defendants in the last case appears from the file book to have been filed on the 1st November, 1822; the bill must therefore have been filed before that time. At

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March *term, 1823, an order was made directing the Commissioner to ascertain and report the amount of debts due by Dr. M'Leod, and whether a sale of his estate would be necessary to meet them. The Commissioner made his report at the same term, recommending the sale, and thereupon an order was made directing the Commissioner to sell the whole estate, real and personal. The Commissioner, Elliott, in pursuance of this order, sold the whole estate, in April, 1823 and Dr. Whitridge became a purchaser, to the amount of $17,400, for which he gave his bond to the Commissioner: and at November term, 1823, an order was made that all the outstanding debts due the estate of Dr. M'Leod, be placed in the hands of the Commissioner for collection, by suit or otherwise. Various other orders are found in the journal, which have no other bearing on the case than to shew who were the parties to the bill, from which I have deduced the conclusion that they were the persons I have before supposed.

At January term, 1825, Chancellor DeSaussure pronounced a decree embracing both the causes. They are entitled on the decree "J. B. Whitridge et ux. v. the Representatives of Joseph James Murray and William Seabrook," and "The same v. Legatees of Dr. M'Leod." After stating the circumstances, the decree goes on to declare that Dr. Whitridge and wife were entitled, and had elected, to take under the marriage settlement, instead of Dr. M'Leod's will, and that she was no longer to be considered as executrix,

in consequence of her having qualified when a minor. Amongst other things, the Commissioner is authorized "to collect the debts due the estate of Dr. M'Leod," using, if need be therefor, the names of the complainants and of the defendant Gabriel C. Capers, who also qualified as executor, and to marshal the assets and pay the debts and legacies as far as the assets would extend.

The commissioner of the court was, by law, entitled to hold his office for the term of four years, and the master reports that Elliott executed his official bond, and entered on the duties of his office on the 8th December, 1821, and it expired, of course, on the 8th of December, 1825. He also reports, that Elliott received large sums on account of Dr. Whitridge's bond, given for the purchase of M'Leod's estate, a part before, and a large sum after, the term of his office expired, and that a considerable balance in his hands is not accounted for. Out of these circumstances certain questions arise, which I shall have

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occasion to *consider in connexion with other claims against the sureties to Elliott's official bond.

2nd. The next in order is the account of Elliott with the Taylor estate.

By the marriage settlement of William M. Taylor and Martha, his wife, an estate, consisting of a plantation called Folly Island, a lot in the city of Charleston, a gang of negroes, and other personal property, were conveyed to trustees, in trust for the use of the said Martha, for life, remainder in fee to the issue of the marriage. After the death both of William M. Taylor and his wife, the children, in a proceeding entitled ex parte Mary S. Darby et al, petitioned the court for a writ of partition to divide the estate amongst them according to the provisions of the deed of settlement.

A writ of partition accordingly issued, and the commissioners therein named returned that they had made partition of a few articles, principally household furniture of inconsiderable value, between the parties, and recommended the sale of all the residue, including Folly Island, the lot in Charleston, and the negroes, and some other articles of personalty. On the 19th March, 1822, an order was made confirming the report, and it was also ordered, "that the property recommended to be sold, shall be sold, on the following terms:—one-third cash, the balance, secured by mortgages of the property, and bonds with personal security, payable, by annual instalments, in one, two and three years."

In pursuance of this order, Elliott, the commissioner, sold all the negroes and other chattels, on the 6th and 11th June, 1822; and the lot in Charleston, on the 28th April, 1825—of the proceeds of which, he received one-third in cash, and took bonds for the remainder, according to the direction of the order for the sale. Of these, he received a part while he remained in office, and the remainder afterwards. He sold Folly Island on the 8th November, 1827, nearly two years after he had gone out of office. The proceeds of all the sales, after deducting the charges, amounted to $15,694.89, to be distributed amongst the parties interested, being four in number, Martha P., Elizabeth R., William H. Taylor, and Mary S. Darby.

The proceeds of all the sales were received by Elliott, and payments were, from time to time, made by him to the parties, which, with the interest computed to the 21st January,

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1832, *left a balance due to Martha P. Taylor, of $464.51; to Elizabeth R. Taylor, $491.57; to Mary S. Darby, $282.71; and to William H. Taylor, $183.71.

The commissioner also reports that Elliott was indebted to Martha P. Taylor, $905, and to Elizabeth R. Taylor, $585, "for other moneys arising out of the sales of the same estate," and that he gave to them, respectively, bonds for the payment thereof, with the defendant, Henry L. Pinckney, as surety. These bonds were sued, and judgment obtained on them. The first was paid by Mrs. Ramsay, for the relief of Pinckney, and she took an assignment of it, and the other was paid by Pinckney; and these, the commissioner submits, cannot be charged against the sureties on Elliott's official bond, as the new bonds were an extinguishment of Elliott's official liability.

3d. Pending the proceedings in the matter of ex parte Mary S. Darby, Elizabeth Mitchell instituted a proceeding in the court against William H. Taylor et al, claiming the right of dower in Folly Island, and praying a writ for the admeasurement thereof, and on the return of the summons, the court decreed that she had released her right of dower, by agreeing to accept in lieu thereof an annuity for life of twenty-one pounds, chargeable on the said lands, and it was ordered, "that the sum of $1,400, part of the proceeds of Folly Island, be invested by the commissioner in public stocks, the annual interest of which is to be received by Elizabeth Mitchell, in lieu of her annuity." This order was made on the 19th of March, 1822. Folly Island, as before remarked, was not sold until November, 1827, and then Elliott retained the money in his own hands, instead of investing it in pursuance of the order. It was for this defalcation that the suit was instituted by Elizabeth Mitchell, and the recovery had against the complainant's testator, and to which, in their bill, they pray the co-sureties of their testator may contribute.

4th. The fourth, and only remaining claim, offered in evidence against the sureties of Elliott, and allowed by the report of the master, is in behalf of Packard, administrator

of Robert Roulain, amounting to $314.50, including interest up to 1842.

It does not very clearly appear, from the documents accompanying the report, how this demand originated. I collect, however, from an order of the court of the 1st March, 1823, that a suit had been brought by Mary S. Darby, administratrix of R. A. Darby, against Morton A. Waring and others, the object of which appears to have been to mar-

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shal the assets of the estate, *and pay the debts, and that Roulain, Packard's intestate, was entitled to recover out of it the sum above stated, and on the day last mentioned, the court, after reciting that the orders before made in the cause could not be carried into effect beneficially to the parties, orders, "that the Commissioner in Equity," (Elliott) "do receive all the papers and money of the estate into his hands, he giving the administratrix a receipt for the same, and that he be directed to place the money at interest, and when the claims in dispute are disposed of he make division among the creditors."

On the 16th May, 1823, Elliott acknowledges, in writing, to have received from Mary S. Darby, the administratrix, in pursuance of the foregoing order, $3,420.38, in cash and bonds, and other evidences of debts due the estate to a considerable amount; and by a certificate dated the 15th April, 1836, he acknowledges a balance of $225, then due the estate of Roulain, from the estate of Robert A. Darby, which had "been placed in his hands by the court of equity."

The Master concludes his report, by recommending that the sureties to Elliott's official bond be charged with all the moneys received by him, whether before or after the expiration of the term of his office, on account of the estates of Dr. McLeod, William M. Taylor, Robert A. Darby, and the sum directed to be invested to pay the annuity of Elizabeth Mitchell.

The exceptions to this report give rise to the following questions.

1st. Whether the sureties of Elliott are liable for moneys received by him after the expiration of his term of office.

2d. Whether they are liable for moneys received by him on account of the moneys, bonds, notes, accounts, &c. due the estates of Dr. McLeod and Robert A. Darby, placed in his hands under the orders of court before referred to.

3d. Whether the statute of limitations is a bar to the complainants's claim to contribution from the legatees of Judge Waties.

4th. Whether the sureties are liable for interest on balances found due by Elliott, for the principal of which they are liable.

1st. Many cases have been referred to in the argument to shew that the sureties for a public officer for the faithful discharge of the duties of his office, are not liable for acts done, or moneys received by him, colore officii, after the expiration of the term of office. They

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clearly establish that position, and it *is a matter of surprise that such a question should ever have been seriously raised. An official bond is but a contract, and must, of course, be construed by the same rules as other contracts; and when the sureties undertake that their principal shall faithfully discharge the duties which the office requires of him, it is impossible, by any process of reasoning, to infer that it was intended that they should be liable for acts done by him after his office had expired, and in violation of law. By the Act of December, 1821, 7 Stat. 324, the master or commissioner of the court is required, on the expiration of his term of office, to deliver over to his successor "all papers and documents appertaining to his office, together with all the moneys, bonds, notes, certificates of stock, and other property, received and held by him under the authority of the court, within twenty days after the date of the commission of his successor," and it would seem that the Legislature, not content with the limitation imposed by law on the term of his office, intended to put it out of his power to do any act under color of it after it had expired.

In the case of Hunt v. Elliott, 1 Bail. Eq. 90, decided in 1822, it was held that the former commissioner of the court, after the term of his office had expired, might go on and complete the sales of estates which had been advertised for sale by him before he went out of office, and if that was the law, I concede that his sureties would have been liable for them: it would have been done in pursuance of the duties of his office. But that case was solemnly and directly overruled in Keith v. Gray, [Rich. Eq. Cas. 227.] decided in the Court of Appeals in 1832, (not reported,) in which it was held, for reasons too palpable to require repetition, that a commissioner or master had no authority to sell after the expiration of his office, although the property had been advertised by him before, or to do any other official act.

The case of Hunt v. Elliott was referred to as establishing a rule of the court authorizing Elliott to sell Folly Island, and to receive moneys after he went out of office, and I concede that the decision in that case was well calculated to mislead, but as a rule of the court, it will not be permitted to contravene the law of the land, nor to disturb the rights of property.

It follows that Elliott's sureties are not liable for any moneys received by him after the expiration of his office, either from the sales of property made by him, or otherwise, and that the co-sureties of complainants's testator are not liable to contribute to the payment of the amount recovered by Eliza-

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beth Mitchell *against Mr. Lowndes, because that demand was on account of the

sales of Folly Island, after the expiration of his office.

2d. If the custody of the moneys, and of the bonds, notes, accounts, &c., of the estates of M'Leod and Darby, and the collection and receipt of moneys due upon them, devolved on Elliott, as part of the duty of his office, then, of course, his sureties are responsible; and whether it did, or did not, is the question to be considered.

At the time of these transactions the Commissioner of the court was authorized by law to exercise all the powers and perform all the duties of the Master, and was, of course, liable to the same responsibility. The two offices were indeed identical, differing only in name. Since that time, by an Act of the Legislature, although the two officers are retained, they are both designated as Masters, and, as before, exercise the same powers.

Before the Revolution, the powers of the Court of Chancery were exercised by the Governor and his Council, and neither the legislative or judicial history of the court, up to that period, furnish any information as to the duties of the Master of the court. The existence of such an office is first recognized in the Act of 1721, but there is nothing in it pointing to the duties of it. But that Act directs that the proceedings and determinations of the court shall be according to the known laws of England. Numerous Acts have since been passed, prescribing the mode of appointment, term of office, and the security required of him for the faithful discharge of the duties of his office, but none of them prescribe any duty, except the Act of 1791, 7 Stat. 259, sec. 6, which requires him to make sales of all property ordered by the court; to ascertain his other duties we must therefore look to other sources.

The general organization of the Court of Equity of this State, is based on the English Court of Chancery. The mode of proceeding is the same, the same formula of process and pleading are used, and the decisions of that court are regarded as authority here, so far they are applicable to the state of things existing here, unless they have been varied or changed by positive enactments of the Legislature, or by the adjudication and usage of our own courts. It is, therefore, legitimate, in the absence of any rule of our own, to look into the duties required of the chancery officers there, to ascertain what they are here.

It must be unprofitable, in the discussion of this question, to enter into a detail of the

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duties required of that phalanx of *officers which are attached to the Court of Chancery in England. From the nature of their offices, none of them can be supposed to have any thing to do with funds or other things brought into court, or funds arising from sales made under the order of the court, except the Master and the Accountant General. The power of the Master over this subject, is that of selling estates under the order of the court; 1 Smith's Ch. Pr. 9: but even he has no authority to receive the proceeds of the sale. His duties are, indeed, inconsistent with the exercise of such an authority, as to him belongs the power of appointing Receivers, and compelling them to appear before him. The Bank of England is the repository of all the funds in court, whether arising from sales or otherwise. Ibid, 22. In 2 Smith's Ch. Pr. 191–2, the precedent of an order will be found, when, after the sales had been confirmed and completed, the purchaser was directed to pay the purchase money into the bank. Nor is the Accountant General entitled to receive or keep funds or effects in court; they are to be paid or deposited in bank in his own name, and his duty in relation to them consists in keeping an account with the bank, according to the causes and accounts to which such money and effects severally belong. 1 Smith's Ch. Pr. 22. In cases where it is unsafe or unreasonable that either of the parties should have the possession of lands or other things in question in the court pending the suit, some one standing indifferent between the parties is appointed a Receiver, who is required to enter into recognizance, with sureties, for the faithful discharge of his duties, and he is bound to place the funds which come into his hands, in the bank, with the knowledge of the Accountant General, and to account to the Master. 1 Smith's Ch. Pr. 628, chap. 10. The orders of the court, directing the monies, bonds, notes, accounts, &c., of the estates of M'Leod and Darby, to be placed in the hands of Elliott, so far as they required him to collect and receive the money due on them, are precisely those required of a Receiver in England, and did not, I apprehend, pertain to the duties of his office as Commissioner.

The usage of the court has been referred to, as appropriating these duties to the offices of Masters and Commissioners, and it is true that it has been done very frequently, and through a long period of time, but my own experience is, that it never has been done, (or if done at all, in rare instances,) when a suitable person could be obtained to dis-

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charge the duties or against the *consent of the parties. So much for the usage. The well known history of the Act of 1821 is, that it was intended to prevent the abuses growing out of the habit of some of the Masters and Commissioners of the court, with a view to their own emolument, to recommend, by report, that funds or estates in controversy should be subject to their control and management. But whatever might have been the law or the usage before, that Act, the Act of 1821, puts an end to the matter. By

the very terms of the Act, he is required, when appointed Receiver, to give bond and security to the judges of the court, in a sum equal to twice the value of the estates intrusted to him, for the faithful discharge of his duties. It may be that the parties might consent to his acting in that character, without giving the bond and security, but if the bond was intended for no more than a protection to the sureties to his official bond, and the parties have dispensed with it, they must take the consequences. The sureties of Elliott are not liable, therefore, for any moneys received by him under the orders of the court directing him to receive the moneys, bonds, notes, accounts, &c., of the estates of M'Leod and Darby.

3d. The statute of limitations is no bar to the claim of the complainants against the legatees of Judges Waties, for contribution, to the extent that their testator was liable. The statute cannot operate until there is a liability and a right to sue. The complainants had no right to sue until they had paid the amounts recovered against them by Mrs. Mitchell, which they did but a short time before the filing of the bill.

4th. Generally, public officers entitled to receive moneys for others, are not liable for interest on moneys in their hands, until a demand is made; but that rule proceeds on the supposition that he has it ready to be paid when demanded, and does not obtain when he has misapplied them, or appropriated them to his own use. Spencer v. Gibbes, Dud. Eq. 177–8–9. That is the case here, and Elliott's sureties are liable to the same extent that he would have been, and are chargeable with interest on all sums retained by him, when received in his capacity as Commissioner.

It is, therefore, ordered and decreed, that the accounts be referred back to the Master, to be restated according to the principles of this decree.

The legatees of the Rev. Dr. M'Leod appealed, on the grounds:—

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*1. That the sureties of a Master in Chancery are responsible for all acts done by him under the order of the court.

2. That they are responsible for all bonds, stocks, money, and choses in action, which came into his hands virtute officii, and which are not accounted for, or delivered up by him, at the expiration of his office.

3. That his securities are accountable for all the Master's acts which might properly belong to a receiver, wherever he is appointed to do the duties of a receiver by the court, without being at the same time required to give security in the special case.

E. R. Taylor, Martha P. Taylor, and others, children of William M. Taylor, appealed, on the following grounds:—

1. That the said appellants were entitled to a decree in this case against the sureties of the late B. Elliott, Commissioner in Equity, for the sum of fourteen hundred and twenty-two dollars, seventy-one cents, decreed against B. Elliott, in the decree filed in 1836, in the case of Eliza R. Taylor and others v. Benjamin Elliott, late Commissioner, with interest from that date.

2. That at the hearing of the cause, at January term, 1842, the accounts rendered by Benjamin Elliott to the children of William M. Taylor, of the sales of the personal estate of William M. Taylor and wife, made during his term of office as Commissioner, in 1822, were given in evidence, from which it was proved that B. Elliott paid to Mrs. Elizabeth Mitchell, for her dower on Folly Island, from the moneys arising from the sales of the personal estate, five hundred and fifty-eight dollars; which payment was unauthorized by the decree, and in violation of Mr. Elliott's duty as Commissioner, and being a default, for which his sureties were responsible, the appellants were entitled to a decree for that amount, with interest from 20th January, 1826, the day when he was required by the Act of 1821 to deliver over all moneys in his hands to his successor in office.

3. That these accounts, above referred to, formed a part of the evidence on which the decree in 1836 was predicated, which decree was before the court in the present case, as the appellants' demand, and the misappropriation of the said sum of five hundred and fifty-eight dollars being so manifest, and the fact not having been disputed at the hearing, it is respectfully submitted, a decree should have been made for refunding that amount, with interest, by the sureties, without the necessity of further references.

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*The administrator of Roulain appealed, on the grounds following:—

1. That the funds received by Benjamin Elliott, from the estate of R. A. Darby, were paid to him during his term of office, for which the sureties to his official bond were responsible.

2. That the debt claimed by the appellant was fully established, and should have been decreed to be paid.

The complainants also gave notice of appeal as follows:

The complainants pray that so much of the decree as rejects the claim of Mr. Lowndes for contribution against his co-sureties on account of the money paid by him in satisfaction of Mrs. Mitchell's judgment on the official bond, may be reversed; or else, that the cause may be remanded for further inquiry in this particular.

King, for the creditors of Elliott. The decree rests on the ground that the rules and practice in England, of the present day, are to govern. This we deny, and contend, that in the absence of any rule of practice laid down by our own courts or adopted by our Legislature, we are to look for our guide,

not to the chancery practice as it now exists in England, but to that practice as it existed at the time our first Court of Chancery was organized. The first Act establishing a Court of Chancery in South Carolina, was passed in 1720. This Act is lost, but its title will be found in Trott. 333. The next Act was passed in 1721: Trott. 460: P. L. 110: 7 Stat. 163. It repeals the Act of 1720, and its § 10 provides "that the court shall proceed, adjudge and determine in all causes, as near as may be, according to the known laws, customs, statutes and usages of the kingdom of Great Britain: and also, as near as may be, according to the known and established rules of his Majesty's high Court of Chancery in South Britain." This is the only authority which the court ever had, for saying that the practice in England is to govern in this State. What, then, does the Act mean? Not, surely, that the Chancery practice in this State shall fluctuate with the English practice. That every statute passed in England shall be law in this country. That every rule adopted by the Chancellor there, shall be the rule here. Surely the Act meant no such thing. What it meant was this: that the rules which existed in England at the time the court was organized—in 1721—should be the rules in this country. It is important, then, to enquire what was the practice in England in 1721. Was it the same in relation to the master's duties as

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exists there now, *and as laid down by the Chancellor? Harg. Ess. 307, 8, 9: Fleta, Book 2, ch. 13; 4 Inst. 407; Com. Dig. Chancery, B. 5; Har. Ch. Pr. 73, 79, 80, edition 1791. These authorities shew what those duties were, and they are almost identical with his duties in this state, according to established usage. In England the whole practice in relation to the duties of the masters, and in many other respects, was altered in 1725, four years after our Act was passed. Stat. 12 Geo. 1, c. 32; 5 Eng. Stat. 591. This statute was passed in consequence of certain malversations in office, made manifest on the trial of Lord Macclesfield, 16 State Trials, 762.

What was the practice in this State under the Act of 1721? All the offices here were blended into one, the master's, except the register's. 1 Des. 107. The cases of Earnest v. Muller, 1 Des. 115, (1785.) Salvador v. Rapley, Ib. 126, (1785.) and Read v. Prince, Ib. 142, (1787,) and the rule of court of 1811, Ib. 64, shew the practice of the court, and that the master, as master, was required to discharge the duties of receiver. The case in Bail. Eq. 468, shews how far the usages of the court are law.

The power of the court to make rules which operate as law, cannot be questioned. In Hunt v. Elliott, Bail. Eq. 93, decided in 1822, it was made a rule of court, that a master in Chancery might sell property after his term of office had expired. This case was overruled in 1832, in Gray v. Keith. Now arises the most serious question in the case. Will the court say that all sales made under the rule of 1822, were void? The consequences will be monstrous. Can the rule of 1832 have a retroactive—an ex post facto—operation? Such an Act by the Legislature would be void: and has the court higher powers than the Legislature?

As to the liability of the sureties, for the monies received on Dr. Whitridge's bond, he cited the 6th sect. of the Act of 1821, 7 Stat. 324.

H. A. DeSaussure, for the devisees of Judge Waties, contended that Elliott, under the orders respecting M'Leod's and Darby's estates, acted as receiver and not as master. He cited 2 Story Eq. 129; 8 Com. Dig. 890; Har. Ch. Pr. 16; 2 Com. Dig. 359; 3 Peters Dig. title Sureties, pl. 2, 3, 4, 10, 18; 3 Madd. Rep. 221; 2 John. Ch. 554; 7 Johns. 332; 1 Story Eq. 320; 2 Ball & Beat. 55.

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*He further contended, that the complainants have no right to call on the co-sureties of Mr. Lowndes for contribution, on account of the amount paid on Mrs. Mitchell's judgment.

Memminger, for Mr. Jervey. Are the sureties liable for the monies received on Dr. Whitridge's bond, after Elliott went out of office? In considering this question, it should be borne in mind that Dr. Whitridge was executor, in right of his wife, of M'Leod; that only one instalment of the bond became due before Elliott's term of office expired, and that the bond was ultimately delivered by Elliott to his successor. Before the sureties can be charged with the receipts of moneys, should it not be shewn that those receipts were valid? Now, if those receipts were valid, Elliott must have acted either as master or receiver. He did not act as master, because his term of office had expired; if he acted as receiver, his sureties as master are not liable.

The liability of a surety cannot be extended beyond the terms of his contract. 9 Wheat. 703; 6 East, 508, 513; 2 Hill, 590; 1 McC. 41; 1 Des. 450; 12 Wheat. 505. The condition of Elliott's bond is, that he shall faithfully discharge the duties of his office. If the receipt of the money was not a part of those duties, upon what principle of justice can it be held, that the not accounting for it is a breach of the bond?

A master cannot be appointed receiver; 1 Smith Ch. Pr. 633. This was the law in South Carolina until 1821. 6 Ves. 467. It is entirely a non sequitur, that under the Act of 1721, the practice in England, previous to that year, was adopted in this Province. 7 Stat. 192. This Act, passed in 1746, repealed, in part, the Act of 1721; and, inter

alia, provided that the proceedings in this Province should conform to the practice of the courts of Chancery in America. There is no such practice in any State, as a master's receiving moneys. The duties of masters are, as counsellors and assistants of the Chancellor. Harg. 295-6; 1 Smith Ch. Pr. 9, 10. He further cited 7 Stat. 258; Amb. 599; 2 Hill, 406.

As to the claim for the proceeds of Folly Island, he said, if it were not for the case of Hunt v. Elliott, it never could be imagined that the sureties were liable. It is a mistake to suppose that a rule of court was made in that case: it was merely a decision in a cause. The case of Gray v. Keith overruled that case. The argument, as to judicial legislation, applies to every case in which the court is called on to settle a question.

Petigru, for the complainants, contended,

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*1. That, by the common law, the duties of master and receiver are distinct.

2. That there has been no change in South Carolina in this respect.

3. That the duties assumed by Elliott, were those of a receiver; and

4. That the sureties on a master's official bond are not responsible for his acts as receiver.

The masters in Chancery are the counsellors of the court; 1 Har. Ch. Pr. 58; and whatever the master can do for the Chancellor, the Chancellor can do for himself at the Common Law. The only exception made by statute, is in the case of sales.

What is a receiver? He is the hand of the court, as the sheriff is the hand of the judge. He is the sequestrator before the decree, as the sheriff is the sequestrator after it. 1 Ch. Ca. 91; 3 Swanst. 279, 109; 1 Har. Ch. Pr. 191; 3 Atk. 564; 2 Ves. 400; 2 Madd. Ch. 245; 1 Ves. Jr. 165; 15 Ves. Jr. 283; Stat. 12 Geo. 1, c. 32. Money brought into court for safe keeping, was paid to the usher. 16 State Trials, 767. When it was to be laid out on security, it was paid to the master; but this was not until after the decree. In this State, there is no usher, no accountant general: and admitting that the master is both, yet he is no receiver. The master is a depositary, merely—a treasurer. The receiver is the overseer, who puts out the money on interest—collects it—makes it. The master is the keeper of the money when it is made. The distinction between the master and receiver is not more broad, more obvious, than that between the cashier and the collecting clerk of a bank. That distinction was well known, previous to 1721; 3 Story Com. 33, 651; 8 Viner Ab. 160; 3 P. Wms. 379; 2 Pro. P. C. 504.

The usage of the court has been referred to, but mere practice will not make law. The principle of communis error facit jus, does not apply to orders taken by consent. Produce the case in which an unwilling master was forced to act as receiver, or where the surety was made to pay, and a precedent will be admitted. All the orders in the cases cited were taken by consent; can such practice make law? Masters have often been appointed receivers, but no precedent can be found in which a master's sureties have been made liable for his acts as receiver.

The decree of January, 1825, in relation to M'Leod's estate, inter alia, provides as follows: "that the commissioner be, and is hereby, authorized and required to collect

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the debts due to that *estate, using, if need be therefor, the names of the complainants and of the defendant, Charles Gabriel Capers, who also qualified as executor on the estate; and that the said commissioner do marshal the assets of the said estate, and pay therefrom, as the same may be realized, the debts due by the said estate, according to their rank, rateably and proportionably; and after the payment of the said debts, that the said commissioner be, and he is hereby, authorized and required to apply the remaining assets of the estate, as they are realized, in paying the legacies given by the will of the said Donald M'Leod, with the interest thereon, rateably and proportionably; and should any surplus remain after the payment of the said debts and legacies, then that the same be invested, subject to the residuary uses and limitations of the said will." Does not this decree place the commissioner in the stead of the executors, and is not this the very purpose for which a receiver is wanted?

As to Dr. Whitridge's bond, the master, as such, was doubtless liable for it. But that liability extended only to the bond itself. As to it the master was a mere depositary. He had no authority to collect it. He could not put it in suit, without the order of the court, and no such order was ever made.

It is impossible, perhaps, to say where the duties of master end, and those of receiver begin, but this does not prove that they are not distinct. Does not the same difficulty exist, even in the material and physical world? Who can say where vegetable life ends and animal life begins?

Can there be any doubt if Elliott had given bond as receiver under the Act of 1821, that the sureties to his official bond would never have been called on? When the parties on both sides name a receiver, it is not usual for him to give bond. 3 Bro. Ch. C. 365; 1 Dick. 68; Elliott acted as a receiver without giving bond, by the consent of the parties.

As to the liability of the sureties for Elliott's acts after he went out of office, he cited 2 Bro. C. C. 579; 2 Ves. Jr. 540; 18 Ves. 20; 4 John. Ch. 123; 2 Saund. Rep. 112.

As to the claim of Mr. Lowndes for contribution, he submitted that, as the judgment was bona fide, the co-sureties were liable. The question was res judicata.

Mr. Petigru further cited 2 Atk. 610; 3 Camp. 388; 16 Ves. 346; 8 Ves. 192; 1 Atk. 489; 2 Ib. 316; 4 Johns. Ch. 619; 2 Bail. 199; 2 McC. Ch. 304.

King, in reply, cited 7 Stat. 192, 165; 1

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Har. Ch. Pr. 79; 2 *Bro. Ch. C. 483; 2 Atk. 126, 213; 2 Sch. and Lef. 26; 2 Cox 377; 3 Russ. 130–7; 2 Story Eq. 138; 1 McC. Ch. 406; 1 Hill Ch. 414; Dud. Eq. 232; 1 Peters R. 46, 72-3; 7 Johns. Ch. 332; 9 Wheat. 737; 1 Bail. Eq. 93; 2 Ball and Beat. 75.

[For subsequent opinion, see 2 Strob. Eq. 48.]

Curia, per DUNKIN, Ch. What were the precise powers and duties of a master in chancery in England, in 1721, it is not very easy now to ascertain. By the Stat. 12 Geo. 1. c. 32, the office of Accountant General was established. This statute was passed in 1725, four years subsequent to the organization of a Court of Chancery in South Carolina. The Accountant General stands in the place of the master and usher, and is required "to do all such matters and things relating to the delivery of the suitors' money and effects into the Banks, &c., and keeping accounts, &c. as by the orders of the Court of Chancery are to be done by the masters and usher. And the masters and usher were to make up their accounts with the Accountant General, and pay into the Bank all money remaining in their hands, to be placed to the account of the Accountant General; also all mortgages, tallies and securities, standing in the master's or usher's name in trust for the suitors, to be assigned to the Accountant General." 1 Har. Ch. Pr. 64, (edition 1796.)

The office of Accountant General has never been established in this country. But we are all of opinion that the duties required by the orders of the court in the cases of McLeod and Darby, were such as had been usually imposed on the master, or commissioner, by the practice of the court from its earliest organization. Many cases have been cited from the reports, commencing, some of them, in 1785; and the rule adopted in 1811, indicates, very clearly, what was the practice of the court, and the propriety of regulating it. It is there provided that "the master and commissioners in Equity shall, at the first sitting of their respective courts in every year, severally make report to the court of the different estates in their hands under and by virtue of any decree or order of the court, with a full and particular account of the moneys received and paid relating to the said estates."

Now, whatever may have been the appropriate and peculiar duties of the masters in chancery in England, prior to 1721, if it had been the practice of the Court of Equity, in South Carolina, since its first organization, to impose on the master duties which more properly belong to a receiver, the master, elected under a presumed knowledge of

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this practice, is bound to per*form those duties, and for any neglect or malfeasance, the sureties on his official bond are responsible to the party aggrieved.

In a new country, and in courts of limited business, the duties of several officers are frequently united in one. In every district of the State except Charleston, the commissioner of the court is also register.

In the Circuit Court of the United States the clerk discharges all the duties of commissioner and register in Equity. In large banking institutions there is a variety of officers, each with his appropriate duties, President, Cashier, Tellers, book keeper, &c. but in smaller institutions, the duties of cashier and teller, &c. in themselves perfectly distinct, are frequently united, and an officer, elected as cashier, is bound for any neglect or defalcation as teller. Such was the decision in Minor v. The Mechanics Bank of Alexandria, 1 Pet. 46, [7 L. Ed. 47.] Minor had been elected cashier of the bank, and given bond for the faithful discharge of his duties as cashier, but under an existing regulation of the directors, the cashier was also required to discharge the duties of teller of the bank. In an action against the sureties for the default of Minor as teller, it was determined that they were responsible; the Supreme Court of the United States holding, that the official bond of the cashier must be construed to cover all defaults in duty, which are annexed to the office from time to time, by those who are authorized to control the affairs of the bank, and the sureties in a bond are presumed to enter into a contract with reference to the rights and authorities of the President and Directors under the charter, &c. So, here, the practice of the court having been to require of the master or commissioner to discharge duties which may be said to belong more properly to a receiver, both that officer and his sureties must be presumed to have contracted with reference to that practice, and are bound by it. It is not easy always to define with precision what are the duties of a receiver, as distinguished from those of a master or commissioner. Since the establishment of the office of Accountant General, in 1725, the practice of the Court of Chancery in England can afford us no light, and the practice in South Carolina has certainly been to unite the duties in the same officer. This difficulty, and some irregularities which grew out of it, led, it is believed, to the passage of the Act of Assembly of 1821, 7 Stat. 323. As the fee bill allowed commissions to the master or com-

missioner only in the case of sales, and then only of one per cent after the first $100, it

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was contended, for a short *period prior to the adoption of that law, that in every other case, when moneys or securities for debt passed through the hands of the commissioner, he was a receiver, and not within the provision of the fee bill, and therefore entitled to the ordinary compensation of 2 1-2 per cent on receiving and 2 1-2 per cent on paying over; and that where securities for debt were turned over, the commissioner, as receiver, was entitled to the same compensation as if money was paid by him. Nearly every clause of the Act of 1821, points to the evil and provides a remedy. It is impossible not to perceive that the law was passed, not in case of the commissioner and sureties, but for the protection of the suitor. Whenever the master or commissioner should thereafter assume the character, or claim the compensation, of a receiver, it should be his duty to shew that he had complied with the provisions of that law by giving bond and security as such. The Act also prescribes his duties, and provides his compensation, when so appointed. The fourth clause provides that "every master or commissioner in equity shall keep a book, in which he shall open and keep a regular account with every individual or estate on whose account he has or shall hereafter receive any moneys, bonds, notes, stock, choses in action, or other property of any description whatsoever, by virtue of his office, or of his appointment as receiver," &c. in which account he shall credit the parties or estates with every thing received, and debit all payments on account of said parties or estates; contemplating, evidently, that the master or commissioner was still to continue to discharge the duties which had been ordinarily imposed on him, and providing that his accounts should be kept in precisely the same way when the duties were discharged officially as when they were discharged by virtue of his appointment as receiver.

The Act of 1821 was manifestly intended to afford no facility to the appointment of the master or commissioner as receiver. It may perhaps be worthy of consideration whether it ought not to be expressly prohibited by law, and a separate office of receiver created. In England it is never permitted, and for the very satisfactory reason, that the master is the proper officer to audit the accounts of the receiver. But considering the long established usage of the country, it is regarded as important for the character of the court, and due to the confidence reposed in it by the community, that, whenever the master or commissioner takes charge of funds or estates, under an order or decree of

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the *court, he should be held to act officially, and be officially responsible, unless he has, by the order or decree, been expressly appointed a receiver, and has given bond and security as required by the Act of 1821.

In regard to the estate of McLeod there can be no doubt of the original liability of the commissioner. Under the Act of 1791, 7 Stat. 259, it is made the duty of the master or commissioner, in the several districts of the State, "to make all sales under the decree of the court." By the order of March 1823, the commissioner was directed to sell all the estate, real and personal, of Dr. McLeod, on the terms specified in the order. In April 1823, Mr. Elliott made the sale, and, among other things, received the bond of Dr. Whitridge, as one of the purchasers, for $17,400. For all sums received on these sales, during his official term, it is not questioned that his sureties are liable, unless they were paid away or disposed of under the authority of the court. Mr. Elliott's term of office expired on the 28th December, 1825. Prior to that period he had received seven thousand dollars on the bond of Dr. Whitridge, and within the following six months he received various other sums, amounting altogether to about nine thousand dollars more. In subsequent years he received small sums, amounting altogether to about six hundred dollars. The last payment was in 1833, about which time the bond was transferred to Mr. Gray. It appears by the report of Mr. Gray, that the balance appearing to be due on the bond was subsequently paid to him, and the bond delivered up to the obligor, Dr. Whitridge.

This bill is preferred by the complainant, one of the sureties of Mr. Elliott, requiring, amongst other things, that all his official creditors should establish their demands. The creditor is, of course, entitled, in this court, and under these circumstances, to rely on any breach of the condition in Mr. Elliott's official bond. By the sixth section of the Act of 1821, it is provided "that, on the resignation, dismissal from office, or expiration of the term of office, of any master, commissioner or register in Equity, all the papers and documents appertaining to his said office, together with all the moneys, bonds, notes, certificates of stock, or other property, received and held by him under the authority of the said court, shall be delivered over by him to his successor in office, within twenty days after the date of the commission of such successor;" and by the last clause of the Act it is declared "that should any master, commissioner or register

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in Equity, *violate or neglect any of the duties prescribed to him by this Act, he may be punished by the Court of Equity, as for a contempt, and his official bond may also be sued by any party aggrieved by his said violation or neglect of duty."

The bond of Dr. Whitridge was among "the papers and documents appertaining to

his office," in the possession of Mr. Elliott when his term expired. It was not delivered over to his successor within the period prescribed by law, nor for six years afterwards. In the mean time, he was enabled to hold himself out as the holder of the bond, and ostensibly entitled to receive payment of it, and did receive payment of the greater part of the bond. In the judgment of the court, the sureties of Mr. Elliott are responsible for the sums thus received by him, in consequence of this neglect or violation of duty. It is not an answer to say, that his successor, Mr. Gray, or the obligor, Dr. Whitridge, might be required to pay these sums. If Mr. Elliott had wilfully burnt the bond, or collusively delivered it up to Dr. Whitridge, without payment, during his official term, could he or his sureties turn the suitor over to an action at law on a lost or destroyed bond, or to a bill in chancery to set up the security thus improperly cancelled? We think not. There was, or ought to have been, a surety to Dr. Whitridge's bond, whose claim to protection might well add to the embarrassment. We do not think that a suitor should be thus driven to encounter these difficulties created by the neglect of official duty by the commissioner, for the faithful discharge of which, not the suitor, but the sureties on his official bond, had covenanted. It may be that Mr. Elliott supposed himself entitled to retain the bond, and receive the money, either as receiver or as private agent of the parties, and that he was not bound to deliver it over to his successor, under the provisions of the Act of 1821. But this error of judgment does not alter the consequences of the act.

The remarks heretofore made decide the question as to the liability of the sureties for the funds of the estate of R. A. Darby. It may be, as was suggested at the bar, that the bill was for the appointment of a receiver. The first order directed that the funds should be paid into the bank of the State as receiver. But the order of March, 1823, reciting that the previous orders could not be carried into effect, directs "that the Commissioner in Equity do receive all the papers and money of the estate into his hands, he giving the administratrix a receipt for the same, and that he be directed to place the

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money at *interest, and when the claims in dispute are disposed of, to make a division among the creditors." For the reasons before stated we think the funds received under this order were held in his official capacity. According to the decision in the Treasurers v. Bates, 2 Bail. 362, the acknowledgement to Packard after the Commissioner went out of office, is sufficient prima facie evidence against his sureties.

The court concur entirely with the Chancellor in regard to the sales of Folly Island, and do not deem it necessary to add any thing to what is said in the decree.

So, too, in regard to the liability of the co-sureties to contribute to the complainants on account of the payment of Mrs. Mitchell's judgment, we think the decree of the circuit court must stand. The principle on which co-sureties are bound to contribute, is thus stated by C. J. Marshall, in Lidderdale v. Robinson, 2 Brockenb. C. C. R. 159, as the result of all the cases; "where a person has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible, shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted, to every equitable extent and purpose, in the place of the creditor whose claim he has discharged. This principle of substitution is completely established in the books, and, being established, it must apply to all persons who are parties to the security, so far as is equitable. The cases suppose the surety to stand in the place of the creditor, as completely as if the instrument had been transferred to him, or to a trustee for his use." Giving to the complainants's testator the full benefit of this principle, and placing him quoad his claim on the co-sureties, on the most favored footing of the original creditor, it has just been determined that the original creditor, Mrs. Mitchell, was entitled to recover nothing.

But it is said this payment was made by the complainants's testator, after a trial at law, and the judgment of the court establishing his liability. On inspection of the record, which has been submitted to us, it appears that the defence offered was, that Mr. Elliott acted as receiver in this transaction; and on that issue we have just held that the decision was correct. But no authority was adduced here, to shew that the co-sureties were bound by that judgment, or that it was evidence of their liability. They were not parties to the record, nor does it appear that they were privies. "It is a general rule,"

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says Mr. *Starkie (1 Ev. 195) "that a verdict shall not be used as evidence against a man where the opposite verdict would not have been evidence for him." If Mrs. Mitchell had failed to recover against Mr. Lowndes in consequence of any defect in proof, or other cause, it is not perceived that the verdict could be given in evidence to defeat a recovery, in her actions against the co-sureties. So, if a co-surety has a receipt in full, or other satisfactory defence, it would not be contended that a verdict against the other surety could debar the use or the validity of the defence. According to Lidderdale v. Robinson, this is the criterion;—the co-surety takes the place of the original creditor, and may be resisted on the same principles and in the same way.

We are also of opinion that this claim for contribution must stand on the pleadings and

proof already adduced. Counsel differ on the question whether this claim was resisted in the circuit court, and the defendant objects to the introduction of any new testimony. Under these circumstances, we do not think that the mere suggestion of the complainants, that a different case could be established, would warrant this court in opening the decree on this point, and directing a further inquiry.

It is ordered, that the decree of the circuit court be modified, and the account of the Master reformed, according to the principles of this decree.

EVANS and WARDLAW, JJ., concurred.

RICHARDSON, J., absent at the hearing propter invalitudinem.

HARPER, Ch. I concur, unless with respect to the judgment against Mr. Lowndes. I think the decision of the court was conclusive on him, though he did not appeal. If he had paid by advice of counsel, I should think that he ought to have contribution. McDowall v. Blake, [1 Bailey, Eq. 330.] It might have been shewn that he was guilty of laches in not making the defence he ought to have made. But this was not alleged, nor the complainants called on to meet it, nor was it in any manner in issue. What the plea was, which was made in the court of law, came out only incidentally; the record being produced by the complainants' own counsel.

JOHNSTON, Ch. and BUTLER and FROST, JJ. concurred in the general conclusion indicated by the opinion of Chancellor DUNKIN, but differed from him with respect to the money received from Dr. Whitridge on his bond, after the expiration of Mr. Elliott's term of office.

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*O'NEALL, J., concurred in the opinion of Chancellor DUNKIN in all respects, except that he thought Mr. Lowndes was entitled to contribution from his co-sureties, in the case in which there was a recovery against him for Mrs. Mitchell's claim.

JOHNSON, Ch., dissenting. I regret that circumstances which I could not control, prevented my hearing the entire argument in this cause at the hearing here, but having twice before heard it fully argued, first in the circuit court, and again in the Court of Appeals, I feel so fully possessed of all the questions involved, as to justify my expressing a decided opinion upon them; and I should be satisfied simply to declare my adherence to the decree of the circuit court, but for the conviction that the judgment of this court inculcates principles at war with long settled and universally received rules of law, applicable to a wide range of contracts in general use, in relation to which I propose to add something to what is said in the circuit court decree.

The first question which I propose to consider is, whether the sureties of Elliott are liable for the moneys received by him under the order of the court of November, 1823, directing "that all the outstanding debts due to the estate of Dr. M'Leod, be placed in the hands of the Commissioner for collection by suit or otherwise," and under the order of the 1st March, 1823, directing "that the Commissioner do receive all the papers and money of the estate" (of Robert A. Darby,) "into his hands, he giving the administratrix a receipt for the same: and that he be directed to place the money at interest, and when the claims in dispute are disposed of, to make a division among the creditors."

It has not and will not be questioned, that according to the practice in the English Chancery Courts, the duties required of Elliott by these orders properly belonged to a receiver, who is not now, and never was, a standing officer of the court, but a person standing indifferent between the parties, appointed by the court to take the possession and management of lands and other things in controversy, pending the suit, where it was improper to trust either of the parties with it. Here the assets of the estates were taken out of the hands of the executor in one case, and the administratrix in the other, and put into the hands of the Commissioner to be administered, which was unauthorized unless they were unfit to retain them, and ought, then, according to the English practice, to have been put in the hands of a receiver. But I am willing to concede that, under the usage which universally prevailed before the Act of 1821, 7 Stat. 323,

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*these duties were properly assignable to the Master or Commissioner of the Court, and appertained to the duties of his office, and that his sureties would have been liable for any defalcation in the execution of them. If, however, I have not grossly misinterpreted that Act, it was intended to reform that practice. It provides, "that whenever hereafter the Master or Commissioner in Equity in this State shall be appointed a receiver of the Court of Equity, and shall accept such appointment, he shall, before he enters upon the duties of such office, duly execute a bond to the Judges of the Court of Equity, with two or more good and sufficient sureties, to be approved of by the court making the order, in a sum equal to twice the value of the estate and effects intrusted to him, conditioned for the faithful performance of his duty as receiver, which bond shall be kept among the records of the Court of Equity, and also recorded by the Register, in a book to be kept for that purpose in every court; and a copy of said bond, certi-

tied by said Register, shall be delivered by him, on demand, to every party interested in said funds; and such party, or parties, is and are hereby authorized to institute a suit at law on such certified copy." &c.

Before the passage of this Act, the Master and Commissioners of the court were, under the usage before referred to, habitually appointed by the court to do the duties required of a receiver, in cases where it was necessary and where another suitable person could not be conveniently obtained, without requiring the security provided for in the Act. But the case under consideration furnishes two examples in which a Commissioner has been appointed to discharge these duties, without having been required to give the security, and there are doubtless many others, and it has been insisted, in the discussion of this case, that the Act did not divest the court of the authority to appoint the Commissioner receiver under the usage as before, and that the security required was intended to be in aid of the official bond, and that consequently the Commissioner, in that character, was bound to obey the order of the court.

I do not know how to meet this argument better than by referring to the terms of the Act itself. Before that, the Commissioner had been required to perform the duties to receiver without giving security, and the Act, if it means any thing, provides that he shall no longer perform these duties without giving the security. That if he shall accept such "appointment"—not the office of Commission-

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er, but of receiver,—"he shall, *before he enters upon the duties of such office" (not of Commissioner but of receiver,) "duly execute a bond" &c., and if the legislature had intended to declare that the Commissioner should no longer discharge the duties of receiver, I am at a loss for language that would more clearly express the idea, qualified only by the condition that he should give bond and security.

The fact that the court made the orders under which Elliott took possession of the assets, is relied on, as referring these duties to his office of Commissioner of the court, and therefore his sureties are liable.

I have before shewn, that the Legislature has declared that they shall not appertain to that office, and that they properly appertain to the office of receiver; and although the orders under which he acted do not entitle him receiver, the omission to do so neither imposes on him the duty, or authorizes him to act in that character, without giving the security. Any other construction would operate as a repeal of the Act. Leave out the title of receiver, and according to the construction contended for, you may impose on the Master or Commissioner all the duties of receiver.

But it has been said, that the act has been done under the authority of the court, and it has been asked in argument, whether the parties will be permitted to suffer loss by these means, and I fear that in our sympathy for suffering suitors, we have lost sight of the rights of Elliott's sureties. But I will ask in reply, whose fault is it that such orders were made? Will any one who has examined the Act, believe that any Chancellor who ever presided on this or any other bench would have made such orders without requiring security, if it had been asked by any one of the parties or their solicitors? It is too clear to admit of a question, and the necessary inference is, that they were made by the assent of the parties. That ought not to be permitted to operate as a wrong to Elliott's sureties.

The history of the Act of 1821, alluded to in the circuit court decree, has been referred to, as furnishing a clue to the interpretation of the Act, and parts of several of the subsequent clauses have been relied on as shewing that, under the usage of the court, the commissions of the Master or Commissioner were doubled or trebled, in passing through the hands of a receiver, instead of the Commissioner or Master, and the Act was mainly intended to correct the abuse of their powers over the subject. I concede in extenso the

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rule, that to ascertain the true meaning *of an Act of the Legislature, it is admissible to look into the history of the times at which it was passed, to ascertain the evils that were intended to be remedied, and to examine into not only all the clauses of the same Act, but all other Acts on the same subject, and to read them as one Act. But that is only admissible where the terms employed are of doubtful import, or where the provisions of the same Act are inconsistent, and never can be resorted to to contravene a plain and positive enactment. Does any one doubt what the Legislature meant when they said that no "Master or Commissioner in Equity shall be appointed a receiver," without giving bond and security? No! that would control the usage, and you look in vain through this Act to find any thing inconsistent with it.

I come now to the consideration of a question which I regard of much more importance, because its decision is calculated to operate not only upon the particular case, but upon a numerous class of contracts. It is, whether the sureties of Elliott are liable for the money received by him on Dr. Whitridge's bond.

The most prominent condition of Elliott's official bond is, that he shall faithfully discharge the duties of the office of Commissioner in Equity, during his continuance in office. The duties to be discharged are those which appertain to the office, as prescribed by positive enactments of the Legislature, and the usages of the court. Amongst them, and immediately applicable to this question, the Act of 1821, before referred to, requires that

he should deliver over to his successor "all the papers and documents appertaining to his office, together with all the moneys, bonds, notes," &c. "within twenty days after the date of the commission of such successor." Dr. Whitridge's bond certainly appertained to the office of Commissioner, and was in the possession of Elliott at the time his office expired. He neglected to deliver it over to his successor within the time prescribed by the Act, and I concede, at once, that this was a defalcation for which his sureties were responsible. But the question arises, what injury did the legatees of Dr. M'Leod sustain by this neglect? If the sureties had been immediately sued on their bond, they, the plaintiffs, might have been compelled to submit the condition to a jury to ascertain the damages, and if the sureties had held up the bond in court ready to be delivered to the plaintiffs, or had furnished evidence of its existence, and pointed out the way of re-

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covering the amount, what jury would *have given more than nominal damages against the sureties? Suppose the bond unpaid, and the sureties, even now, sued upon Elliott's official bond, and, on submitting the condition to a jury, they were able to shew that Dr. Whitridge was abundantly able to pay his bond, and that, notwithstanding the great delay, there was no obstruction to a recovery against him, would the jury, in the wide discretion which they are entitled to exercise in questions of damages, find against them the whole amount of Dr. Whitridge's indebtedness to the estate of M'Leod, still leaving the legatees to recover the same amount from him, with interest on both sums from the time the bond was due? And yet this court in the exercise of Chancery powers, are, we are told, authorized to sit in judgment to ascertain the damages, admitting no claims to mitigation.

But it has been said, that this bond has been paid to Elliott, and therefore his sureties are liable. That was after the expiration of his term of office, and the authority to receive it cannot be traced to any connexion with his duties while in office. It is true, that the bond was made payable, in the usual form, to him and his successors in office, but these terms, in themselves, as well as the nature of the transaction, point to the successor as the person entitled to receive the money after Elliott went out of office. And again it is said, that his possession of the bond after he went out of office, authorized Whitridge to pay him the money; and cases have been referred to, to shew that possession of a bond or note is prima facie evidence of authority to receive the contents. Take that for all it is worth—no case can be found in which it has been even surmised that a debtor would be protected in paying money due on a bond or note, to one whom he knew was not entitled to receive it, although he might be in possession of the bond or note. Now, the Act of 1821 is a public Act, which every one is bound to know, nor will ignorance of it be received even as an extenuation. That Act required that Elliott should turn over the bond to his successor within a limited time, indicating, as clearly as language can, that his power over it, and his right to receive the money, were at an end; and in legal effect operated as a notice to Dr. Whitridge, as effectually as if the whole Act had been stamped on the bond in capital letters. The true question then, is, whether the sureties, who were not in the way to know, and will not be presumed to know, that Elliott had the bond in his possession, or Dr. Whit-

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ridge, who paid the money to him, *knowing that he had no authority to receive it, shall lose the money.

I have before remarked, that Elliott's receipt of the money could not be traced to any connexion with his duties during his continuance in office. His office ended, and his liability attached, when he neglected to deliver over Whitridge's bond to his successor within the time prescribed by the Act; and it will be difficult to find any principle or dictum by which his sureties would be held liable for any act done by him afterwards. He had ceased to be commissioner, and was acting sui juris, and if in this case the Act be referred to his powers as commissioner, he might, if alive, go on and execute every order of the court made during his continuance in office. If such a principle be established, the sheriffs of the various districts in the State might go on after the termination of their offices, and enforce and collect the executions in their offices, on the responsibilities of their sureties; and so of clerks, ordinaries, guardians and others acting in a fiduciary character, who are required to give bond and security for the faithful discharge of their duties. Having once assumed their offices or duties, their sureties would remain liable in all time, for any act they may have done or omitted, under color of their power or authority; notwithstanding their offices had terminated, or their trusts had been discharged. On this point, I may rely with confidence on the judgment of the court, as to the liability of Elliott's sureties, for the proceeds of the sale of Folly Island, under the order of the court in ex parte Mary S. Darby et al. That order was made whilst Elliott remained in office; and because he sold the Island afterwards, and without authority, it is held that his sureties are not liable for the money received; and I confess that I am utterly unable to distinguish between the cases.

It is now received as a maxim, that sureties are favored in all matters of doubtful right. I agree, that generally, they are not discharged by the mere passive neglect of the creditor to enforce his rights against

their principal; yet, there are numerous instances in which active diligence is required, of which the Law merchant furnishes some examples. According to that, the holder of a bill of exchange, or promissory note, must demand payment, and if it is dishonored, give notice to the indorser, who stands in the relation of surety, within a limited time, to entitle him to recover against the indorser; and I am much inclined to think, that a rule

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founded on the same principle might *be usefully applied to cases like the present. Here the legatees of McLeod must have known that Elliott had possession of the bond of Dr. Whitridge, for they were parties to the proceeding. They might have compelled him to turn it over to his successor, upon a rule to shew cause, or recovered it in an action of detinue. The sureties, as before remarked, were not in a situation to know that such a bond existed, nor had they any clue by which to direct their enquiries in relation to it. Elliott might have concealed it from them, in despite of all their enquiries, and it would have been impertinent in them to file a bill for a discovery, on the mere supposition that he had violated the duties of his office, and thereby exposed them to loss; and now, after a lapse of near twenty years, when all hope of their being reimbursed is lost, they are called on to pay a large sum, which, if lost at all, has been lost by the negligence of the parties claiming.

JOHNSTON, Ch., and BUTLER and FROST, JJ., concurred in so much of this opinion as declares that the sureties of Elliott are not liable for the money which he received on Dr. Whitridge's bond.

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1 Rich. Eq. *187

*A. LEPRINCE and A. FOURGEAUD, Assignees of C. G. A. Lacoste, v. PHILIP EUGENE GUILLEMOT and Wife, H. POINCIGNON and Others, Creditors of Lacoste.

(Charleston. Jan., 1845.)

[*Fraudulent Conveyances* ⇐⇒94; *Judgment* ⇐⇒780.]

A contract, entered into in France, between husband and wife, and their parents, before the marriage, and in contemplation thereof, whereby the parents mutually stipulated to advance, as a marriage portion, each the sum of forty thousand francs, payable at their, the parents', pleasure, but bearing an annual interest until paid of 5 per cent, with a reservation to the parents of the reversion of the capital in case of their children's deaths before them without issue—*Held*, on the testimony of French lawyers, to be a valid contract in that country, and to constitute debts, due by the parents from the date of the marriage, equally binding with other debts: *Held* further, that the contract was binding in this State, on the father of the wife, and that it was not fraudulent as against his creditors because not recorded here.

[Ed. Note.—Cited in Carpenter v. Lewis, 60 S. C. 40, 38 S. E. 244.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 240; Dec. Dig. ⇐⇒94; Judgment, Cent. Dig. § 1348; Dec. Dig. ⇐⇒780.]

[*Husband and Wife* ⇐⇒29.]

Such a contract, if entered into in South Carolina, would be valid, semble.

[Ed. Note.—Cited in Cloud v. Calhoun, 10 Rich. Eq. 374.

For other cases, see Husband and Wife, Cent. Dig. §§ 158–168, 205, 882; Dec. Dig. ⇐⇒29.]

[*Contracts* ⇐⇒144.]

The validity and construction of a contract, are to be determined by the laws of the country where it was entered into, though its lien and operation, and all priorities of right under it, are generally limited to that country, and in enforcing or executing it, the tribunals of other countries are not bound to give it any effect, so far as it may contravene the policy of their own States.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 724; Dec. Dig. ⇐⇒144.]

[*Wills* ⇐⇒29.]

The Act of 1823, 6 Stat. 213, requiring marriage settlements to be recorded, does not apply to a contract not amounting to a settlement.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 59–62; Dec. Dig. ⇐⇒29.]

[*Contracts* ⇐⇒34; *Husband and Wife* ⇐⇒29.]

The Act of 1785, 6 Stat. 636, requiring marriage contracts, &c., to be recorded, only avoids the instrument, for nonregistration, as against the creditors of, and purchasers from, the persons taking interests, under the instrument, and leaves it valid as to all the rest of the world.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 162; Dec. Dig. ⇐⇒34; Husband and Wife, Cent. Dig. § 167; Dec. Dig. ⇐⇒29.]

[*Assignments for Benefit of Creditors* ⇐⇒39.]

Where a debtor, being the owner of property in this State and elsewhere, by a deed, purporting to convey his whole estate, assigned to trustees his property in South Carolina, in trust, (1) to pay such of his creditors as should within a limited time execute to him releases, and (2) to distribute the surplus, if any, pro rata among his creditors generally, *Held*, that the concealment of the extra territorial property, was a fraud which vitiated the assignment.

[Ed. Note.—Cited in Claflin & Co. v. Iseman, 23 S. C. 424; Trumbo, Hinson & Co. v. Hamel & Co., 29 S. C. 526, 528, 532, 8 S. E. 83; Younger v. Massey, 41 S. C. 65, 19 S. E. 125.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 160; Dec. Dig. ⇐⇒39.]

[*Assignments for Benefit of Creditors* ⇐⇒171.]

Where an assignment for the benefit of creditors was set aside as fraudulent, *Held*, that judgments recovered against the assignor after the assignment, and after the assigned property had been sold by the assignees, were not entitled to preference over the claims of other creditors, but were to be paid pro rata with them.

[Ed. Note.—Cited in Gracey v. Davis, 3 Strob. Eq. 58, 51 Am. Dec. 663; Clarke v. Baker, 36 S. C. 424, 15 S. E. 614; Curlee v. Rembert, 37 S. C. 222, 15 S. E. 954.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 504; Dec. Dig. ⇐⇒171.]

Before Johnson, Ch., at Charleston, February, 1843.

This was a bill of interpleader, filed by the

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assignees of La*coste against his creditors, which came before the court on exceptions to the master's report.

On the 24 June, 1840, Charles Gregorie Arnauld Lacoste, a merchant, trading in Charleston, New York and Paris, made and executed an assignment, which declared "that, for paying of the just debts of the said Charles Gregorie Arnauld Lacoste, as far as his property, of whatever kind, will extend," he, the said Lacoste, conveyed to the complainants two lots in the City of Charleston, twelve slaves, all his merchandise, furniture, household goods and stock in trade, in his store on King's street, "or elsewhere, in the City of Charleston, and all the money due and owing to him by any person or persons whomsoever," in trust, first to sell the property, collect the debts, and retain for the assignees a commission not exceeding 5 per cent. "And in the second place to distribute the whole of the clear residue of what may come to their hands, among the creditors of the said Charles Gregorie Arnauld Lacoste, that may, on or before the first day of January next, accept of this assignment, and release the said Charles Gregorie Arnauld Lacoste from their several demands, rateably and in proportion to the amount that may be due them, respectively; and in case there should be any surplus, then to pay and apply the same to the discharge of any debts of the said Charles Gregorie Arnauld Lacoste, that may be demanded of them, rateably and in proportion to their several amounts."

On the 13 January, 1841, Lacoste executed in New York, for the benefit of his creditors, an assignment to Edward Bayer, of choses in action to a considerable amount, some merchandize in New York, some lots in Oswego, and five thousand acres of land in Tennessee. In a schedule, annexed to this assignment, he named the defendant, Guillemot, as one of his creditors.

Shortly after the assignment of the 24th June, 1840, was executed, the complainants sold the property included in it. On the 30th January, 1841, after the sale of the property by the complainants, the defendants, Poinsignon and Mottel, obtained and entered up judgments, in the Common Pleas for Charleston District, against Lacoste for about $6,400, and on the 13th April, in the same year, the defendants, Marie C. DeVillers and Felicite DeVillers, also recovered and entered up judgment against him for $20,000.

The only persons who accepted the terms of Lacoste's assignment were Philip Eugene Guillemot and Jeane Elvina Lacoste, his wife, of the city of Paris, in France; and one of

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the *leading questions made in the cause, was, whether they were creditors of Lacoste. Another important question was, whether the assignment to the complainants was valid as against the creditors, who had not accepted its provisions, and executed releases.

Mrs. Guillemot was the daughter of Lacoste, and the claim of herself and husband arose out of a marriage contract, entered into in Paris, on the 23d May, 1836, between Lacoste and his daughter, and Mr. Guillemot and his parents. The preamble to this contract, and two of its articles, were as follows.

"Before the undersigned, Royer, Esquire, and his colleagues, notaries in Paris, personally appeared Philipe Eugene Guillemot, student of medicine, residing in Paris, Rue Faubourg, St. Dennis, No. 109, of legal age, son of Mr. Jacques Magnus Guillemot, proprietor, and of his wife, Mrs. Madelaine Julie Antheaume, residing in Paris, in the said Rue du Faubourg, St. Dennis, No. 109; the said Mr. and Mrs. Guillemot appearing for the purpose of countenancing and authorizing their son, and for the purpose of constituting the marriage portion which they are about to give him.

"And Madame Jeane Elvina Lacoste, residing with her father and mother, herein named, of legal age, daughter of Mr. Charles Gregorie Arnauld Lacoste, merchant, a citizen of the United States of America, and of Mrs. Gabrielle Emelie de Rochefort, his wife, both residing in Charleston, South Carolina, United States of America, the said Mr. Lacoste residing, for the moment, in Paris, Rue Grarge Batiliere, No. 26, appearing for the purpose of countenancing and authorizing his daughter, and for the purpose of constituting the jointure which he is about to give her.

"In contemplation of the marriage proposed between the said Guillemot, Jr. and Madame Lacoste, the celebration of which will take place forthwith, the parties have made the following clauses and civil condition, in presence of, on the part of the future bride, Mr. Armand Coste, her cousin, on the part of the future husband, Mr. Jules Guillemot, his brother.

"Article 2. In consideration of the contemplated marriage, Mr. and Mrs. Guillemot, parents of the future husband, constitute in his favor, and as a portion in advance of his share of their estates at their deaths, whichsoever shall first die, and in case of insufficiency to be taken out of the estate of the survivor—

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*"A capital of forty thousand francs, to be paid at their pleasure, but producing an annual interest of five per cent. until discharged; which interest the donors obligate themselves, in solidum, to pay to the donee, every

six months, at his residence, counting from the day of his marriage.

"Mr. and Mrs. Guillemot expressly reserve to themselves the reversion of the said forty thousand francs, in case that their son should die before them without leaving issue.

"Article 3. And Mr. Lacoste, in consideration of the intended marriage, acting not only in his own name, but as guaranteeing the consent of his wife, constitutes as a jointure for his daughter,—

"A capital of forty thousand francs, which the donors will pay at their pleasure, and which shall produce, until discharged, an annual interest of five per cent. for the payment of which interest Mr. Lacoste obligates himself and his wife, in solidum; the interest to be paid to his daughter, at the residence of the future couple in Paris, every six months, beginning from the date of the marriage.

"Mr. Lacoste reserves, for himself and for his wife, the reversion of the forty thousand francs, which he has constituted as a portion for his daughter, in case that she should die before her parents, without leaving issue.

"The payment of this jointure shall be imputed on the estate of the parent who shall first die; and in case of insufficiency, on the estate of the surviving parent."

It was proved, from the testimony, taken by commission, of several persons residing in Paris, two of whom were advocates of the Royal Court of Paris, that this contract was duly executed and registered according to the laws of France, and that its effect was to constitute a valid debt of forty thousand francs, due by Lacoste from the day of his daughter's marriage, and to give a lien on all his fortune for the payment of the debt.(*a*)

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*It further appeared, that the debt to the Misses DeVillers existed previous to the 23d May, 1836; and that, on the 15th June, 1839, Lacoste conveyed to a trustee, for the use of

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his wife, the *whole of his real and personal estate, in Charleston; and that, in June,

(*a*) The following are the interrogatories propounded to the witnesses in France, the answers thereto, and a copy of the marriage contract.

Interrogatories.

1st. Do you know the parties named in the title of these interrogatories, or either, and which of them?

2d. Be pleased to examine the archives of the Bureau in which settlements made in contemplation of marriage are usually recorded, and especially examine the record hereunto annexed, and say if the same is a true copy, in due form of law, according to the laws of France, as they existed at the time the said record bears date.

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*3d. Are you well acquainted with the laws of France, as they existed at that time, and state whether the said marriage contract is in due form, and whether its legal effect, according to the said laws, is to constitute a valid debt against Charles Gregorie Arnauld Lacoste, to the extent of forty thousand francs, from the day of the marriage of his daughter, as set forth in said contract, and constituting also a general pledge of his entire estate to pay the same?

4th. Where is the original contract? Is it deposited in the archives of the proper department, and is the copy annexed as sufficient evidence, by the laws of France, of the due execution of the original? State fully.

5th. State in what office the annexed deed, by the laws of France, should be recorded. Examine, or cause to be examined, said office, and state if this settlement is duly enrolled.

6th. State any other matter or thing tending to prove that the annexed, or any other paper, in nature of a marriage contract, exists, whereby Charles Gregorie Arnauld Lacoste became liable to pay to Philip Eugene Guillemot, and Evelina, his wife, a sum of money, in consideration of their marriage; and annex all documents, records and proceedings in any way, to the answers to these interrogatories.

Cross Interrogatories.

1st. If you say that the contract referred to in the interrogatories in chief, was duly made and legally executed, and is properly authenticated, according to the laws of France, and that it constitutes a valid debt against Charles Gregorie Arnauld Lacoste, and a general pledge of his entire estate, for the payment of the same, please to state, also, whether, by the said laws, such pledge extends to property subsequently acquired, and whether the said laws permit any part of the estate of the said Charles Gregorie Arnauld Lacoste to be applied to the payment of such debt, to the exclusion of his bona fide creditors. If so, be kind enough to mention in what code, chapter, section and article, such law is to be found, and in what book, or in what page, the same may be referred to.

2d. If you know the parties to the said contract, do you, or do you not, know that Madame Guillemot, the alleged creditor, is the daughter of the alleged debtor, Charles Gregorie Arnauld Lacoste? And do you, or do you not, know that the alleged debt is a mere gift, or voluntary donation, from the said Charles Gregorie Arnauld Lacoste to his said daughter?

3d. Do you, or do you not, know that the said Charles Gregorie Arnauld Lacoste was lately a merchant or trader within the kingdom of France, and that recently, and since the date of the said contract, became there a bankrupt, or insolvent?

4th. Do, or do not, the laws [of] France provide that in cases of bankruptcy or insolvency, voluntary debts, such as that constituted by the contract already referred to, shall be postponed in payment, until all the bona fide debts of the bankrupt or insolvent are fully paid and satisfied?

5th. Do the laws of France, in any, and in what, case permit or prohibit the application of the estate of an insolvent person, to the satis-

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faction of his *gifts or voluntary donations, whilst his bona fide creditors are left unpaid? Please refer to code, chapter, section, article, book and page.

6th. If you know of any other matter or thing going to shew that the property of Charles Gregorie Arnauld Lacoste should not be taken from his actual creditors to satisfy this gift to his daughter, be pleased to state the same as fully and particularly as if thereto specially interrogated.

Interrogatories in Reply.

1st. When the parents of both the parties contract, prior to the marriage, and each agrees

1840, the said deed was declared fraudulent as to his creditors, by a verdict had on certain proceedings in attachment.

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*By the Chancellor. On the twenty-fourth of June, 1840, Charles Gregorie Arnauld Lacoste conveyed and assigned to the complainants, by deed, certain real and personal property and choses in action, in trust:

1st. To pay the expenses of the assignment.

2d. To pay all those of his creditors who

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should, on or be*fore the first day of January, then next ensuing, accept the assignment, and upon receiving their adequate proportion of the proceeds of the assigned estate, sign releases to him in full of their

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to furnish a fixed sum, does or not such an engagement constitute, by the laws of France, a contract, and is not the future marriage of the parties, and the mutual contribution, a good and sufficient consideration for said contract?

2d. When a debt is once so incurred, does the law of France admit of any subsequently contracted debts taking precedence, or is it, like every other debt for a consideration, valid at its date?

3d. By the laws of France, is a contribution, in consideration of an intended marriage, a gift or donation? Or does it acquire the rank of a bona fide debt, and equal in rank to any other debt?

4th. If you refer to the laws of France, as to the rank of debts in cases of bankruptcy, please refer to the chapter and section, and those local laws applicable to bankruptcies occurring in France.

Answers, etc.

In the year one thousand eight hundred and forty-one, on Tuesday, twenty-third of November, at two o'clock, afternoon.

(Government Stamp of 1 fr. 26c.)

Before the undersigned, Henri Thion de la Chaume, and Francois Louis Charles Pierre Paul Huillier, Esquires, Notaries at Paris.

(Government Stamp.)

Being in the study of the said Huillier, Esquire, in Paris, Rue Taitbout, No. 23.

(Huillier's Notarial Seal.)

Personally appeared Mr. Philip Eugene Guillemot, formerly a student of medicine, at present a man of letters, and Madame Jeane Elvina Lacoste his wife, who is duly authorized by him, both residing together, at present, Rue des Saints Peres, No. 38.

(Thion de la Chaume's Not. Seal.)

Who said as follows:

That a case is pending in the Court of Equity of South Carolina, between Messrs. Le Prince and Fourgeaud, assignees of Mr. Lacoste, plaintiffs, and Messrs. Poincignon and Mottel, defendants for the appearers.

That the said court has directed a commission of Interrogatory to the President of the tribunal of Commerce at Paris, for the purpose of appointing two or more Notaries, in this city, to receive, upon oath, the depositions of persons who can testify to facts relating to the said case, with the intent that the depositions shall be returned in the form prescribed by the said court.

That the undersigned Notaries have been ap-

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pointed for the said purposes, *by the said President of the Tribunal of Commerce, and that they have taken the oath before him.

That in this stage of proceeds, [I say proceedings, Tr.] the appearers require, by these presents, the said notaries to receive the depositions of the witnesses in the form prescribed by the said Court of Equity.

After reading (these presents,) Mr. and Mrs. Guillemot signed, and then retired.

(Signed) Ene. Guillemot.
J. E. Lacoste.

"The interrogatories put by the said Court of Equity, the cross interrogatories, and the answers thereto, have been written by the undersigned notaries on a sheet stamped one franc, twenty-five centimes, which sheet has been hereunto annexed, after due mention having been made thereof, by the undersigned notaries, and shall be recorded with these presents."

In execution of the commission to them confided, the said notaries, (taking into consideration,)

1st. That under the laws of France, notaries, before whom marriage contracts have been executed, have the keeping of the originals or minutes, and the delivery of authentic copies thereof.

2d. That documents emanating from notaries, bear an authentic character, even in foreign countries, when, 1st, the signature of the notary has been certified by the President of the tribunal, within whose district (the notary actuates.) 2d, the signature of the said President being certified by the Minister of Justice, or by his delegate. 3d, the signature of the latter being certified by the Minister of Foreign Affairs, or by his delegate. 4th, and lastly, the signature of the latter being certified by the diplomatic or consular agent of that country where the document is to be produced.

3d. That according to usage in France, jurists (avocats,) are expected to answer questions of law propounded to them, and to deliver certificates of the custom, (in each case.)

The undersigned notaries have invited the following persons to appear before them.

1st. Royer, Esquire, notary in Paris, who has executed the marriage contract, mentioned in the interrogatories put by the said Court of Equity. 2d. Mr. De Lemarre, designated by the said court as Chief du Bureau de la Chancellerie au Ministere des Affaires Etrangeres, and delegated by the minister for the purpose of authenticating documents. 3d. Charles Ledree and Paul de Jouvencel, "avocats a la Cour Royale de Paris." [This is a title given to those jurists who practice in the Cour Royale and in the Inferior Courts.]

If the appearance of other persons should be deemed necessary, they will be invited to furnish evidence.

And, upon the invitation of the undersigned

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notaries, immediately ap*peared Mr. Antoine Adolphe Charles Ferdinand Royer, Notary residing in Paris, Rue Vivienne, No. 22, who did, after taking the oath, present to the undersigned notaries, the minute or original of the marriage contract, passed before him and his colleague, by Mr. Philip Eugene Guillemot and Madame Jeane Elvina Lacoste, on the twenty-third day of May, one thousand eight hundred and thirty-six, which minute makes a part of his archives.

The said Royer then made the following answers to the questions propounded by the said Court of Equity, (which questions) are enumerated in the annexed document.

1st. To the first question—"I have slightly known Messrs. Lacoste and Guillemot; however, I have had communication with them occasionally, concerning their business."

2d. To the second question—"the minute of the marriage contract, which I have just exhibited, makes a part of my archives, and the copy thereof produced by the Court of Equity, is a faithful one, delivered by me in due form,

demands. In pursuance of the power conferred by the deed, complainants have sold the estates, and the proceeds have been paid into court, to abide the event of this suit,

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which is a *bill filed, calling on the defendants, who have conflicting claims, to interplead. One creditor only, Philip Eugene Guillemot, and his wife, the daughter of Lacoste, have accepted the assignment within the time limited by the deed, and of their claim I shall hereafter have occasion to speak.

The other defendants, also creditors of

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Lacoste, insist that *the deed of assignment is fraudulent and void, because Lacoste own-

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according to the laws of France, existing at the date of the contract."

3d. To the third question—"It is not my province to answer this question."

4th. To the fourth question—"I have already stated, that I am the custodiary of the original of the said marriage contract; that this copy is in regular and authentic form, and that it is, under the laws of France, a sufficient proof of the contents of the original; this is in consequence of the law of 25th Ventose, in the year 11, and of articles 1317 and seq. and 1394, of the civil code."

5th. To the fifth and sixth questions—"In consequence of the answers which I have made above, a specific answer to these questions becomes useless."

To the counter interrogatories, Mr. Royer answered as follows:

1st. To the first—"It is not my province to answer this question."

2d. To the second—"I know that Mrs. Guillemot, who claims as creditor, is the daughter of the debtor, Mr. Lacoste, and that the debt is a pure gift and voluntary donation, from father to daughter."

3d. To the third—"I know that Mr. Lacoste has been a merchant in France, but I am ignorant of what may have befallen him since (the date of) the contract."

4th. To the fourth, fifth and sixth questions—"It is not my province to answer these questions."

In answer to the interrogatories in reply to the cross interrogatories, put in succession, Mr. Royer stated that it was not his province to answer, and that he abstained from doing so, these questions, and the former, coming more properly under the cognizance of advocates at law; and after reading, Mr. Royer signed, and retired. (Signed) Royer.

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*Immediately (after,) personally appeared Mr. Auguste Delamarre, "Chief du Bureau de la Chancellerie au Minister des Affaires Etrangeres de France," Knight of the Legion of Honor, residing in Paris, Rue Grenelle St. Germain, No. 20, who, after taking the oath before the undersigned notaries, did make the following answers to the questions put by the said Court of Equity, to wit:

1st. To the first question—"I do not know any of the parties mentioned in the preamble of these presents."

2d. To the second question—"All that I can answer relatively to this copy or exhibit is, that I have certified the signature of Mr. Poret, delegate to the Minister of Justice, who had certified the signature of the President of the Civil Tribunal of Seine, by whom had been certified the signature of Mr. Royer, notary in Paris, that (these formalities) render the copy authentic."

3d. To the third question—"I am not a jurist, nor am I competent to answer the question; it does not come within my sphere."

4th. To the fourth question—"I cannot answer this question, it is foreign to the functions which I fulfill."

5th. To the fifth and sixth questions—"I make the same answer as I did to the fourth question."

Mr. Delamarre answered as follows, to the cross interrogatories, put successively by the court.

"I am not acquainted with the parties at issue, I am not a jurist, these questions are foreign to my functions, I cannot answer them."

Mr. De Lamarre answered as follows, to the interrogatories in reply to the cross interrogatories.

"I repeat, that I am not acquainted with the parties at issue; I am not a jurist, it is not possible for me to answer these questions."

Whereupon, Mr. De Lamarre, after reading, signed with the notaries, and retired.

(Signed) De Lamarre.

And immediately intervened Mr. Charles Ledree, advocate of the Royal Court of Paris, residing (in Paris,) Rue du Vingt Neuf Juillet, No. 6, who did, after taking the oath, make the following answers to the aforesaid interrogatories propounded by the Court of Equity.

1st. To the first—"I am not acquainted with Mr. Lacoste, but I am acquainted with Mr. and Mrs. Guillemot, with whom I am on social terms."

2d. To the second—"The document produced appears to me to be a copy, in due form, of a marriage contract, passed according to the French laws; the original thereof must be found in the archives of Royer, Esq. Notary in Paris, who executed it."

3d. To the third—"As a lawyer, I am well ac-

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quainted with the laws of *France, as they existed at the time; this contract is in due form, and its effect is to constitute a valid debt, quoad Mr. Lacoste, of forty thousand francs, from the day of his daughter's marriage, as is mentioned in the contract, and to give a lien (obliger,) on all his fortune for the payment of the said debt."

4th. To the fourth—"This copy is a regular and authentic one; it is sufficient proof of the existence of the original."

5th. To the fifth and sixth questions—"In view of the foregoing answers, a reply to the present one is needless."

To the cross interrogatories, Mr. Charles Ledree answered as follows.

1st. To the first—"A pledge of the kind extends to property subsequently acquired by the donor; it creates, in favor of the donee, a claim having equal rights with other creditors. (See Civil Code, title 3, Chapter 1st, Article 1101, and seq. 1134, and sequentia.")

2d. To the second—"I know that Madame Guillemot, who presents herself as a creditor, is a daughter of Mr. Lacoste the debtor, and that the debt is a pure gift, and voluntary donation, from father to daughter."

3d. To the third question—"I know the facts stated, but I am ignorant of what was the real position of Mr. Lacoste, as respects his fortune, at the date of the contract."

4th. To the fourth question—"I know that the laws of France provide, that in case of insolvency, voluntary debts, such as that constituted by the contract in question, have the same rights as any other debt of the insolvent, and they are paid pro rata."

5th. To the fifth question—"The laws of France allow the same rights to donees of the insolvent, as they do to his other creditors; if there be not sufficient assets to pay all, each

ed a considerable property not included in the assignment, and to enable a creditor to take the benefit of the assignment, he is required by it to release his demand for anything that may remain unpaid. It is not denied that the assignment included all the property,

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rights, and credits, to which Lacoste *was entitled, and which were in this State, but it is pretty clearly established, that he owned, at the time, a considerable property in New York, where he then resided; and the question is, whether that vitiates the deed. I have never seen even a dictum denying that a debtor may not prefer one creditor to another, although he may not have the means

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of paying all his *debts, nor can it be pre-

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takes a share of the assets proportioned to his claim. This is a conclusion from general principles of law, and from articles 25, 725, 893 and 894, 901, 902 and 931, and seq. of the Civil Code."

6th. To the sixth question—"I can imagine no reason for paying Mr. Lacoste's assets exclusively to his creditors, other than his daughter, except in case that Mr. Lacoste had failed before the (date of the) marriage contract; I do not think that Mr. Lacoste was doing bad business at that time; I only (state that I) am ignorant of what was his situation at the date of the marriage contract, and whether he was at the head of his business and trade."

Mr. Charles Ledree answered, as follows, the questions in reply to the cross interrogatories:

1st. To the first question—"An obligation contracted in the terms above set forth, constitutes a real contract, and the contemplated marriage is good and sufficient cause thereof."

2d. To the second question—"When such a debt is contracted, it is like every other debt for a consideration, valid at its date."

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*3d. To the third question—"By the laws of France, a donation, in consideration of an intended marriage, acquires the rank of a bona fide debt, and is equal in rank to any other debt."

4th. To the fourth question—"There appears to me to be no necessity of answering this question."

Mr. Ledree, after reading, signed and retired.

(Signed) Charles Ledree,
Avocat a la C. Royale.

And immediately appeared, personally, Mr. Hippolyte Felicite Paul de Jouvencel, advocate of the Royal Court of Paris, residing in (Paris,) Rue de la Victorie, No. 13, who did, after taking the oath, answer the questions propounded by the Court of Equity, as follows:

1st. To the first question—"I have been well acquainted with Mr. Lacoste, and Mr. and Mrs. Guillemot."

2d. To the second and subsequent questions, to those contained in the cross interrogatories, and in replies to the cross interrogatories, which were all propounded successively, Mr. de Jouvencel having answered in a manner which appeared to the undersigned notaries to be identical with that of Mr. Charles Ledree, the undersigned notaries, in order to avoid useless repetitions, read to Mr. de Jouvencel the answers of Mr. Charles Ledree; Mr. de Jouvencel stated that he approved these answers entirely, that he adhered to them as expressing his opinion on these questions; he added only, that it was within his personal knowledge, that at the date of the said marriage contract, Mr. Lacoste was at the head of his business, and did honor to his engagements.

After reading, Mr. de Jouvencel signed and retired. (Signed) Paul de Jouvencel.
Avocat a la Cour Royale de Paris.

Immediately intervened Mr. Germain Nicolas Thibaut, merchant, one of the judges of the Tribunal of Commerce of Seine, residing in Paris, Rue Neuve St. Enstache, No. 36, and Mr. Jean Lemaine, merchant, residing in Paris, Boulevard Bonne Nouvelle, No. 31, who did, after taking the oath administered by the undersigned Notaries, say that they were acquainted with Mr. Lacoste, of whom mention is made in the case submitted to the Court of Equity of South Carolina, that they have had commercial transactions with him, and that he was at the head of his business, and still did honor to his engagements, towards the end of the year one thousand eight hundred and thirty-eight.

Of all which, the present verbal process has been made; it is entirely in the hand writing of Thion de la Chaume, Esq. one of the undersigned notaries; (in preparing this verbal process,) the undersigned notaries have followed, as nearly as it was possible, the rules prescribed by their commission. They have only derogated from such rules as were incompatible with the laws of France.

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*And Messrs. Thibaut and Lemoine, after reading, signed, together with the notaries.

(L. S.) (Signed) Germain Thibaut.
N. Quinson and Lemoine,
Thion Huillier.

Recorded in Paris, 29th November, 1841, vol. 169, fo. 171, case 7. Received two francs and twenty centimes for tenths.

(Stamp.) (Signed) Dumanoir.

Marriage Contract.

(Stamp.) Before the undersigned, Royer, Esquire, and his colleagues, notaries in Paris, personally appeared Phillipe Eugene Guillemot, student of medicine, residing in Paris, Rue Faubourg, St. Dennis, No. 109, of legal age, son of Mr. Jacques Magnus Guillemot, proprietor, and of his wife, Mrs. Madelaine Julie Antheaume, residing in Paris, in the said Rue du Faubourg, St. Dennis, No. 109, the said Mr. and Mrs. Guillemot appearing for the purpose of countenancing and authorizing their son, and for the purpose of constituting the marriage portion, which they are about to give him.

And Madame Jeane Elvina Lacoste, residing with her father and mother, Lacoste, herein named, of legal age, daughter of Mr. Charles Gregorie Arnauld Lacoste, merchant, a citizen of the United States of America, and of Mrs. Gabrielle Emelie de Rochefort, his wife, both residing in Charleston, South Carolina, United States of America, the said Mr. Lacoste residing, for the moment, in Paris, Rue Grange Batiliere, No. 26, appearing for the purpose of countenancing and authorizing his daughter, and for the purpose of constituting the jointure, which he is about to give to her.

In contemplation of the marriage proposed between the said Guillemot, Jr. and Madame Lacoste, the celebration of which will take place forthwith, the parties have made the following clauses, and civil condition, in presence of, on the part of the future bride, Mr. Armand Coste, her cousin, on the part of the future husband, Mr. Jules Guillemot, his brother.

Article 1st.

There shall only exist, between the married couple, a community of Acquets; (this community) shall be governed by articles 1498, and 1499, of the Civil Code. Wherefore, the community shall not be bound for the personal debts of either party, incurred before the marriage, and all the property, real and personal,

vented, unless the debtor be deprived of the power of disposing of his property altogether. If it consists of money, chattels, or lands, he may pay or transfer the whole to one creditor, if it be necessary to pay the debt, to the exclusion of all others. He may make terms with his creditor, and that is done habitually. He may say to him, "here is an

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*article of property which I will give, if you will accept it in full of your demands." The creditor is not bound to accept it, but if he does, the debt is discharged, whether the property be of the value of the debt or not,—it is a new contract, by which the old is superseded. Now, if the debtor can do all this directly, how is it that a deed, conferring on the assignees the *power to treat with creditors upon precisely the same terms, should be void? As in the first case, so in this—the creditor is not bound to accept, and may look to the responsibility of the debtor. If he accept, with a knowledge of all the facts, it is a new contract, by which he is bound, and being a voluntary act, it cannot be regarded as a very great hardship. But this view of the matter is founded on the supposition, that the creditor had a full knowledge of all the circumstances necessary to enable him to estimate correctly all the means to which he might resort for the payment of his debts. Here, however, there was concealment on the part of Lacoste. There is nothing in this deed, nor is

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which each party now possesses, or may hereafter acquire by gratuitous title, shall be "proper" (the personal property sj.) to such party.

Article 2d.

In consideration of the contemplated mar-

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riage, Mr. and Mrs. Guillemot, *parents of the future husband, constitute in his favor, and as a portion in advance of his share of their estates at their deaths, whichsoever shall first die, and in case of insufficiency, to be taken out of the estate of the survivor.—

A capital of forty thousand francs, to be paid at their pleasure, but producing an annual interest of five per cent. until discharged, which interest the donors obligate themselves, in solidum, to pay to the donee, every six months, at his residence, counting from the day of his marriage.

Mr. and Mrs. Guillemot expressly reserve to themselves the reversion of the said forty thousand francs, in case that their son should die before them, without leaving issue.

Article 3d.

And Mr. Lacoste, in consideration of the intended marriage, acting not only in his own name, but as guaranteeing the consent of his wife, constitutes as a jointure for his daughter.—

A capital of forty thousand francs, which the donors will pay at their pleasure, and which shall produce, until discharged, an annual interest of five per cent. for the payment of which interest Mr. Lacoste obligates himself and his wife, in solidum; (the interest) to be paid to his daughter, at the residence of the future couple in Paris, every six months, beginning from the date of the marriage.

Mr. Lacoste reserves, for himself and for his wife, the reversion of the forty thousand francs, which he has constituted as a portion for his daughter, in case that she should die before her parents, without leaving issue.

The payment of this jointure shall be imputed on the estate of the parent who shall first die; and in case of insufficiency, on the estate of the surviving parent.

Article 4th.

At the dissolution of the community, the survivor shall have the right to take, by way of extra portion, such moveable property belonging thereto, as he may choose, amounting to six thousand francs, according to the inventory then to be made, or to take that sum in money, at his option.

The wife shall be entitled to the said extra portion, though he should renounce the community.

Article 5th.

The future couple make, to one another, reciprocal donation, inter vivos, which is accepted, of the usufruct of all the property, real and personal, which may belong to the party who shall first die.

The survivor, by reason of this usufruct, shall not be bound to give security, nor to invest, but he shall be obliged to make an inventory.

Whereof act.

Done at Paris, at the residence of Mr. Lacoste, father of the future wife, on the twenty-third of May, one thousand eight hundred and

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thirty-six. The *appearers, after reading, signed, together with the notaries. The minute of these presents remains in the keeping of Royer Esquire.

In the margin is the following note. Recorded in Paris, at the 4th Bureau, on the twenty-fourth May, 1836, fo. 36, vol. C. 3, 4, 5. Received five francs for the document, five hundred francs for the constitution of dower, five francs for contingent donation, and fifty-one francs for tenths. (Signed) Boutrais,
(Signed) Royer.

This copy is written on two scrolls, without reference or erasures.

(Notarial Seal.) (Signed) Royer.

The undersigned judge, acting for the President of the Civil Tribunal of Seine, certifies the signature of Royer, Esq. Notary in Paris. Paris, twenty-first day of July, 1840.

(Seal) (Signed) Prudhomme.

I certify the signature of Mr. Prudhomme, Judge of the Civil Tribunal of Seine. Paris, 22d July, 1840, by delegation. Le Chef de Bureau du Ministere de la Justice.

[L. S.] (Signed) Poret.

The Minister for Foreign Affairs certifies the signature of Mr. Poret. Paris, 22d July, 1840. By authorization of the Minister. Le Chef du Bureau de la Chancellerie.

[L. S.] [Signed] Delamarre.

I, Robert de Leaumont, Notary Public and Translator, residing and practising in Charleston, do certify that the preceding pages are faithfully translated from the French original, submitted to me by the Master in Equity, E. R. Laurens, Esq.

In Testimony Whereof, I have hereunto affixed my signature, and seal of office, in Charleston, on the eleventh of May, one thousand eight hundred and forty-two.

[L. S.] R. De Leaumont,
Notary Public and Translator.

there anything in the evidence, to shew that the creditors had any knowledge that he

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owned other property in New *York; and if the creditors had accepted and released, under the deed, there is no question that the releases might have been avoided, on the ground of fraudulent concealment in obtaining them. It may be said, that the creditor who has accepted, is entitled to the benefit of the deed, as he was no party to the fraudulent interest. That Lacoste intended a fraud, there is no doubt, and his acceptance under the assignment, made him, although involuntarily, a party to it. To allow it, would operate injuriously to the other creditors, as, after having exhausted the assigned estate, if that was not sufficient to pay his demand, he might, with the other creditors, have proceeded against Lacoste for what remained due. The case of Jacot v. Corbett et al. (Cheves's Eq. 72,) establishes very clearly, that a voluntary assignment, made by a debtor for the benefit of creditors, if it be made with a fraudulent intent, is wholly void; and that case is also referred to, to shew that this deed is fraudulent; but the cases are not precisely the same. There, the fraud complained of was, that the deed had, itself, provided that the debtor should have a right to retain, for his own use, all the assigned effects, after paying forty per cent. on the debts due to a certain class of creditors; and it was held to be void, on that account, as a fraud in law. This case is stronger—here was fraud in fact. The other creditors, (defendants) object to the claim interposed in behalf of Philip Eugene Guillemot and wife, on the ground that the debt was merely voluntary on the part of Lacoste, and void as to bona fide creditors. As before stated, the wife was the daughter of Lacoste. They were married in France, in 1836, where he then resided; but before the marriage, and in contemplation of it, the fathers of Philip Guillemot and Lacoste entered into an agreement in the forms prescribed by the laws of France, wherein it is recited, that the marriage was forthwith intended to be had and solemnized; and the father of Philip, on his part, undertakes, in his favor, to advance a capital of forty thousand francs, as a portion, to be paid at pleasure, and to pay thereon five per cent. per annum, until the principal should be paid; and Lacoste, on his part, undertakes, in favor of his daughter, to advance the same amount of capital, in the same manner, and upon precisely the same terms. The question is, whether that contract was voluntary and void, as to the creditors of Lacoste. Lacoste was, at the time carrying on extensive mercantile operations in this city, and in New York, and

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owned visible property of considerable *value, but his credit began to be suspected by those best acquainted with his affairs, as early as 1834, and there is no question that he was largely indebted at the time he entered into this contract. He then owed the debt of about twenty thousand dollars, claimed to be set up now by the defendants, De Villers; but there is no means of ascertaining whether, at the time, he could afford, in justice to his creditors, to make this provision for his daughter; and the claim must rest on the question, whether the marriage, and the advancement made by the father of Philip, was a valuable consideration.

Marriage is generally regarded as a valuable consideration for a contract, and I believe it is somewhere said, and perhaps with justice, that it is the best; and although it may shock the lovers of romance, I do not know why a parent may not buy a husband for his daughter, or a wife for his son. In real life, it is often done. Paupers may, and do often, intermarry, and get along well enough in the world, and marriage is very often unequal and inconsiderate. Prudent persons, however, look to the future; and parents are unwilling that their children, especially daughters, should enter into the contract of matrimony, without a reasonable prospect of their wants being suitably provided for; and I cannot see any reasonable objection to their stipulating for it. There is nothing in morals opposed to it, nor do I think there is anything in the law which prohibits it. Now, let us suppose that the parents of young Guillemot and wife held commune together, with respect to the intended marriage of their children, and had reasoned, as well they might, that without some provision for them, they might be subjected to want; and that to remove this difficulty, they agreed, each with the other, to contribute equally to raise a fund for their support. Is not their mutual undertaking a valuable and legal consideration? Would not the violation of the contract be a breach of good faith between the parties to the contract, and a fraud upon the married couple, who might have been seduced into the marriage in the prospect of such a provision? And is the law so harsh as to demand that such a contract should be set aside? I think not. In Davidson & Simpson v. Graves, Riley's Eq. 219, the intended husband, who was largely indebted, settled the whole of a very large estate on his intended wife, and the settlement was held to be void as to creditors, because the value of the settled estate was so disproportioned to the probable wants of a family, as to furnish intrinsic evidence

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that there was a settled purpose *to defraud creditors. Here, Lacoste was engaged in extensive mercantile transactions, which, if fortunate, might result in wealth. He owned other visible property of considerable value, and with these prospects, he might have reasonably and fairly concluded, that this

was but a reasonable provision for his daughter; and if a contract be fair and valid in its inception, subsequent events could not render it otherwise. I am, therefore, of opinion, that this claim is entitled to stand on the same ground as the others. There is no exception as to the validity of the claims of the other defendants: some, perhaps all of them, have obtained judgments against Lacoste, and it is claimed that they ought first to be paid in the order of the priority; but in this court, equality is justice; no such thing as priority, except legal liens, is known here. Creditors stand here all on the same footing. The defendants, Marie C. DeVillers and Felicite DeVillers, who reside in France, authorized an agent in Savannah to accept for them, under the assignment, as soon as it might be supposed they had notice of it; but the authority did not arrive, and the offer to accept was not tendered until after the time limited by the deed had expired. They claim, however, to be entitled to the benefit of the conditions of the assignment, but, for the reasons before given, it cannot be allowed.

It is, therefore, ordered and decreed, that the costs of the several parties to this suit be paid out of the fund in the hands of the master; and that the residue of the said fund be paid to the several creditors, rateably and in proportion to the amount of their respective demands.

From this decree, the defendants, the Misses DeVillers, appealed, on the grounds,

1. That marriage is not a valuable consideration to support a conveyance, except as between the husband and the wife; and a gift by a father to his daughter, on her marriage, is as purely voluntary, and as unavailing against existing creditors, as a gift made at any other time, or to any other person.

2. That an agreement to give, is not a gift; and even where the latter may be supported, the former will not be enforced, especially against creditors of the donor at the time of the agreement to give.

3. That for the foregoing reasons, the claim of Guillemot and wife should have been rejected by his Honor; but that, at all events, the claim of Guillemot and wife should have been limited to the arrears of annual inter-

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est, if any be due, secured to them *by the marriage contract: and that there is no ground on which Guillemot and wife can be regarded as creditors for the amount of the principal, especially as the reversion is expressly reserved to Lacoste and wife, and is, moreover, payable only at the pleasure of Lacoste.

The defendant, Poincignon, appealed, on the above grounds, and also on the further ground,

That as the assignment was declared to be void, because of fraud, the fund arising from the sale of the assigned estate should have been distributed among the judgment creditors, according to the date of their respective judgments.

The defendants, Guillemot and wife, appealed, on the ground,

That the assignment to the complainants was valid.

Kunhardt, for Poincignon, submitted that Lacoste's assignment to the complainants was void, for actual or constructive fraud. The badges of actual fraud were, 1, the settlement of Lacoste on his wife, which was declared void by the verdict of the jury. 2. The fact that the assignment to the complainants was made but a few days after that verdict was rendered. 3. The assignment in New York, which shews that the first assignment did not contain, by a large amount, the whole of Lacoste's property; and which was made just before Lacoste returned to South Carolina to take the benefit of the insolvent debtor's Act.

If these circumstances are not sufficient to convince the court of the mala fides of the transaction, then the deed must be set aside, because contrary to the 13 Eliz. 2 Stat. 496. In Jacot v. Corbett, it was held, that if the creditor stipulates for a release, and reserves an interest to himself, the assignment is fraudulent as against creditors. In that case the interest reserved was expressed on the face of the deed. In this case, the interest reserved is dehors the deed, to wit, the property mentioned in the New York assignment. He cited 5 Johns. Ch. 332; 11 Wend. 107; 1 Ed. Ch. R. 451.

If the assignment is set aside, the judgment creditors should be paid according to their legal priorities, and not pro rata with the other creditors. 2 Blackf. 485; 1 Amer. Ch. Dig. 160.

As to the claim of Guillemot and wife. The promise is, to pay at the pleasure of Lacoste —can such promise constitute a debt? Again; the debt is contingent and uncertain, —either Lacoste or his wife,—the one who dies first,—is to pay. 8 Ves. Jr. 335. 27 Law Lib. 149. Lacoste was indebted, at the time

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*the contract was entered into: is it not therefore fraudulent as to his creditors? 1 Bail. Eq. 229; 4 Johns. Ch. 450.

Magrath, for Guillemot and wife, contended that the assignment to the complainants was valid. The property omitted could not have been reached by any process which the courts of this State could issue. The creditors, therefore, were not delayed and hindered within the meaning of the Statute of Eliz. 1 Story Eq. § 366–7; 4 Johns. Ch. 452; 1 Story Eq. 362, note 2. The mere stipulation for a release does not vitiate an assignment. Ang. on Ass. 28; 7 Wheat. 566; 4 Mason, 206; 14 J. R. 458; 20 Ib. 442; 2 Hill Ch. 452; 2 Wash. C. C. R. 69; 4 Mason, 312. If

the deed to the complainants was fraudulent in its inception, was it not made valid by the New York assignment? 3 Bac. Abr. 315, Fraud. C.

He contended that the validity of the marriage contract must be determined by the laws of France. Story Contl. Laws, § 276. Such contracts are favorably regarded, 3 Des. 594, and marriage is the highest consideration known to the law. 2 Des. 269. He cited 2 Hill Ch. 31; Bail. Eq. 141, 230; Ather. Mar. Set. 202, 129; 2 Vern. 183; 3 Johns. Ch. 495; 6 Ves. 759; 17 Ib. 271; Cowp. 706; 9 Ves. 193, where a settlement by a father on the marriage of his son was declared valid, and ex parte Winchester, cited in 1 Atk. 116, where a bond given by the wife's father to the husband on the marriage was holden good. As to the objection, that the debt was payable at pleasure, it was enough, he said, that it was a debt by the laws of France. 3 Atky. 188 note; 2 P. Wms. 600.

It is objected that the contract should have been recorded here. Surely our Acts requiring marriage contracts and settlements to be recorded, do not apply to contracts entered into in foreign countries, by foreigners, whose creditors are foreigners, and where no property in South Carolina is conveyed.

He contended that Guillemot and wife, having accepted the assignment, were entitled to be paid in preference to all other creditors; 4 Wash. 233.

Bailey, for the Misses De Villers, contended that the assignment of 1840 was void, on account of actual, as well as legal, fraud. Courts of justice have held, but with great reluctance, that a debtor may make an assignment, giving preferences among his creditors. They have also held, that he may stipulate for releases, where the assignment contains every thing, and is bona fide. In this case the assignment was not made in good

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faith. *It did not contain all that Lacoste was worth. It would be monstrous to decide, that a debtor may make a valid assignment, omitting property, and stipulating for a release. What is the principle on which the court proceeds in holding the stipulation for a release valid? It is this. That an honest debtor, who gives up every thing, ought not to have his future industry cramped and restrained, by a heavy load of debt. Does Lacoste's future situation, supposing him to have retained twenty or thirty thousand dollars worth of property, require that his industry should be unfettered?

It was not necessary to consider whether the New York assignment was supplemental to the Charleston assignment, and made it valid, although void in its inception. The New York assignment was executed just before Lacoste returned to South Carolina, to take the benefit of the insolvent debtor's Act, and was therefore itself a fraud.

If the assignment is set aside, the assets, he said, must be distributed in pari passu. Equity delights in equality. The judgment creditors had no liens on the assets in the hands of the assignees, and the bill was filed not to set aside the deed, but merely to have its trusts declared. 1 Story Eq. § 352-3; Bail. Eq. 296.

The last question is, are Guillemot and wife creditors of Lacoste? The policy of the law of this State is, that a voluntary deed shall not prevail against creditors. Shall this policy be overruled by the French law in relation to realty? In construing a contract, the court will be governed by the lex loci, but in giving effect to it, the lex fori prevails. Story Contl. from § 303 to § 328. By the policy of our laws, marriage contracts must be recorded. If this deed prevails that policy is violated. Guillemot and wife are driven to this alternative: either the settlement is voluntary, and therefore fraudulent as against the creditors, especially those who were creditors at the time the contract was made, or else it is a marriage contract—supported by the marriage consideration—and therefore void because not recorded.

Hunt, for Guillemot and wife, said there were but two questions important to his clients. 1. Is the assignment valid? 2. Are Guillemot and wife creditors?

The validity of the assignment depends upon but a few fundamental principles. It is clear from the decided cases that a debtor in insolvent circumstances may prefer one

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creditor to *another, and however hard or unequal it may be, the power necessarily results from the absolute dominion of the owner over his estate. It is equally well established, that if a debtor may set apart and deliver any part of his estate in payment of any particular debt, he can also convey the same property to a trustee for the same purpose. It is only a mode of doing the same thing. The next matter to be considered is, whether a stipulation that the creditors so favored shall release the debtor, as a condition of the preference, vitiates the deed. Why should it? It is the every day course of business for one to compound with a creditor, by giving a release. It is perfectly optional with the creditor to receive payment on this condition, or to pursue his remedy at law,—volenti non fit injuria,—and at least if the creditor consents to the arrangement, other creditors cannot complain, as this arrangement lessens the number to compete for what is left. If, then, a creditor consents to release his debtor, on receiving a dividend under such an assignment, the court has no authority, on the complaint of another creditor, to set it aside. If the debtor may convey absolutely, then none but those on whom the condition is imposed can complain. In this case Guillemot and wife are satisfied to re-

lease. Thus far, then, the case is clear on principle. It is also to be remarked that the release stipulated for does not extend to the property of the debtor, but only to his person. All the above principles are fully discussed and laid down as good law, by Chief Justice Marshall, with his peculiar power and clearness, in 7 Pet. R. 615.

The principal grounds on which deeds of assignment have been declared void and fraudulent, will now be noticed, and none of them apply to this case. The class of cases most usually referred to, and commented upon in the case of Jacot v. Corbett, is that where the debtor removes the property beyond the ordinary process of law, and thus compels the creditor to stipulate something in favor of the debtor, as a condition of obtaining payment; that is, giving the debtor an interest in the identical property assigned, or some other property of the debtor. And thus, when Corbett stipulated, that on receiving forty per cent on their debts, the residue of his estate should revert to himself, this was held fraudulent, both at common law and under the 13 Eliz. So, where it was stipulated that, unless the creditors all released, the property should revert to the donor, and generally where the grantor does not part absolutely with the property, so as to have no interest which can revert, until the

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*creditors are all paid in full, it has been deemed a hindering and delaying creditors, and the assignment has been deemed void under the statute. But when all property in the assigned estate is absolutely parted with, and if one set of creditors do not take it, it goes to others, and finally to general creditors, the case amounts simply to a preference which is admitted to be lawful. In this case, the trusts are, first, in favor of the accepting creditors, and second, in favor of all creditors generally; so that the debtor parted with all his interest, giving a preference to those who released him.

It must be remarked, that the statute only applies to property leviable by execution. As to choses in action, if conveyed, there must be some other ground than mere hindering and delaying creditors; and in fact the court does not, in such cases, vacate the deed, but controls the execution of the trusts, so as to prevent fraud.

The next class of cases which is insisted on, as coming within the prohibited kinds of conveyances, embraces what are called partial assignments, or conveyances of part only of the debtor's estate. If this is not done fraudulently, it is not easy to perceive how that can affect the conveyance. Why may not a man say to his creditors, here is property which I will deliver to you, if you will give me a personal release; if not, you must take your chances according to your legal rights. If any one or more creditors assent and give the discharge, what claim have other creditors to set aside the conveyance? If a payment in full would be only a legal preference, surely other creditors cannot complain that the preferred creditors have received but a part of their debts, and thus left more for themselves. The only case which can give rise to any difficulty, is this: If the debtor conveys, or purports to convey, all his estate, and his creditors release, under the mistaken impression that they had received all the effects of the debtor, and thus had executed a true bankrupt discharge. What, then, is the legal operation of the deed? Certainly it is not void. As far as it extends, it is legal. The difficulty arises as to the omitted property, and as to that, the remedy is clear. The law would compel the debtor to convey the residue, and thus perfect the first deed, according to the intent of the accepting creditors; for a donor is bound to comply, according to the understanding he knew he conveyed to the accepting creditors.

The fraudulent intent of the debtor cannot

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be imputed to the *accepting creditors. They, at least, are innocent; and then the question arises: if there are two classes of creditors, one who do, and one who do not, accept such partial assignment, what will be their relative rights? If the accepting creditors waive all objections to the partial character of the conveyance, it is not easy to perceive what right the other creditors have to complain. And if the accepting creditors attempt to subject the residue of the property, and set aside their releases as obtained under false pretences, they must do equity; and as equality is equity, they must relinquish any preferences under the deed. In that case, the deed would not be vacated, but the cumulative remedy of subjecting the residue of the estate, would be afforded on equitable principles. Thus it results, if the accepting creditors do not seek any redress, the deed stands; if they do, it stands for what it is worth—and the general creditors are let in, if the other property is subjected to the assignment. Apply these rules to this case. The accepting creditors are satisfied, and do not seek any part of the New York property. The deed is therefore valid. It is due to the debtor to remark, that the New York property was the valueless remains of a broken concern, and only conveyed for form sake. The authorities to support the above principles are 4 Dal. 76; 7 Pet. 615; 5 Mass. Rep. 42; 1 Edw. Ch. 451; 5 Pick. 265; 6 Green. Rep. 395; Ang. on Ass. 96, 108. The doctrine, as a text, may be seen in this sentence. "The circumstance of the debtor assigning over to trustees all his property, without any reservation to himself, and giving the surplus, if any, to those creditors, if any, who do not come in and agree to release on taking their preferred share, is deemed to disarm the transaction of all unfairness and

ill gotten." This is the rule, certainly, where all the debtor's property is assigned. Now, we must distinguish this case from one where a part of the property was designedly withheld. This would be evidence of a design to compel a universal release, leaving a part of the debtor's estate to himself, and thus something like an express reservation of a part of his estate to himself. But in the case before the court, Lacoste clearly intended to convey all his estate, and for all useful purposes did so; and afterwards went through the form of adding these worthless claims, at a time when he was not informed of the state of the assignment and the releases. In fact, as the New York property was out of the State, he may have thought he could not include it

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in a deed executed here. *At all events, the circumstances negative any fraudulent intent, and the accepting creditor is content.

The marriage deed constitutes a valid debt due by Lacoste; if so, he might pay it equally or by preference. To decide whether it did constitute a valid debt, we must resort to the law of the place; because the parties are supposed to contract with reference to that law. Thus, the true meaning and consent of the contracting parties, is ascertained by referring to the laws under which they lived. The interest was to be paid in France—the parties were domiciled there. What the law of a foreign country is, is ascertained either by an authentic publication, or the opinions of local jurists obtained by commission. We have examined two eminent jurists, practitioners in the highest courts of Paris, and they concur in stating that the marriage contract created a debt from the date of the marriage. But a dilemma is presented thus. If the consideration was marriage, then it is a marriage contract, and must be recorded in this State. If not, then there was no consideration, and it is void against creditors. To this, there are two replies. 1. Marriage was, it is true, the inducement, but the payment of an equal amount by the husband, through his father, of a part of the son's inheritance, was a valuable consideration. Again, it was not a settlement by the husband, but an advancement by the wife's father, and so a lawful contract. It conveyed no visible property, and did not come within the meaning of the recording Acts—which are intended to guard against liens on visible property. If a father gives his son a bond as a marriage portion, it is a good debt, although not recorded; but if he conveyed to him a house, it might be different. It is questionable, however, whether the law refers to any other settlements than those of the wife's or husband's property.

But it is urged that Lacoste was in debt, and also insolvent, because the event proved him to be so some years after, and the case of Izard v. Izard is referred to; but there Mr. Izard was a planter, and no casualty had intervened to affect his estate. Here Mr. Lacoste was a merchant, and came within the influences of the storm that in 1837 prostrated so many of the first houses both here and in Europe. He was, at the time of the marriage, at the head of his business, and honored his engagements. It was a sacred debt. Both husband and wife had encountered the charges of a family on the faith of it, and he might well have preferred it.

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But his aim was justice to *all his creditors. He was the victim of misfortune, and was willing at least to save his honor from the wreck.

Curia, per JOHNSTON, Ch. This appeal has been twice extensively argued; first before all the Chancellors, and again in this court; and I have formed an unhesitating opinion upon all the points involved in the cause, and a majority of the court, concurring in it, have directed me to announce the conclusions to which they have come. If, in performing this duty, I do not take notice of all the topics to which our attention has been directed by counsel, this seeming neglect does not proceed, in the slightest degree, from insensibility to the uncommon research and ingenuity of their arguments, but from a persuasion that in a more limited view the subject will be seen in a clearer light.

In considering the questions presented, perhaps the most natural method will be to examine, in the first place, the claim of Guillemot and wife, the only accepting creditors; for if this demand should, upon investigation, prove invalid, it will be unnecessary to enquire into the validity of the assignment of June, 1840, since the assigned assets will, in the case I have supposed, be as effectually thrown open to the remaining creditors, who have not accepted, as if the assignment were formally set aside.

The claim we are now to examine, arises out of articles executed in Paris, immediately preceding, and in contemplation of, the marriage of Guillemot with the daughter of Lacoste. They were executed and registered with all the solemnities required by the laws of the country, and were subscribed not only by the affianced parties, but by Lacoste, the father of the intended wife, and by both the parents of the intended husband; the parents on both sides mutually stipulating a portion of 40,000 francs, on behalf their children respectively, payable at their (the parents) pleasure, but bearing an annual interest of 5 per cent. until discharged.

The evidence is, that Lacoste's credit was good at the time, and that he continued to honor his engagements, and was at the head of his business for several years afterwards, though he was indebted at the date of the articles, and eventually failed here, where they have never been registered. This contemporaneous indebtedness, and this nonregistration, are the principal objections urged

against the validity of Lacoste's undertaking.

The general doctrine is reasonably settled, that the validity and construction of a con-

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tract are, throughout the world, to be *determined by the laws of the country where it was entered into; Story Confl. Laws, ch. 8, passim, (especially if, as in this instance, it was intended to be executed there,) though its lien and operation, and all priorities of right under it, are generally limited to that country—and in enforcing or executing it, the tribunals of other countries are not bound to give it any effect, so far as it may contravene the policy of their own States; Story Confl. Laws § 323–4–6.

Mr. Charles Ledree, advocate of the Royal Court of Paris, whose examination was put in evidence at the hearing, testifies: "As a lawyer, I am well acquainted with the laws of France as they existed at the time; this contract is in due form, and its effect is to constitute a valid debt quoad Mr. Lacoste, of forty thousand francs, from the day of his daughter's marriage." "It creates, in favor of the donee, a claim having equal rights with other creditors." "The laws of France provide, that in case of insolvency," (supervening) "voluntary debts, such as that constituted by the contract in question, have the same rights as any other debt of the insolvent, and they are paid pro rata." "The laws of France allow the same rights to donees of the insolvent, as they do to his other creditors; if there be not sufficient assets to pay all, each takes a share of the assets proportioned to his claim." "I can imagine no reason," he says, "for paying Mr. Lacoste's assets exclusively to his creditors, others than his daughter, except in case that Mr. Lacoste had failed before the date of the marriage contract." "An obligation contracted in these terms, constitutes a real contract, and the contemplated marriage is a sufficient consideration." "When such a debt is contracted, it is, like every other debt for a consideration, valid at its date." "By the laws of France, a donation in consideration of an intended marriage, acquires the rank of a bona fide debt, and is equal in rank to any other debt."

Mr. Paul DeJouvencel, advocate of the same court, referring to the answers of Mr. Ledree, said that he approved them entirely, and that he adopted them, as expressing his own opinions; "adding, only, that it was within his personal knowledge, that at the date of the marriage contract, Mr. Lacoste was at the head of his business, and did honor to his engagements."

This is the evidence as to the validity and construction of the contract in question, and it leaves no room for doubt, that it is valid, and constitutes a debt to the extent of Mr. Lacoste's engagement, dating from the mar-

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riage. Indeed the witnesses *Ledree and Jouvencel, in other parts of their testimony which I have omitted, seem to go further, and to establish that the contract created a lien covering not only the then existing property, but extending to the subsequently acquired property of Lacoste. But I have not attended to this, because it is pretty clear that the allowing of a foreign lien is rather a question of policy. As observed by C. J. Marshall (Harrison v. Sterry, 5 Cranch, 289, 298 [3 L. Ed. 104,] and see [Shelby v. Guy] 12 Wheat. 361–2 [6 L. Ed. 495]) "the law of the place where a contract is made, is, generally speaking the law of the contract; that is, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and rather a personal privilege dependent on the laws of the place where the property lies, and where the court sits which it to decide the cause."

But if we were at liberty to decide the validity of Mr. Lacoste's engagement by our own law, we must come to the same result. There is no doubt that responsibilities incurred by the opposite contracting parties form a sufficient consideration to support a contract. It may not be necessary to inquire how far the venturing upon the conjugal relation, with all its cares, and dangers, and duties, by the intended wife, entitled her to insist on this principle of law as against her father, nor whether the assumption of the grave and multiform responsibilities of the relation by the husband, do not constitute him, in the best sense of the word, a purchaser of the benefits of the collateral contract, (a point well settled.) It is sufficient to observe that a full consideration arises, as against Lacoste, from the correlative and mutual obligation undertaken by the parents of Guillemot on the other side. But the objection that these articles were not duly recorded in this State remains to be considered.

It is said that this is a marriage contract, and, as such, required to be published by registration here, and that for want of this statutory pre-requisite, we cannot give effect to it.

This contract rests not only on the marriage consideration, but upon the counter engagement of Guillemot's parents: and if the former gives it the savour of a marriage contract, the latter would seem to entitle it to stand upon other grounds, and to free it from the necessity of registration. Bank v. Brown, 2 Hill Eq. 558, [30 Am. Dec. 380.]

But I am disposed to enter into the very objection presented, and this rather as the end to which Mr. Lacoste looked, in this transaction, was manifestly the marriage of

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his daughter, and *the motive with which he entered into the contract, and accepted of

the stipulation of the other parties, was to bring that marriage about, and provide for its consequences.

For the purpose, therefore, of meeting the question presented, it may be conceded that this is a marriage contract. It must be constantly borne in mind, however, that, as such, it is valid by the laws of France, where it was made, and stands upon full consideration; and that the only objection to it, is its non registration: an objection which, in the case of a foreign contract, cannot apply to its validity but only to its operation.

The question is, is its operation to be disallowed for mere want of registration? I think not.

As a contract not amounting to a settlement, this instrument does not fall within the provisions of the Act of 1823, 6 Stat. 213, but under the operation of the Act of 1785. (4 Stat. 656, 6 Ib. 636.) For the understanding of the commentary which I shall make, the words of this latter statute must be closely attended to. "Whereas, the practice prevailing in this State, of keeping marriage contracts and deeds in the hands of those interested therein, hath been often times injurious to creditors and others, who have been induced to credit and trust such persons, under a presumption of their being possessed of an estate subject and liable to the payment of their just debts; for remedy whereof, and to prevent such deceitful practices,

"Be it enacted, &c., That on or before the first day of September next, all and every marriage contract, deed or settlement, now actually existing, after being duly proved, shall be recorded, or lodged in the Secretary's office of this State, to be recorded; and where such contracts or marriage settlements, or the parties thereto, are without the limits of this State, then and in such case, the parties interested therein shall be allowed twelve months from the passing of this Act, to record, or lodge such contract as aforesaid in the office aforesaid. And all that shall hereafter be entered into for securing any part of the estate, real or personal, in this State, of any person or persons whomsoever, shall, within three months after the execution thereof, be duly proved, and in like manner be recorded, or lodged in the said office to be recorded, excepting such as shall be entered in without the limits of this State, which shall be recorded, or lodged to be recorded, in the said office, within twelve months from the date thereof: And in case any person or persons whomsoever, interested in such mar-

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riage deed, contract, or *settlement, shall neglect or refuse to record, or lodge the same, in the manner or within the times before mentioned, in the office aforesaid, to be recorded, then the same, in respect to creditors, shall be deemed, and is hereby declared to be, fraudulent; and all and every part of the estate thereby intended to be secured to such person or persons, shall be subject and liable to the payment and satisfaction of the debts due and owing by such person or persons, in as full and ample a manner, to all intents and purposes whatsoever, as if no such deed, contract or settlement, had been ever made or executed." (*b*)

The cases shew that in the interpretation and application of this statute, the inquiry has hitherto been generally confined to the question, whether the instrument under examination fell within the definition of a marriage contract or settlement, and if it came within that description, the instrument has been condemned for want of registration, without making the further enquiry, whether the person raising the objection was entitled to complain:—whether, in fact, he was one of those persons intended by the statute to be protected by the recording which it enjoins. But this is the most material enquiry of all, and first in order. It has recently been decided, unanimously, by a full bench, that however sweeping the terms of this statute, and that of 1823, yet being remedial statutes, they are to be construed according to their spirit and real intent, and that there are persons whose protection did not enter into the purpose of the legislature, and who therefore have no right to complain of a non compliance with their directions. Fowke v. Woodward, Speers Eq. 233. If, by a fair interpretation of the Act of 1785, it be found that the mischief intended to be remedied by it was a concealment of the marriage articles or settlement from the creditors of the married parties, and that the remedy was provided for the benefit of these creditors, it must follow that the creditors of Guillemot and wife alone, and not the creditors of Lacoste, can be heard here;—and can there be a doubt that this is the true interpretation of this Act? The preamble describes the mischief to be the practice of concealing the instrument by "those interested therein," to the prejudice of those who may be induced to trust "such persons" under the mistaken sup-

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position, *that the property in their hands is not settled, but subject to "their" debts,—and it expressly recites that the object of the Legislature is to remedy this mischief and suppress this deceit.

The duty of registering the instrument is plainly imposed on the persons benefited by it, and if this were less clear from the terms of the Act, its title (*c*) is sufficient to dispel all doubt upon the subject. Where the con-

(*b*) It will be observed, that in quoting this Act, his Honor has used the copy, printed from the manuscript of Mr. Grimke, in 6 Stat. 636, and not the Act as it was engrossed, and as printed in P. L. 557, and 4 Stat. 656. R.

(*c*) "An Act to oblige persons interested in marriage deeds or contracts to record the same in the Secretary's office of this State."

tract or the parties are in the State, a shorter time is allowed; but where either the instrument or the parties are out of the State, a longer time is allowed to "the parties interested therein" to effect the registration. Then the consequences of neglect are pointed out. If the parties "interested in such deed, contract or settlement," neglect to record it, it shall be deemed fraudulent "in respect to creditors." Whose creditors? Why, surely the creditors of "the parties interested therein,"—the creditors of "such persons" as by concealing the settlement which they were directed to record, have induced these creditors, (says the preamble,) to trust them by the delusive exhibition of property in their hands apparently liable to "their" debts. If this can possibly be still doubted, let us read the Act further. What is the precise consequence of the fraud on the creditors? Why, simply, that the "estate thereby intended to be secured to such persons," shall be thrown open, not to the creditors of every body or any body, but to the creditors of the parties interested, and made as liable to the debts due by them as if no such deed had been executed.

I cannot hesitate for a moment, as to the true spirit and proper construction of this Act. The registration required by it, was intended exclusively for the benefit of creditors of, and purchasers from, the persons interested in the contract or settlement; and none but they can complain of the want of registration.

One or two further objections to this claim of Guillemot and wife remain to be noticed; but they were so feebly urged that they had nearly escaped me.

One of them is, that no debt is due for the capital of forty thousand francs, which was payable at Lacoste's pleasure, but only for the interest as it accrues, which alone should be provided for. But the French lawyers say that the contract constitutes a debt (and even a lien) for the full amount, from the

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time *of the marriage. If this were not so, probably the detention of the interest was sufficient to render the capital demandable instantly. But this matter is put beyond doubt by the subsidiary assignment of January, 1841, in which Lacoste recognises the capital as a debt, and indicates his pleasure by a direction that it be paid.

Another objection is, that by the terms of the contract, a reversionary interest is reserved to Lacoste and his wife, in case their daughter should die in their lifetime without leaving issue. But this is such a contingent interest in Lacoste, as cannot be attached upon at this time for the benefit of his creditors. The debt is due now. Certainly, Lacoste could not excuse himself from the payment of it, on the ground that by a bare possibility a future right may spring up on his part to reclaim the money. When the contingency happens, he may make his claim; and his creditor's rights, being dependent upon his, must obey the same rule.

The next question relates to the validity of Lacoste's assignment of June, 1840. The Chancellor condemns this instrument, on the ground of intentional fraud; and I am of opinion his conclusion must be supported.

The case is briefly this. The debtor, being possessed of property not only in this State, but elsewhere, by his deed of assignment, purporting to be executed in fulfilment of a design, which it recites, of paying his creditors, rateably, "as far as his property, of whatever kind, will extend," conveys, as his whole estate, only so much of his property as lies in South Carolina, taking no notice whatever of the existence of any extra-territorial property. By the terms of the deed, he gives a preference to such creditors as shall, within a limited time, release him from whatever portion of their demands may not be extinguished by the property assigned, and if any balance remains of the assigned assets, after paying off the accepting creditors, it is to be applied to his debts generally. A single creditor, whose demand falls short of the property included in the assignment, has accepted; the rest, whose demands far exceed it, dissent and attack the instrument.

The argument in support of this deed is, that preferences among creditors are allowable, and that the dissenting creditors here, could not, therefore, have complained if they had been entirely excluded, instead of having been allowed the privilege of ranging themselves in the preferred class. That if

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they have *lost that advantage, this was the consequence of their own voluntary neglect; and, after all, their default has only resulted in a case of mere preference—a preference which has worked no injury to them as dissenting creditors, inasmuch as, by the very terms of the deed, all the remaining property covered by the assignment, is still open to them, and all the extra-territorial property is as liable as it would have been if no such deed had ever been executed. The fraud lies in a delusive offer of alternatives to the creditors, some of which they dare not accept, without subjecting themselves to conditions, the consequences of which were carefully concealed from them, (or rather covered by misrepresentation) and which were calculated to secure advantages to the debtor to which he was not entitled.

Will it be denied that every creditor had an interest in this assignment from the moment of its execution? If not, then the professions of the instrument were delusive. Will it be denied, that a free choice among the alternatives presented, was, in itself, one of the benefits proposed? If so, there should have been no lurking danger to attach, if the creditors should make an unwary choice.

The scheme of this assignment was such, that the creditors were to be led on to accept, under the expectation and belief that the assignment covered their debtor's whole estate, and that the releases which were exacted were to be an empty discharge of his future, and merely possible, acquisitions. But if they had accepted and released, they would have found, to their surprise, that they had been tricked into a discharge of property that should have been accessible to their demands. It is no answer to this to say, that if they had so released, they were entitled to have the releases set aside. For on what ground would they have been thus entitled? On the ground of fraud in obtaining them. And how obtained? By the instrumentality of the assignment professing to contain an entire surrender of their debtor's property, whereas, it embraced but a part of it. What is this but to admit, indirectly, that the deed was, in itself, fraudulent?

The defence of this deed proceeds upon a misconception of the true grounds of objection to it.

The ground is, not that it gave a preference; Vaughan v. Evans, 1 Hill Eq. 414, and innumerable other cases, shew that preferences, fairly given, are allowable.

Nor is it the exaction of a release for any unsatisfied balance; Niolon v. Douglas, 2 Hill Eq. 443, [30 Am. Dec. 368,] a case decid-

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ed almost *unanimously by both benches, and to the entire satisfaction, so far as I know, of the profession, is authority for such an exaction when made under fair circumstances. The difference between the assignment in that case and in this, is immense. That, not only professed to be, but was, a surrender of the debtor's whole property. This is a partial surrender, with a deceitful coloring leading to a belief that the whole was given up. The fraud here, consists in an artful combination of two things, each of which is, in itself, lawful; preferences given as the premium of releases exacted—and in the application of them to a case where the first thing demanded by justice, to wit, a full surrender of the debtor's property, has not been performed. In Jacot v. Corbett, Cheves's Eq. 71, it was held, that a reservation for the debtor's benefit, was a direct fraud. The effort here, was to obtain the sanction under the hands of creditors to a similar benefit, which benefit was concealed from them by their debtor. The result, if the effort had been successful, would have been the same in the one case as in the other,—and shall it be said, that the intention to produce a fraudulent result, is not a fraudulent intention?

A passage in Niolon v. Douglas, 2 Hill Eq. 451, [30 Am. Dec. 368,] has been commented on, as giving the substance of the argument in support of Lacoste's assignment. It is there said, "Johnson's assignment would not have been invalid, if he had simply preferred his other creditors over the plaintiff. It would have been clearly valid, if he had surrendered to the other creditors without condition. I suppose it would have been equally valid as against the plaintiff, if, in his surrender to them as privileged creditors, he had required releases from them. Such a requisition, so far from being a subject of just complaint with the plaintiff, would have been greatly to his advantage, by freeing the debtor's after acquisitions from claims which might otherwise have stood in the way of his obtaining satisfaction of his debt. Then, if it would have been no fraud in the debtor to prefer others over the plaintiff, with or without conditions, is he defrauded by giving him an opportunity to participate with them? an opportunity which it would not have been fraudulent in the debtor to have denied him. If the plaintiff refuses to accept the condition proposed, his refusal only reduces him, by his own voluntary act, to the position of an unpreferred creditor. He is not only left

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uninjured, but, as I *remarked before, he is positively benefited by the condition, although he has not accepted it; the acceptance of it by others having warded off competing claims from the debtor's after acquisitions." I adhere to every word of this passage; but I cannot apply one word of it to the case of a partial and deceptive surrender.

In Johnson's case, no fraud could have been perpetrated upon creditors, either accepting or dissenting. If they accepted, they got all their debtor was worth, and their release of any unpaid balance was an empty thing. If they dissented, they did so in the face of their debtor's honest proposal to do all for them in his power to do, and knowingly took their chances to be paid out of his future acquisitions.

When, therefore, it was asked, "if it would have been no fraud in the debtor to prefer others over the plaintiff, with or without conditions, is he defrauded by giving him an opportunity to participate with them?" The answer must, evidently, be "no." But why? Simply because none of those who took the preference and released, were, or could have been, defrauded. But here, every creditor who might accept beyond the amount of the assigned assets, in which case only would the required release have been of any import, would have been defrauded; and it was a delusion and a mockery to hold out, under specious appearances, an opportunity and a temptation to the dissenting creditors to share in such consequences.

The matter appears very plain to my mind, and I have, I fear, labored it too much, with the hope of making it as plain to others.

Two circumstances have been selected to secure this transaction from the imputation of bad faith. It is said that Lacoste, had his designs been unfair, might have confessed

a judgment to his daughter and son-in-law, and his abstaining from this is evidence of good intentions towards all his creditors. He put them all on one footing. This argument assumes that the motive of the fraud was parental and not selfish. But the reservation of property, to be secured by the releases exacted, was in his own right and not in right of his daughter, and it was himself alone who was to be benefited. Was this less a fraud, because, in its scope, it extended to all his creditors—his daughter as well as the rest?

Another circumstance relied on, is the execution of the assignment of January, 1841,

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after the limited time for accepting the *former had expired. It is said, he could not have known, at the time this second assignment was executed, that every creditor had not already accepted under his previous assignment, and that the second assignment is proof of a sincere desire to do justice to all his creditors. Let this go for evidence of a returning sense of justice, which is all that it can prove, how does it serve to undo the wrong already inflicted? The dissenting creditors had already been deprived of the equality of benefits professedly held out to them, by the acceptance of one creditor, while they were compelled to abstain, and the limited time within which they might have accepted had expired; and how were they to reinstate themselves?

The last question to be decided is, upon what conditions is this court to interpose for setting aside the fraudulent assignment, and giving the creditors the benefit of the assets?

The assignment displaced no liens. All the judgments have been obtained, not only since the date of the deed, but since the sale of the assigned property by the assignees. There is no doubt, then, that all the creditors must stand upon an equality, and be satisfied pro rata.

Upon all the questions, therefore, this court concurs in the result of the Chancellor's decree, and it is ordered that the same be affirmed and the appeal dismissed.

BUTLER, EVANS, WARDLAW and FROST, JJ., concurred.

DUNKIN, Ch., concurred in the result.

JOHNSON, Ch. I was absent at the argument of this cause here, but concur, entirely, in the opinion of the court.

HARPER, Ch. I concur, with the exception that I think there are circumstances to repel the imputation of fraud in the assignment.

O'NEALL, J. I concur in Chancellor Johnston's opinion, except as to the question whether the marriage contract ought to be recorded.

RICHARDSON, J., absent, from indisposition.

CHARLESTON, EXTRA TERM, MARCH, 1845.

CHANCELLORS PRESENT.

Hon. DAVID JOHNSON,
" WM. HARPER,
" JOB JOHNSTON,
" B. F. DUNKIN,

1 Rich. Eq. *222

*STEPHEN C. TENNANT, Administrator, with the Will Annexed, of Francis Dalcour, v. THE EXECUTRIX AND EXECUTORS OF JOHN STONEY and Others.

(Charleston. March, 1845.)

[*Assignments for Benefit of Creditors* ⇐196.]

Where a debtor executed a penal bond to two persons, styling them "trustees for and in behalf of" some of his simple contract creditors, named in a schedule thereunto annexed, with a condition, which, after reciting that the creditors had agreed to receive the principal of their debts, with interest at the rate of six per cent., declared that the bond should be void, if the debtor should, within a given time, pay the said debts with interest, as therein expressed; and to secure the payment of the said bond, executed to the trustees a mortgage, expressing a covenant on the part of the creditors that they would accept in discharge of their debts the principal sums with interest at the rate of six per cent, and allow the debtor a certain time for the payment thereof; *Held*, that the bond and mortgage were valid, in favor of the creditors, who afterwards accepted the terms, all of whom, except one, were ignorant of the transaction at the time; and that the bond, after the mortgaged property was exhausted—the debtor having died—was entitled to priority over simple contract debts.

[Ed. Note.—Cited in Adickes v. Lowry, 15 S. C. 136; Burgiss v. Westmoreland, 38 S. C. 428, 17 S. E. 56.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 615; Dec. Dig. ⇐ 196.]

[*Assignments for Benefit of Creditors* ⇐62.]

An indenture tripartite, executed by only two of the parties, *held* to be complete and operative, the assent of the third party only affecting the trusts of the instrument.

[Ed. Note.—Cited in Arnold v. Bailey, 24 S. C. 497.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 242–251, 256; Dec. Dig. ⇐62.]

[*Assignments for Benefit of Creditors* ⇐296.]

Where a deed of trust is made for the benefit of creditors who are absent, no expression of the assent of the creditors is required as preliminary to the vesting of the legal estate in the trustee.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 870; Dec. Dig. ⇐296.]

[*Assignments for Benefit of Creditors* ⇐1.]

It is impossible to put a deed, made with the

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motive of securing credit*ors, upon precisely the same footing with one creating a trust for pure volunteers.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 1; Dec. Dig. ⇐1.]

[*Trusts* ⇐9.]

Whenever an instrument effectually creates a trust, even for volunteers, they may enforce it against the settlor, semble.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 6, 7; Dec. Dig. ⇐9.]

[*Assignments for Benefit of Creditors* ⇐44.]

Where, in a conveyance for the benefit of creditors, terms are prescribed for their acceptance, but no time is fixed within which they are to accept, if they have never dissented they may at any time accept before the fund is distributed; provided, that other persons are not thereby placed in a worse condition than they would have been in, if the acceptance had been sooner.

[Ed. Note.—Cited in Adler v. Cloud, 42 S. C. 278, 291, 20 S. E. 393.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 195; Dec. Dig. ⇐ 44.]

[*Assignments for Benefit of Creditors* ⇐69.]

An acceptance in the terms prescribed, is not in equity indispensable. The creditor's election may be presumed, from his acting in conformity with the terms. A substantial is substituted for a formal election.

[Ed. Note.—Cited in Arnold v. Bailey, 24 S. C. 497; Burgiss v. Westmoreland, 38 S. C. 428, 17 S. E. 56.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 181; Dec. Dig. ⇐ 69.]

[*Assignments for Benefit of Creditors* ⇐44.]

Certain acts by creditors held to amount to an acceptance.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 173–197; Dec. Dig. ⇐44.]

[*Equity* ⇐62.]

Legal assets are administered in equity in the same manner as at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 183; Dec. Dig. ⇐62.]

[*Equity* ⟸62.]

In the administration of assets, Courts of Equity recognize and enforce all antecedent liens.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 183; Dec. Dig. ⟸62.]

[*Dower* ⟸62.]

Where, on a bill to marshal the assets of a testator against his executrix, who was also his widow, the real estate of the testator was sold under the order of the court, before any claim for dower was made by the widow; *Held*, that she might come in on petition, before distribution of the funds, and claim the value of her dower out of the proceeds of the sale.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 204; Dec. Dig. ⟸62.]

[*Husband and Wife* ⟸10.]

Where a husband received from his wife's father a bond, and gave him a receipt therefor, which expressed that he had received it "in trust for his daughter"—the wife of the recipient—"and her children;" *Held*, that the husband was a debtor to his wife and children for the amount of the bond, but that his estate was not liable to account for the interest on the wife's share during his life.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 23, 34, 35, 38–46, 396, 398; Dec. Dig. ⟸10.]

[*Chattel Mortgages* ⟸286.]

Where the purchaser of negroes, sold under an order of the court to foreclose a mortgage, was ready and willing to comply with the terms of the sale on the instant they were bid off, but they were not delivered for several days; *Held*, that the purchaser was not bound to pay the gaol fees, for keeping the negroes in the interim between the sale and delivery.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 576; Dec. Dig. ⟸286.]

[*Chattel Mortgages* ⟸288.]

Where a creditor furnished shoes for the use of mortgaged negroes, whilst they were in the possession of the executors of the mortgagor, and before a sale for foreclosure, *Held*, that upon shewing that the executors were insolvent, and either were in advance with the estate, or at least not in arrears with it, the creditor would be entitled to be paid out of the proceeds of the negroes.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 577, 578; Dec. Dig. ⟸ 288.]

[*Assignments for Benefit of Creditors* ⟸320.]

[A creditor is entitled to an allowance of, and to dividends on, his claim as it stood when the assignment was made, though he afterwards, and before the claim is presented for allowance, applies the proceeds of collaterals on the debt.]

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 937; Dec. Dig. ⟸320.]

[*Husband and Wife* ⟸120.]

[A conveyance to a husband in trust for "the use of his wife" does not give her the separate use, and the husband's life interest is liable for his debts.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 430; Dec. Dig. ⟸120.]

[This case is also cited in Stoney's Ex'rs v. J. L. & S. Joseph & Co., 1 Rich. Eq. 359, without specific application.]

Before Johnson, Ch., at Charleston, February, 1843.

The late Mr. Stoney, having come under very heavy liabilities for Dudley & Stuyvesant, a New York house, and by their failure incurred ruinous losses, by his bond,

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dated 16th June, 1837, *became bound to John Magrath and James Hamilton, trustees, in the penal sum of 400,000 dollars. The condition of the bond, after reciting that Mr Stoney was indebted as drawer, acceptor, or indorser of divers bills of exchange, and that the parties to whom he was so indebted had agreed to receive the principal secured by the said bills, with interest at the rate of six per cent., and that John Magrath and James Hamilton should be appointed trustees in behalf of the creditors, to take security for the said debts, is to the effect that the bond shall be void, in case Mr. Stoney shall pay the creditors named in a schedule annexed, the sums opposite their respective names, on or before the 16th day of June, 1841. In the schedule, the bills are set down, in some instances, without the name of the holder, and in other instances the name of the holder is mistaken.

By indenture tripartite, made the same day, between John Stoney of the first part, John Magrath and James Hamilton of the second part, and "the creditors whose names are signed and seals affixed to these presents," of the third part, reciting that the said John Stoney is indebted to the parties of the third part, and that they have agreed to release him "from all damages to which he may be liable to the said parties of the third part by reason of the non-payment, non-acceptance, and protest of any bills of exchange," and to allow him time for the payment of principal, and interest at the rate of six per cent. until the 16th of June, 1841; and reciting the bond aforesaid, Mr. Stoney conveys to the said John Magrath and James Hamilton, as trustees to the trusts aforesaid, four plantations, called Foot Point, Fording Island, Hilton Head, and Ferry Tract, and a tract of Pine land, all in St. Luke's Parish, and 380 negroes. The trustees covenant to perform the covenants herein mentioned, and there is a proviso, that in case Gen. Hamilton shall cease to be President of the Bank of Charleston, he shall nominate the President for the time being, to act in his place, in the execution of the trusts of the deed. To this deed is annexed a schedule of bills, similar to that which is annexed to the bond, but the schedules differ in several particulars.

The deeds were delivered to the Bank of Charleston, and the indenture recorded, but there was no execution by the parties of the third part.

In September, 1837, Mr. Stoney came to a settlement with the Merchants Bank of Cheraw, who held two certain bills for 10,000 dollars each, included in the schedule to the

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deeds of June, *1837. They calculated in-

terest on the bills at the rate of six per cent. added exchange at three per cent. and the costs of protest. From the amount, the payments were deducted: Mr. Stoney gave his note for the balance, and the bills were delivered up to him.

On the 27th June, 1838, Mr. Stoney came to a settlement with the Bank of Charleston. Interest on the various bills held by the bank, at the rate of seven per cent. to 17th June, 1837, and six per cent. from that day; three per cent. for exchange, and an additional charge for costs of protest, were added to the principal; from the amount, the payments were deducted—and for the balance, with twelve months interest at six per cent., Mr. Stoney gave his note for 127,260 dollars, payable to the Cashier of the bank, at twelve months, and received the original bills of exchange, which were delivered up to him.

No other bill holders took any notice of the deeds of 1837—some of them were paid in full.

Mr. Levy, who held bills to the amount of 41,000 dollars and upwards, about the date of the deeds stopped payment, and soon afterwards made an assignment of all his estate, for the payment of his debts. He had notice of the proposal of Mr. Stoney, which led to the deeds, but took no part, as his affairs were to be placed in liquidation. These bills are mentioned in the schedules with a remark, that the property is disputed by the bank of Charleston, S. C., and by Dudley & Stuyvesant.

On the 7th November, 1837, Mr. Stoney filed his bill against Mr. Levy, to restrain the negotiation of these bills, and to have them delivered up, on the ground that they were drawn without consideration.

Phelps, Dodge & Co. held two bills of exchange drawn by Dudley & Stuyvesant on Peter Stuyvesant, for 12,500 each; and it is supposed that these are the same drafts described in the schedule of the bond as drafts indorsed by Mr. Stoney, and sold to the bank of Charleston—and in the schedule to the indenture as drafts indorsed by Mr. Stoney, on Peter Stuyvesant, at sight. But the bills never were sold to the bank of Charleston, and Phelps, Dodge & Co., who were the holders in June, 1837, had no notice of the deeds during the life time of Mr. Stoney. He died in November, 1838, and Mrs. Elizabeth Stoney, Peter Gaillard Stoney, and Christopher Fitzsimons Stoney, proved his will, and committed the management of the estate to John Magrath.

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*In 1839, Phelps, Dodge & Co. sued out a writ against the executrix and executors in an action of assumpsit, returnable to January 1840. After this action was commenced, Messrs. Yeadon and Macbeth received information of the deeds of 1837, and of the bills thereby secured, which they communicated to Phelps, Dodge & Co. their clients, who then abandoned the suit at law, and claimed the benefit of the deeds, and now submit to be bound by them.

In 1840, the bills held by Mr. Levy's assignee were sued at law, and a verdict for plaintiff obtained, on which judgment was entered up 30th January, 1841, for $52,457.90—being the amount of principal and interest at seven per cent. and costs of protest.

On the 15th of January 1841, Mrs. Stoney and the executors filed their bill of revivor and supplement, against Mr. Levy and his assignee, for an injunction against the said judgment, alleging that the bills upon which the action was brought had been improperly obtained from Dudley & Stuyvesant, by J. L. & S. Joseph, and that they were accepted by the testator for the accommodation of Dudley & Stuyvesant, and that Mr. Levy held them as the agent of J. L. & S. Joseph, and not as an indorser in the course of business; and that as between Joseph and the other parties to the bills, the same are null and void. An injunction was granted, and the cause was yet pending.

On the 19th November, 1840, this bill was filed by Mr. Tennant, administrator of Francis Dalcour, of Cuba, planter, for the balance due on account of the crops consigned by Mr. Dalcour in his life time, to Mr. Stoney as his merchant.

In January, 1841, Mr. Laurens was directed to take an account of the complainant's demand, and of the estate of the testator. By his report, dated the 1st of July, 1841, Mr. Laurens stated the amount due to the complainant, at $19,467.44, and that the account of the executors was incomplete, and that no account of the testator's debts had been rendered. On the 10th July, 1841, on hearing the master's report, the court ordered a sale of the whole estate, that the money be brought into court, and that the master advertise for creditors, and take an account of debts and assets.

The bank of Charleston, the Merchants bank of Cheraw, Phelps, Dodge & Co., and the assignees of J. C. Levy, appeared before the master, who made a report of the sale of the property, and of the administration of

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the estate by the executrix and ex*ecutors through their agent, and of the debts and assets of the testator, and allowed to the bank of Charleston, the Merchants bank of Cheraw, Phelps, Dodge & Co., and the assignee of J. C. Levy, their claims to satisfaction out of the proceeds of the estates conveyed in trust by the indenture of June, 1837.

To this report exceptions were taken, and on the 28th February, 1843, the cause was heard on the report and exceptions, by his Honor, Chancellor Johnson, who made the following decree.

The bill prays an account and discovery of the estates, real and personal, of the late John Stoney, the defendant's testator, and the payment of a large sum due by him to the complainant's testator on an account. In the progress of the cause, other creditors have been made parties, and as it is ascertained that the estate is not sufficient to pay all the demands, it has become necessary to ascertain the amount of the assets, and to marshal them amongst the creditors. The case, therefore, necessarily involves the settlement of the accounts of the executors, and the determination of the right of priority amongst the creditors, as well as other matters, which will be hereafter noticed.

The contest amongst the creditors, the matter which I propose first to consider, arises out of a bond and mortgage executed by the testator, Mr. Stoney, to James Hamilton, President of the bank of Charleston, and John Magrath, intended to secure some of his creditors. The bond is in the penalty of four hundred thousand dollars, and bears date the 16th of June, 1837: and the condition recites that, "whereas, the above-bound John Stoney, as the drawer, acceptor, or indorser, of divers bills of exchange, is indebted as hereinafter mentioned, and the parties to whom the above bound John Stoney is so indebted, have agreed to receive the principal sum for which the said bills have been drawn, together with the lawful interest upon the same, at the rate of six per cent. per annum, in satisfaction of their demands; and that the said John Magrath and James Hamilton be appointed trustees for and in behalf of the said creditors, to take of and from the said John Stoney, good and sufficient security for the payment of the said debts. Now, the condition of this obligation is such, that if the above-bound John Stoney, his heirs, executors, and administrators, shall and do well and truly pay and satisfy, or cause to be paid and satisfied, the divers creditors whose names are mentioned in the schedule hereunto annexed, the several sums opposite

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their respective names, with the *interest thereon, as therein expressed, (and for the payment of which said principal and interest, the said parties may be legally entitled,) on or before the 16th day of June, in the year 1841, then this obligation to be void," &c. In the schedule annexed to the bond, Mr. Stoney acknowledges himself indebted, on bills drawn, indorsed, or accepted by him, and held by the bank of Charleston, to the amount of one hundred and twenty-one thousand dollars; on bills held by Phelps, Dodge & Co. to the amount of twenty-five thousand dollars, which had been sold by him to the bank of Charleston; on bills held by the Merchants's bank of Cheraw, to the amount of twenty thousand dollars; and S. N. Bishop's acceptances of three bills in favor of Dudley & Stuyvesant, to the amount of forty-one thousand, six hundred and twenty dollars. Immediately below this last item, is the following remark, "The three last mentioned bills are now held by J. C. Levy of Charleston; the property in the said bills is disputed by the bank of Charleston, and by Messrs. Dudley & Stuyvesant." And it had as well be remarked here, that these bills had been indorsed by Dudley & Stuyvesant to the Josephs & Co. of New York, and that they had forwarded them to J. C. Levy, their agent here, for collection; and that on a bill filed in this court, by the present defendants against J. C. Levy and the Josephs & Co., it has been adjudged that Levy is only entitled to recover on them about twelve thousand dollars, the sum actually paid by them for the bills. These are all the creditors provided for by the bond, that are now before the court. There were some others who refused to accept, and were paid in full.

On the same day, the 16th June, 1837, on which the bond was executed, Mr. Stoney executed a deed, which purports to be tripartite, between himself of the first part, John Magrath and James Hamilton, of the second part, and the creditors of the said John Stoney, "whose names are signed and whose seals are affixed to these presents, of the third part;" wherein it is recited that "the said John Stoney is now justly indebted in divers large sums of money to the parties of the third part, respectively, and it is mutually agreed upon, by and between the said parties, that the said John Stoney shall and will sufficiently secure all the debts due and owing by him to the said parties of the third part, and that the said parties of the third part shall and will remit, release, and forever relinquish the said John Stoney of and from all damages which he may be liable unto the said parties of the third part, by reason of the non-payment, non-acceptance and protest, of any bill of exchange; and that they the

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said parties of *the third part, will grant and allow the said John Stoney time for the payment and discharge of the principal sum of the aforesaid debts, together with the interest thereon, at the rate of six per cent. per annum, until the 16th day of June which will be in the year 1841." The bond before referred to is then substantially recited, and the deed goes on thus: "Now this Indenture witnesseth, That for the better securing the payment, to the said John Magrath and James Hamilton, trustees of the said creditors, the parties of the third part of the said bond, according to the condition thereof, and also in consideration of the sum of one dollar, in hand well and truly paid by the said John Magrath and James Hamilton, he, the said John Stoney, hath granted, bargained, sold and released, and by these presents doth grant, bargain, sell and release unto

the said John Magrath and James Hamilton, their heirs," &c. Here follows the description of five plantations, and the deed proceeds. "And also, all and singular the negro slaves, now being and working upon the said plantations, or tracts of lands, or any or either of them, amounting in number to three hundred and eighty, and named in the schedule annexed. To have and to hold," &c. —"And the said John Stoney does hereby bind himself, his heirs, executors," &c. "to warrant and forever defend," &c. "And the parties of the third part, in consideration of the premises, do covenant, promise, and agree to and with the said John Stoney, each for himself, well, truly and faithfully to keep, preserve and perform the covenants and agreements hereinbefore mentioned, and on their part to be performed, fulfilled and kept. And it is also further agreed, by and between the parties aforesaid, that it shall and may be lawful for the said James Hamilton, in case of his ceasing to be President of the Bank of Charleston, to nominate and appoint the President of the said Bank of Charleston, for the time being, to act in the aforesaid trust, in the room or place of the said James Hamilton," &c. Then follows a covenant, that Mr. Stoney shall remain in the use and possession of the property, until default shall be made in the payment.

None of the creditors named in the schedule annexed to the bond, have signed or sealed the deed: but the Bank of Charleston, and the Merchants Bank of Cheraw, claim to be entitled to come in under its provisions, on the ground, that they have substantially conformed to the conditions, although they have not signed and sealed.

I will first examine the claim of the Bank

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of Charleston. It *appears from the evidence, that not long after the deed was executed, this Bank and Mr. Stoney made a settlement of their accounts, in which Mr. Stoney was charged with seven per cent. interest on the bills, from the time they became due, until the execution of the deed, and costs of protest and postage, and with exchange, at the rate of three per cent. and upon his giving a new note, payable on the second day of July, 1839, for the amount made up of the principal and these charges, (deducting a payment on account made at the time of this settlement,) the original bills were delivered up to him. Mr. Rose, the Cashier of the Bank, stated that the damages usually charged by the Bank on bills returned from New-York, under protest, were at the rate of ten per cent. that the exchange charged Mr. Stoney, in his account with the Bank, was only the rate of exchange between New-York and this place, and that the charge for costs of protest and postage, were actual expenditures, all of which were assented to by Mr. Stoney, and that the new note was taken, as it was supposed, in conformity with the intention of the parties to the mortgage, and not as an abandonment of the rights of the Bank under it. That it was the intention of the Bank not to violate, but conform to it, and that the original bills were delivered to Mr. Stoney, as he understood, to enable him to prosecute his claims against the parties he supposed to be liable to him. The Bank has received from Mr. Stoney a large sum, in part of the principal sum due on this note.

The claim of the Merchants Bank of Cheraw is founded on circumstances very like those of the Bank of Charleston. They differ in nothing except that in the statement of their account, Mr. Stoney is charged with interest on the bills, from the time they became due, to the date of the deed, at the rate of six per cent. instead of seven, and the new note was made payable at the time stipulated for the payment on the mortgage.

As to the claim of J. C. Levy. He was the holder of the three bills mentioned in the schedule annexed to the bond, the property in which was said to be disputed by the Bank of Charleston and Dudley and Stuyvesant: and Mr. Levy, who was examined as a witness, testified that about the time the bond was executed, he was informed that Mr. Stoney was desirous of making terms with certain of his creditors, and securing the payment of their demands, and a paper containing their names, including his own, was read to him. That he was afterwards called on to attend a meeting of the creditors at the

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Bank, and found there *Hamilton, the President of the Bank, Magrath, the Solicitor and another, (one of the creditors.) That on Hamilton's asking his assent to the terms proposed, he expressed his willingness to do all that was desired by Mr. Stoney, but stated that he was on the point of making an assignment of his own effects, for the benefit of his creditors, rendered necessary by the failure of the Josephs & Co., and not knowing how far he was authorized to act, he declined acting at all. Hamilton replied that he thought he was right, and added, that there would be a law suit about these bills. Witness thought that he alluded to an attachment that the Bank was about to issue, and did issue, against the Josephs & Co., in which he was garnisheed. He states also, that he was wholly ignorant the bills were provided for by the bond and mortgage, and it appears that he had no notice of it, until the 12th July, 1841.

On the 27th September, 1837, Levy made an assignment of his effects, for the benefit of his creditors, including the bills in question, to Judge Gilchrist, who brought suit on them on the fifteenth day of April, 1840, against the executors of Stoney, and at January Term, 1841, recovered a judgment. There was no opposition to this recovery, and it seems to have been understood be-

tween the counsel and the parties, that the liability of Mr. Stoney on the bills was to be tried on the bill before referred to, filed by the defendants, executors of Stoney, against Levy and the Josephs & Co., and that the judgment at law was only intended to protect the bills against the operation of the statute of limitations. Judge Gilchrist had no notice that the bills were provided for by the bond and mortgage, until the 12th of July, 1841, which was after the time limited in them for the payment of the debts.

As to the claim of Phelps, Dodge & Co. They had no notice of the bond and mortgage, or that their demand was secured by them, until the fall of 1839, and as soon as they were informed, they, through their attorney, Mr. Yeadon, tendered their acceptance to John Magrath and Ker Boyce, who had succeeded Hamilton as President of the Bank of Charleston, and had been substituted trustee of the bond and mortgage. But they, as well as P. G. Stoney, one of the executors, thought it was unnecessary, as they were sufficiently protected by the bond and mortgage, and therefore the acceptance was not made in form.

As to the claim of the complainant, as the administrator of Dalcour. The bona fides

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of this demand is not contradicted, *but it is not provided for in the bond and mortgage. But it is insisted, notwithstanding, that the mortgaged assets ought to be brought into the account of the general assets of the estate, and distributed amongst all the creditors, rateably.

Before entering upon the consideration of the various questions to which these circumstances have given rise, it is proper to state, that all the creditors before the court are simple contract creditors, unless the bond and mortgage give to the demands of the creditors provided for by them, the dignity and rank of specialty debts; and that there was no evidence that any measures whatever were taken by Mr. Stoney in his lifetime, or his executors after his death, or by the trustees, to give notice to any of the preferred creditors, unless it be the Bank of Charleston, and the Merchants Bank of Cheraw, and that the information of all the others was obtained accidentally. I think it was said at the bar, that Hamilton took possession of the bond and mortgage, when they were executed, and kept them in his desk at his family residence, until he resigned the office of President of the Bank, and assigned the trust to Boyce, and that they were afterwards kept at the Bank.

I propose now to consider, first, the claim of the complainant, Tennant, that the mortgaged property should be brought into the account of the general assets of the estate, and with them to be distributed equally amongst all the creditors.

The grounds relied on, are—**1.** That none of the creditors intended to be preferred can avail themselves of the protection of the bond and mortgage, because none of them have accepted the terms, by signing and sealing in the manner provided for in the mortgage. 2. That on the contrary, Judge Gilchrist, the assignee of Levy, has violated the condition of the mortgage, by bringing a suit against the executors of Stoney, and obtaining a judgment for the amount due to him. 3. That the Bank of Charleston has violated the condition of the mortgage, and forfeited all claim to its protection, by charging Mr. Stoney, in the settlement of their accounts, with interest at seven per cent., damages in the name of exchange, costs of protest and postage, and taking a new note, payable at an earlier day, and receiving a large sum before the time appointed for the payment. And so of the Merchants Bank of Cheraw, which charged him with damages, costs of protest and postage, and took a new note for the amount, in direct violation of the condition of the mortgage. 4. That the proceeds of the

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sales of the mortgaged property *being in Court, they must be regarded as equitable assets, and are distributable, according to the uniform rule of the Court, rateably amongst all the creditors.

As before remarked, none of the creditors have accepted in the terms prescribed in the mortgage, and that in equity is not indispensable. The creditor's election may be presumed, from his acting in conformity with one or the other of the alternatives offered. A substantial is substituted for a formal election. Thus, if one of the preferred creditors here, knowing that he had been protected by the mortgage, had forborne to sue, or demand payment for his debts, until the time limited for the payment, he will be presumed to have accepted, although he had not signed and sealed the mortgage; but if, on the contrary, some of the creditors had demanded immediate payment, or sued for their debts, knowing that they were protected by the mortgage, that would have been an abandonment of their rights under it. 1 Swan. Rep. 396. Dillon v. Parker, note. But here no time is limited within which the creditor shall come in and elect; and the rule on that subject clearly is, that unless they had renounced the right, directly or indirectly, they are entitled to come in and accept, notwithstanding any given lapse of time, unless it should operate an injury to other persons, or place them in a worse condition than they would have been in, if they had accepted as soon as the provisions of the mortgage were known to them; and it is very clear, that no one will be put in a worse condition, by permitting these creditors to come in and accept now, than they would have been in if they had accepted at the execution of the mortgage. It is necessary, too, that the party should know that he had the right to elect,

and the effect it would have upon his interest. Election, from its very nature, supposes that the party had all the knowledge necessary to enable him to determine which alternative would be most for his benefit. These rules are clearly laid down in Brice v. Brice, 2 Molloy, 21, reported in 12 Cond. Eng. Ch. Rep. 325. There the complainant filed a bill for an account of the estate of Edward Brice, and for liberty to elect to take under his will, or in opposition to it. He had proved the will, and acted under it for more than ten years; but there was evidence that he was ignorant of his right to claim in opposition to the will, and he was permitted to make his election. These creditors have the right to come in even now, and accept the terms of the mortgage, unless they have forfeited it by their acts.

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*In the application of these rules, I will begin with the case of Phelps, Dodge & Co., and it is enough to say, that they tendered their acceptance on the instant that it came to their knowledge that they were protected by the mortgage, nor have they done any act indicating their intention not to accept.

The commencement of the suit, and obtaining a judgment against the executors for the amount due to Levy, is relied on as evidence that he had elected not to accept; but neither he nor his assignee had any knowledge that his debt was provided for in the mortgage, until after judgment was obtained. It was said that Levy was invited to attend a meeting of the creditors of Stoney, and he might have known it if he would; but when he was told by the trustees, that his right to the three bills of exchange which he held would be contested, he might well conclude that there was no intention to secure their payment. This was followed by a bill filed by Stoney in his life time, to avoid their payment, which was revived by his executors after his death; and surely there was nothing better calculated to drive him from any further inquiry, as to the existence or contents of the bond and mortgage.

Nor do I think that the Bank of Charleston is concluded from accepting, by any act which it has done. The evidence shews that the Bank agreed, upon solemn deliberation, to accept the terms proposed, and the acts complained of were done in good faith, and with the intention of carrying their resolution into effect. The addition of the seven per cent. interest, instead of six, up to the date of the mortgage, the exchange, costs of protest and postage, was the result of the construction of the terms proposed in the mortgage by the officers of the Bank, with the assent of Mr. Stoney. The acceptance of the Bank of the payment of a large sum by Mr. Stoney, on account of its debt, is relied on as a fraud on the other preferred creditors; and it is insisted that as to them, it avoids the security intended for the Bank, in the bond and mortgage. There is no doubt that when a debtor, by the terms of his composition with his creditors, professes to put them all on a footing of equality, and by a secret agreement gives an advantage to one over the others, the agreement would be void; as where a debtor, professing to assign all his effects to pay his creditors rateably, keeps back a part of his effects, for the benefit of one, or as a bribe to induce him to accept, it would be void, as to the others. But here the obligation of Mr. Stoney, on the bond,

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was to pay all these *creditors in full, and he mortgaged, not all his effects, but certain specific property, for the payment; and it was his duty, as well as his interest, to pay off the debts as fast as he was able: and, certainly, there was nothing in the bond, or the mortgage, which required him to distribute every dollar he might be able to pay, rateably, amongst them all, as the means were not derived from the mortgaged property. The payment to the Bank did no injury to the other creditors. On the contrary, it operated as a positive benefit, by extinguishing, to that amount, the demands upon the funds out of which they were to be paid.

The Merchants' Bank of Cheraw stands on the same, or rather more favorable grounds than the Bank of Charleston, and is of course entitled to share in the distribution of the fund. The excess of interest charged by the Bank of Charleston, and the exchange, costs of protest and postage charged by both, must be deducted from their demands.

I shall now notice the fourth and last proposition in this branch of the case. In the administration of assets, that are purely equitable, this court is governed by a rule peculiar to itself, founded upon the principle that equality is equity; and it distributes them equally amongst all the creditors, without reference to the dignity or rank of their demands: but in administering legal assets, the court distributes them according to the strict rule of law. Now, legal assets, as distinguished from equitable, are such as come, for example, into the hands of an executor, to be disposed of in the due course of administration; whilst on the other hand, equitable assets are those which can only be come at and applied to the payment of debts, through the instrumentality of the Court of Equity. The court, however, recognizes and enforces, in the same manner that a law court would, if it had jurisdiction, all antecedent liens on the property. 1 Story's Eq. 519, 520–1.

The proposition that the mortgaged property constitutes merely equitable assets, is attempted to be maintained, on the ground that a deed to third persons for the benefit of creditors, can be only enforced in equity against either the trustees or the debtor. If the bond and mortgage are worth any

thing at all, they give a lien on the specific property, and that is strictly enforced in this court. In the case of assets in the hands of an executor, subject to the payment of the debts, the law furnishes a rule for distribution: and the debtor may, if he will,

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exercise *the same authority in directing the distribution, even in opposition to the rule of law, which will be enforced here.

The argument goes even further, and insists that the bond and mortgage are altogether void, because voluntary merely; and the cases referred to by the counsel, of Widgery v. Haskell, 5 Mass. Rep. 151, and Seaving v. Brinkerhoff, 5 Johnson's Ch. Rep. 331, are authority for the rule, that an assignment made for the benefit of creditors without their knowledge, and without their assenting to it, or without any consideration, or one which is grossly inadequate, is void as to the creditors: but that is not this case. Here the creditors were bound by the terms of the mortgage, to release a part of their demands, and give time for the payment, and they have accepted the terms; and that does not preclude them from satisfaction out of the general assets, if the mortgaged property should prove insufficient to pay all. And if we take a practical common sense view of the transaction, it will be seen that the bond and mortgage were intended as a security for the payment of pre-existing demands, in consideration of getting time, and a small deduction from the legal demands; a contract entered into with perfect good faith, and no doubt in the full confidence of all the parties, that Mr. Stoney's ample means would, in the time given, enable him to pay them and all his other creditors.

Another question of some importance has arisen between the preferred and general creditors of Mr. Stoney. It is supposed that the mortgaged assets will not be sufficient to pay the preferred debts. These, it will be recollected, were, in their original form, simple contracts; but it is insisted that the bond and mortgage raised them to the rank of specialty debts, and that in the distribution of the general assets, they are entitled to priority over the simple contract debts. It has been frequently held in our courts, that penal bonds, conditioned for the performance of official, or semi-official duties, such as sheriff's bonds and bonds of guardians and administrators, were entitled to rank as specialties in the distribution of assets, to the extent of the damages incurred by a breach of the condition; and the reasoning on which the courts proceed is, that the penalty constituted the debt, to be discharged by the performance of the condition. These bonds, it will be observed, are intended as a security for liabilities that might be thereafter incurred, and not for an ascertained demand, and are indeed the foundation of the parties' right to sue. Here the

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bond is conditioned to pay pre*existing debts, in their nature simple contracts, and imposes no new obligation; and so far from operating as an extinguishment of them, is a recognition of the liability of the obligor to pay them, in the form in which they stood. If Mr. Stoney had been unable or refused to give the security contemplated in the condition of the bond, what would have been the remedy? Concede that this court could have compelled the trustees to sue the bond at law, and they had received the money, to what purpose would they have applied it, but to the payment of the debts due to the creditors? And they are simple contracts. If we look through the bond and mortgage, and read them together it is obvious that the object of Mr. Stoney was to gain time, and a small reduction of the amount of his liabilities; and on the part of the creditors, to obtain security for their demands; and it was never yet heard, that a mortgage to secure a pre-existing debt, although it would operate as a charge upon the property mortgaged, would extinguish the original debt, or change its character: and it is against the principles on which the court proceeds in the distribution of assets, to give preference to creditors, unless they come within the strict rules of law. I am therefore of opinion, that with respect to the balances that may remain due to the preferred creditors, after the proceeds of the mortgaged property, they are only entitled to participate rateably with the other creditors, in the distribution of the general assets.

Mrs. Stoney, the widow of the testator, claims to be entitled to dower in the real estates mortgaged, to be paid out of the proceeds of the sales. This comes before the court on a petition filed after the sales had actually been made under the order of the court; and she concedes, that she is concluded from asserting her right of dower in the lands themselves, in the hands of the purchaser, as she was a party to that proceeding, and had not interposed her demand for dower, but now claims to be indemnified out of the proceeds: and the question is, whether she is estopped by the order of the sale.

There is no question, that at law a party to a suit is estopped by any order or judgment of the court affecting the subject matter of the suit: and that rule obtains also in this court, when there has been a final disposition of the subject of controversy; but here the substitute of the proceeds of the sales of the lands is in court, and the very object of this proceeding is to ascertain who is entitled to it, and there is no reason

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why Mrs. Stoney's *claim ought not to be as much favored as that of the creditors. Dower is so much favored in law that no power

can divest the widow of it, without her consent expressed or implied, from her omission or neglect to prosecute it. Has she now come too late? I think not. In proceeding on what is usually called a creditor's bill, it is the familiar practice of the court to allow creditors who have not come in and proved their demands within the time limited by the order of the court, to come in at any time before the funds are distributed, on very slight grounds of excuse for not conforming to the order, and in some instances, perhaps, without any excuse at all. Now, I can very well suppose that Mrs. Stoney preferred to take her dower in the form of money, instead of the lands, in specie, or what is more probable, that she supposed, in ignorance, perhaps, of the amount of the debts, and the value of the estates, that so large an estate would pay all the debts, and leave an ample provision for her; and unquestionably that would have been the result, if the estates had been sold but a few years before. It was the unprecedented depreciation in the value of property, which brought loss to the creditors, and ruin to the family of Stoney.

Mrs. Stoney and her children claim a demand against the estate for seventeen thousand, two hundred and twelve dollars, and fifty-two cents, on account of a fund confided to the testator by her father, for their use. It is founded on the following writing: "Charleston, 26th December 1826. Received of Capt. Peter Gaillard, Thomas Ashby's bond, on which there is principal and interest, due on the 1st January 1827, of eighteen thousand, nine hundred and forty-five dollars, in trust for his daughter, Mrs. Elizabeth Stoney, and her children, and on which a balance of fifteen hundred dollars is to be refunded to him, after the first of January next." Signed, "John Stoney." And from an account written below, it appears that after deducting the payments made to Gaillard by Stoney, the above balance of seventeen thousand, two hundred and twelve dollars and fifty cents, remained due on the bond. Whether Mr. Stoney ever received the money from Ashby, or what became of the bond, is not known.

The only objection to this claim is, that this contract cannot be set up as a trust. Contracts are always construed according to the intention of the parties, to be collected from the terms used. Now, it is apparent that Gaillard did not intend to give the money secured by the bond, to Mr. Stoney, and

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it is equally *clear that he intended it for the use of Mrs. Stoney and her children; and it is impossible to give it that effect, unless we suppose that, as far as she is concerned, he intended it for her sole and separate use, because if it be construed a gift to her, it would operate as a gift to her husband. Her children are equally entitled with herself, and with respect to their right, there is no question. The trust for them is direct, and there is nothing in the relation between them and their father to oppose to their claim. I am, therefore, of opinion, that the principal sum with the interest from the time the bond became due, must be paid to Mrs. Stoney and her children, in equal portions, out of the general assets of the estate, rateably with other simple contract creditors.

I will now proceed to the consideration of various other questions, arising out of the administration of the testator's estate by his executors, which come up in the form of exceptions to the master's report on their account.

A large portion of the general assets of the estate has been applied by the executors to the payment of simple contract debts in full, and the creditors now before the court complain that that was a misapplication of them. Clearly, that was a mal-administration for which the executors are responsible.

They complain, too, of another act of maladministration, arising out of the following circumstances. The testator, it appears, was in the habit of accepting bills of exchange drawn on him by the house of Dudley and Stuyvesant, of New-York, and to secure him against any liabilities he might incur on that account, they mortgaged to him certain real estates in New-York, but the testator neglected to have the mortgage recorded, within the time prescribed by the laws of New-York, and Dudley and Stuyvesant afterwards mortgaged the same property, with other property to a large amount, to secure the payment of a large sum of money, and that having been recorded, was entitled to precedence over the mortgage to the testator; and the executors state in their answer, that the testator entered into a contract to purchase in the junior mortgage, including the other property mortgaged, at a stipulated price, but died before the contract was consummated, and believing that it would benefit the estate of their testator, and regarding themselves as bound by his contract, they paid the money, and took an assignment of the mortgage. They add, that they have expended large sums of money in suits at law and in equity

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in New-York, in prosecuting their *claim under these mortgages. It appears that the mortgaged estates have not been sold, and it is not known what will be realized from them. It is thought, however, that there will, in all probability, be a loss on the sales, and the creditors insist that the payment of the money for the junior mortgage was a misapplication of the funds of the estate. The executors are unquestionably entitled to be credited with any sums of money necessarily expended in prosecuting their claims under the mortgage to their testator, because, it was their duty so to do, and the money dis-

bursed on that account is a part of the expenses of administration; and if, as they state in their answer, their testator had entered into a binding contract with the holder of the junior mortgage, they were bound to perform it to the extent of the means in their hands, if it worked no injustice to other creditors. The answers do not state any thing about the form or manner of the contract, nor is there any thing found in the evidence reported by the master, which throws any light on the subject. It may be that the contract was binding on the testator, but from what is said of it in the answer, I am led to suppose that it was a mere treaty, which the testator, if he had lived, would have carried into effect, but had not the form or substance of a binding, legal contract. If that be so, the application of the funds of the estate to that object, was an act of mal-administration, for which the executors are responsible. The act was not one which the law required them to do, and they had no right to speculate upon the chance that it would benefit the estate. As before stated, it does not appear how the fact was. It is a matter of some consequence, and as it will be necessary to refer the matter of account back to the master, I shall direct him to take evidence on the subject.

The testator, and defendant John Magrath, were the executors of the late John Williamson, and the master reports, that at the time of the death of the testator, he had funds in his hands belonging to that estate to the amount of something over ten thousand dollars, and that has been paid by the defendants, out of the general assets of their testator. That was clearly a simple contract debt, and the executors are only entitled to be credited with what would have been a rateable proportion in the distribution of the assets amongst the simple contract creditors.

The testator, in his life time, paid to the Bank of Charleston, on account of the principal, about thirteen thousand dollars, and the master has recommended that the Bank

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should not be *allowed to come in, until the other preferred creditors shall have received out of the proceeds of the mortgaged assets a sum equivalent to that paid to the Bank, upon the principle of a pro rata distribution; and the Bank excepts to this, on the ground that the payments were not made out of the mortgaged property, and, therefore, cannot impair the rights of the Bank to a full pro rata share of the mortgaged property, on the balance due to them.

This exception must prevail. There is no question, that if a debtor make a general assignment of his effects, any secret agreement which he might make with one of them, to induce him to come in and accept, or any act which he might do to the prejudice of the others, or which might be inconsistent with perfect fairness, would be void. But that is not this case. Here the assignment, or rather mortgage, is not of the debtor's assets generally, but of certain specific property to secure certain creditors; as between them, their rights are restricted to the particular property, and I cannot perceive that there is any unfairness, or injustice done to the others, in the debtor's paying one or more of the creditors in part, or in full, out of other assets. On the contrary, it is a positive benefit, by diminishing the amount with which the mortgaged property was charged.

The Bank of Charleston also excepts to the report, on the ground that the master has credited the defendants with one thousand, one hundred and thirty-nine dollars, and ninety-eight cents, paid by them for City assessments on the property in New York. If, as I suppose, the property mortgaged by Dudley and Stuyvesant to Stoney, remained in their possession and use, they were bound to pay the taxes, but they became insolvent, and did not, and probably were unable to, pay the assessment. Taxes and assessments here ride over all other claims to property, and, I suppose, in New York, and it would have been criminal in the executors to have stood by and seen the property sold for the assessments. All doubt about it will be removed, if we bring the matter nearer home, and suppose that the property was situated in Charleston. No one would question that the executors would have been justifiable in paying the City assessments on property mortgaged to their testator, if the mortgagor did not, or was unable to, pay them. The effect of neglecting to do it, would be to lose the security which the property gave for the payment of the debt. The defendants are entitled to be credited with the amount paid by them on account of the assessments

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on the lots *mortgaged to their testator, but not with what they may have paid on those acquired by their contract with other mortgagees.

The Bank of Charleston further excepts to the master's report because he has rejected a claim set up by them for five hundred and twenty-six dollars and nine cents, paid by them on the same assessments of the property in New York, at the request of the executors. The same rule must prevail in this case as in the last preceding exception. The Bank is entitled to be reimbursed the amount paid on account of the assessments on the property mortgaged to the testator. This, and the last exception, strike me as being directly opposed to each other.

The Bank also excepts to the report, because the master has charged against it two hundred and sixty-three dollars and twenty-one cents, with the interest, for the goal fees, on negroes purchased by the Bank, at the sale of the mortgaged estates. It appears, from the evidence, that the negroes were sold on Monday and Tuesday, the 29th and 30th

of March 1842, and a number were purchased by the Bank. The Bank was ready and willing to comply with the terms of the sale, on the instant they were bid off, but the negroes were not delivered until the Tuesday following. In the interim between the sale and delivery, the goal fees, (for the negroes were confined there for safe keeping,) amounted to the sum stated in the exception; and the master states, as a reason that they were not sooner delivered, was because it was impossible to prepare the necessary papers sooner, and one witness, a broker, testified that the purchaser of negroes is usually charged with their keeping in the workhouse, from the contract of sale until their delivery.

The evidence does not establish any usage, as to the matter in hand. If the purchaser neglect to comply with the terms of the sale, or if after he has complied with them, he suffer them to remain in the work-house or goal, he must pay the charges, and that, I suppose, is the usage to which Mr. Carter refers. But I should not be disposed to adopt any usage so repugnant to common sense and common justice, as this appears to me to be. The purchaser was entitled to the possession of the negroes the instant they were bid off, if he was ready to comply with the terms of the sale, and if the delivery was delayed for the convenience of the seller, or on account of his inability to do what was necessary to the delivery, it was no fault of the purchaser. This charge must, therefore, be put down to the expenses of the sales, and paid out of the proceeds.

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*Cooper and Hunt claim to be paid out of the proceeds of the sales of the mortgaged negroes, the amount of an account for shoes furnished by them for the use of the negroes mortgaged, whilst they were in the possession of the executors, and at their request, and it has been rejected in the master's report. This is properly the debt of the executors, and at law they alone would be liable. There are, however, numerous cases in which parties who have furnished the means of subsistence, and for the preservation of trust estates, have been held entitled to be paid out of the fund, when the trustee was insolvent and unable to pay. That rule would, under the circumstances indicated, have applied here. But there is no proof, and there was no evidence offered, of the insolvency of the executors.

The counsel of the parties will be at liberty to move for all the orders necessary to carry this decree into effect.

From this decree the several parties to the suit appealed, that is to say:

From so much of the decree as declared that the Bank of Charleston, the Merchants Bank of Cheraw, Phelps, Dodge & Co., and J. C. Levy, are entitled to satisfaction out of the proceeds of the lands and negroes included in the indenture of 16th June, 1837, to the exclusion of or in preference to other creditors, the complainant appealed, and submitted the following, among other reasons, to shew that the decree should in this particular be reversed.

1. That said deed is inoperative at law, and the parties must therefore come into equity for relief, if they would have any benefit from it.

2. But equity favors equality, and assets are in this court distributed pro rata; nor can any creditor have a preference, unless by virtue of a lien, and equity will not set up a lien which is ineffectual at law, to improve the condition of one creditor at the expense of another creditor of equal merit.

3. That to the said deed no creditors were parties, and therefore it was subject to be revoked as long as nothing was done by the creditors that might serve as a consideration moving from them. But in fact no consideration to support the said deed moved from the creditors, and they retained all their rights upon the original causes of action, and so the deed continued to be solely the deed of Mr. Stoney, and to be revocable by him, and was in fact revoked by his death.

4. That the said deed was conditional, and

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the creditors who *would take under it, must shew that they have all strictly complied with its terms. But the said creditors have failed to shew a compliance, and on the contrary it has been shewn that the conditions of the said deed were broken by every one of the persons who now claim the benefit of it.

The Bank of Charleston appealed from the decree, and moved that the same may be modified in the particulars and for the reasons following, that is to say—

1. That the bond and mortgage of Mr. Stoney, referred to in his Honor's decree, was voluntary, and inchoate as a lien on his estate, and could neither bind him, nor vest any rights in the creditors mentioned in the schedule annexed to the bond, until the mortgage had been tendered to them by him for their acceptance, and actually accepted by them, in such manner as to render the terms and conditions therein contained, binding and obligatory upon them. That in point of fact, the bond and mortgage were intended, originally, for the benefit and protection of the Bank of Charleston only, the application and negotiation for indulgence, which resulted in the execution of the bond and mortgage, by Mr. Stoney, having been made and conducted by him, solely with that institution, and the debts for which indulgence was stipulated, and security offered, being all of them such as belonged to that Bank, or for which it might be eventually liable, or of which, if it were necessary, it might acquire the control; the terms of the bond and mortgage, moreover, being obligatory and binding on the Bank, originally and independently of the

subsequent settlement with Mr. Stoney, by virtue of the execution of the mortgage by its President, with the privity and by the authority of the board of directors. And although it would have been competent to Mr. Stoney, in his life time, to have extended the contract to the other creditors mentioned in the schedule, by tendering the mortgage to them for execution, or acceptance of its terms, yet it was entirely within his option to do so, or not, as he might deem advisable or expedient; and no creditor had the right, by a tender or expression of willingness to do so, to become a party to the mortgage, by executing the same, or otherwise to entitle himself to the benefit of it, until it was tendered to him by Mr. Stoney; nor had the trustees in his life time, or they or the executors after his death, any power or authority to extend the benefit of the contract to any creditor to whom Mr. Stoney had not tendered it in his life time. Wherefore, it is submitted there is error in so much of the de-

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*cree as admits the assignee of J. C. Levy, and Phelps, Dodge & Co., to a participation in the proceeds of sale of the mortgaged property, inasmuch as the mortgage was never tendered to them by Mr. Stoney in his life time, nor could their offer to accept the same avail to give them any title to the security proposed by it, especially after his death; and the decree ought, therefore, in this respect, to be reformed.

2. That independently of the general character of the bond and mortgage, as voluntary instruments, and except as to those creditors to whom the mortgage was actually tendered, and by them accepted, a mere authority to the trustees, and revocable at his pleasure, the bond and mortgage, upon their face, exclude both the assignee of J. C. Levy, whose debt was disputed and denied, and Phelps, Dodge & Co., whose names are not even mentioned in either instrument; so that in no point of view can they be regarded as either parties or privies to these instruments, or entitled to any benefit under them.

3. That if Phelps, Dodge & Co. ever had a right to avail themselves of the benefit of the bond and mortgage, by their acceptance of the terms prescribed, independently of the assent of Mr. Stoney thereto, and without a tender by him, yet such right was lost by their not accepting before his death, by which event the rights of his creditors, and their liens upon and interest in his estate, became fixed. Nor will their want of notice avail to give a right to accept after his death; especially as the very want of notice, whilst it proves laches on their part, at the same time excludes the idea of any contract or of any consideration, upon which such right could be founded. And it is, moreover, respectfully submitted, that the commencement of a suit against the executors of Mr. Stoney, by Phelps, Dodge & Co. upon their original cause of action, after notice of the bond and mortgage, was a waiver of any claim under those instruments, nor could such claim be revived by an abandonment of the suit.

4. That for the same reasons, the assignee of Levy is excluded from any rights under the bond and mortgage, both by his non-acceptance during the life time of Mr. Stoney, and by his assignee's actually recovering judgment against the executors of Mr. Stoney, after his death, upon the original cause of action.

5. That the bank of Charleston is entitled to rank as a bond creditor, as to any residue of its demand which may not be satisfied out of the mortgaged property; it being as much a part of the contract, upon which the bank

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surrendered the bills of ex*change held by them, and accepted the terms imposed by Mr. Stoney—that the debt should be secured by specialty, as that it should be specifically protected by the mortgage. Wherefore, it is respectfully submitted, that there is error in so much of the decree as declares the bank of Charleston a simple contract creditor only, for the said residue; and that, in this respect, the decree should be also reformed.

6. That there is further error in so much of the decree as declares that Mrs. Stoney is entitled to her dower, to be assessed and paid out of the fund in court, it being respectfully submitted, that dower is a specific charge upon, or more properly an estate in, the land in which it is claimed; and that if the right to dower out of the specific land has been released, or waived, or even lost by neglect, it is gone forever, and cannot be set up as a charge upon the estate. Wherefore, it is submitted that the decree in this respect, also, should be reformed; and it is insisted that at least the amount which may be assesssed for dower, should be set off against the balance due by the executors upon the account of their administration of the estate.

7. That there is no sufficient evidence to charge the estate of Mr. Stoney with the amount of Thomas Ashby's bond, referred to in the decree, and especially no evidence that he ever received any part of the balance of seventeen thousand, two hundred and twelve dollars and fifty cents, reported to be due upon it. That, moreover, there is nothing in the terms of the receipt given by Mr. Stoney, which is the only evidence of any trust, on which a trust can be raised for the sole and separate use of Mrs. Stoney; and, therefore, as to so much of the money due on the bond as she was entitled to, if collected by Mr. Stoney, it became his jure mariti, and if not collected by him, then his estate cannot be liable at all. Wherefore, it is submitted that there is error in so much of the decree as establishes the amount due upon the said bond as a charge upon the estate, and that the same should be reformed.

8. That the claim of Cooper & Hunt cannot

be established as a charge upon the estate, except upon proof, not only that the executors are insolvent, but also that they are in advance to the estate: wherefore, there is also error in so much of the decree as declares that they will be entitled to payment upon proof of the insolvency of the executors, and the same ought to be reformed.

Phelps, Dodge & Co. appealed, on the following grounds:

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*1. That the claim of the bank of Charleston, under the trust bond and mortgage from Mr. Stoney, should not have been allowed, because the said bank not only never accepted the terms of the said bond and mortgage, but violated the terms and provisions thereof, in several particulars. 1st. By surrendering their original drafts and taking a new note from Mr. Stoney, for a larger amount and at a shorter term of credit, than stipulated in the said bond and mortgage. 2d. By not confining the settlement with Mr. Stoney to the face of the original draft, but requiring from him a large sum of money for premium of exchange, protests and postages, and including the same in the principal of the new note above mentioned. 3d. By charging interest at the rate of seven, instead of six per cent., and including the same in the principal of the note.

2. That the claim of the bank of Cheraw, under the said bond and mortgage, should not have been allowed, because the said bank not only never accepted the terms of the said bond and mortgage, but violated the terms and provisions thereof. 1st. By surrendering their original drafts, and taking from Mr. Stoney a new note. 2d. By not confining their settlement with Mr. Stoney to the face of the original drafts, but taking from him a large sum of money for premium of exchange, protests and postages.

The assignee of Levy appealed, on the grounds:

1. That he is entitled to the full benefit of the bond and mortgage, stated in the decree, for the whole amount of the bills of exchange held by him, rateably and proportionally with the other debts secured by the said bond and mortgage.

2. That if it be contended or deemed, that the said bills of exchange are not entitled to the security of the said bond and mortgage, on the ground that their terms were not in time accepted by the holder, and that the want of information is not a sufficient excuse for the omission, then these defendants submit and contend, that the bank of Charleston, through their Presidents, James Hamilton and Kerr Boyce, and the said John Magrath, the trustees of these defendants, have committed a breach of trust against these defendants, in altogether neglecting and omitting to give, in time, notice to these defendants of the execution of these securities. And these defendants submit and contend, that the said bank of Charleston and John Magrath are answerable and liable to these defendants for the said breach of trust, and that the court will order and decree them, the said

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*bank of Charleston and John Magrath, to make up and pay to these defendants, as between co-defendants, whatever they, these defendants, may lose by the said breach of trust.

3. That the bank of Charleston violated the conditions of the said bond and mortgage, and are not entitled to the benefit of them.

7. That if the bank of Charleston are held entitled to the benefit of the said bond and mortgage, then they, as trustees of the other creditors under the said bond and mortgage, must either bring into the common fund the moneys which they have received on account of their debt from Mr. Stoney, since the execution of the bond and mortgage, and independently of them, or the said bank must be postponed on the funds arising under the mortgage, until the other creditors secured by it are equalized with them.

Mrs. Stoney and her children appealed from so much of the decree as declares that the bank of Charleston, Phelps, Dodge & Co., the Merchants bank of Cheraw, and J. C. Levy, are entitled to have the property embraced in the mortgage deed of the 16th June, 1837, applied to the payment of their respective demands, in preference to those of other creditors; and they relied upon the following grounds, viz:

1. That none of the said parties signed and sealed the said deed, or made themselves parties thereto, by acting under it and conforming to the conditions required to be performed by those for whose benefit it was intended.

2. That it is only as a contract, to which Mr. Stoney was a party on one side, and they were parties on the other side, that the said deed can be regarded as giving them any right to be preferred to other creditors; and as to Phelps, Dodge & Co., and Levy, they certainly could not have been parties to an instrument, of the very existence of which they had no notice until after the death of Mr. Stoney, the other contracting party.

3. That as to Levy's claim, it ought not to be admitted as a demand against the estate of Mr. Stoney at all, because the evidence shews that it was founded on a conspiracy between Dudley & Stuyvesant and Josephs & Co., to defraud Mr. Stoney.

Cooper & Hunt appealed from so much of the decree as affirmed that they are not entitled to have their demand paid out of the estate, without proving the insolvency of the executors, on the following ground, viz:

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*That their demand being for necessary supplies, furnished for the negroes of the estate, for which, if the executors had paid, they might have refunded themselves out of

the estate, this court will overlook the intervention of the executors, and make the payment immediately to the party ultimately entitled to receive it, and the solvency or insolvency of the executors can make no difference.

The executors of Stoney gave notice of appeal, as follows:

1. The executors appeal from so much of the decree as gives a specific lien to any one creditor, and claim that all the assets of the estate should be rateably distributed.

2. Should the decree be sustained, in relation to the payment to the executors of John Williamson, and sundry other simple contract creditors, the executors will ask leave that an order may be made, authorizing them to make the executors of Williamson, and all others who have been overpaid, parties to these proceedings, and that they may be decreed to refund all over their rateable share of the estate, under the final decree.

The Merchants bank of Cheraw appealed, on the following grounds:

1. Because the bank of Charleston having, with other creditors, entered into an arrangement with Mr. Stoney in his life time, could not in good faith vary the same to the prejudice of creditors; and, therefore, that for all moneys received by the bank of Charleston, the said bank should come into an account.

2. Because, for the surplus, after the proceeds of the sale of the mortgaged property are exhausted, the creditors whose claims are included in the bond and mortgage are entitled to rank as specialty, and not as simple contract creditors.

The executors and executrix of Stoney appealed, on the following grounds:

1. That under the circumstances of the case, in the payment of the debts denominated simple contracts, the executors are not liable, as in a case of mal-administration.

2. Because the funds belonging to the estate of John Williamson were in the joint possession of the executors of Williamson, and vesting absolutely in the survivor, formed no part of the estate of Mr. Stoney.

3. Because the bank of Charleston having agreed with Mr. Stoney, and having taken special security for his performance of it, could not vary that contract to the prejudice

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of other creditors; *and, therefore, the report of the master, recommending that the bank of Charleston should account for the $13,000 paid by Mr. Stoney, should have been sustained.

4. Because the claims of Mr. Hunt and Mr. Cooper were charges against the estate, and should have been defrayed from the funds in the hands of the master, and should not have been decreed a charge against the executors.

5. That the expenses of the negroes from the day of sale should be paid by the purchaser, and that no exception should be made in favor of the bank of Charleston.

Petigru, for complainant, cited 2 Fonb. Eq. 396; 2 Atk. 290; Francis' Maxims, 13; 4 John. Ch. 633; 1 Camp. 148; 3 Meriv. 7; 5 Cond. Eng. Ch. 1; 13 Ib. 121; 8 Ib. 96; 4 Mass. R. 144; 1 Leon, 194; Rob. on Fraud. Convey. 429; 1 Ch. Ca. 249; 5 John. Ch. 332; Co. Lit. 204; Doug. 684; 2 J. R. 207; P. L. 408; 3 Kent. 115; 1 Dick. 375; 1 McC. Ch. 434; 2 John. Ch. 576; 2 M. & R. 503; 3 Bro. Ch. 639; 1 Hopk. 373.

Yeadon, for Phelps, Dodge & Co. cited 1 Story Eq. 522; 1 McC. Ch. 466; 8 Pick. 113; 8 Cond. Eng. Ch. 97; 15 Ves. 52; 14 J. R. 409; 12 Ib. 536; 1 Vern. 261; 1 Story Eq. 370.

A. G. Magrath, for Bank of Cheraw, cited Story on Cont. 76, 77; 4 Mason, 214; 11 Wend. 250; 4 John. Ch. 429; Ang. on Ass. 186; 3 Esp. 228; 2 Camp. 383; 1 McC. 441–2; Ib. 168; 3 B. & C. 248; 10 Eng. C. L. R. 67; 11 Wheat. 78; 4 John. Ch. 529; 2 Ves. & B. 306; 1 Anst. 111; 2 Rose, 79; 2 Ves. & B. 416.

Bailey, for Bank of Charleston, cited in 1 Bail. Eq. 172; 2 McC. Ch. 56; 2 Cru. Dig. 344–7; 1 Story Eq. 287; Ib. 520, 522; 8 Eng. Cond. Ch. 99; 2 Story Eq. 439, 440; 15 Ves. 52; P. L. 494; 2 McC. Ch. 382; 3 Hill, 145; Bail. Eq. 159, 283, 311; 2 Tread. 770.

Mazyck, for Mrs. Stoney and children and Cooper and Hunt, cited 1 Dick. 375; 1 Wheat. Selwyn (ed. 1839) 446–7; 2 Watts, 451; 2 Whart. 167; 5 Eng. Cond. Ch. 7; 6 Ves. 666; 18 Ves. 84; 14 John. R. 404; 2 Hill, Ch. 250.

King, for assignee of Levy, cited 1 McC. Ch. 466; P. L. 67, 68; 1 Story Eq. 408 et seq.; 12 John. R. 536, 554, 559; 4 Cowen, 603; 5 Pet. 264; 1 Vern. 260; 1 Hill, 242; 2 Story Eq. 439; 1 Hill Ch. 414, 430; 2 Hill Ch. 443; 1 McC. Ch. 406; 3 John. Ch. 261; 14 Pet. 20, 32; 1 Story Eq. 226; Rice Eq.

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*315, 325; Dud. Ch. 55; 2 Sch. & Lef. 689, 709, 718; 2 McC. Ch. 470.

Hunt, for the executors of Stoney.

Curia, per JOHNSTON, Ch. Perhaps the plainest view may be obtained of the principal questions involved in this appeal, by taking our position at once amidst the circumstances existing at the death of Mr. Stoney. He died in possession of a large estate, consisting partly of property which he had conveyed away by the deed of the 16th of June, 1837, and partly of other property, of which the title still remained in himself; and he was largely indebted, the principal debt consisting of a bond, in the penalty of 400,000 dollars, the rest being simple contracts.

The whole of the property has been sold; the proceeds of it are in this court; the

different creditors and claimants have been called in, at the instance of the plaintiff, who is a general and simple contract creditor of the deceased; and the question is, how shall the fund be distributed among them?

The simple contract creditors insist upon a pro rata distribution: those interested in the bond and deed contend for a preference.

If the deed be regarded as an ordinary conveyance, and the bond as an ordinary obligation, and if there were no connexion between them, the principles of the decision would be very clear. The property covered by the deed would constitute no part of Mr. Stoney's estate, but would belong to the grantees; and its proceeds must be awarded to them. The estate of Mr. Stoney would be restricted to the property of which the title remained in him. Out of this his debts must be satisfied, in the order prescribed by the statute; and, of course, the bond would be preferred over the simple contracts.

But this is not exactly the character or position of these instruments. The bond purports to have been taken by Hamilton and Magrath, the obligees, as trustees of certain simple contract creditors of Mr. Stoney, whose names and demands are exhibited in a schedule annexed to and referred to in it; and its penalty is suspended, upon a condition, that he should pay them, with certain abatements, within a specified time, which he has failed to do. The deed purports to have been executed to the same trustees, as a security to the bond, and to advance the interests of the cestuis que trust, the creditors mentioned in the bond schedule. The first and natural impression from these

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*circumstances would be, that the proceeds of the property covered by the conveyance should be passed through the grantees to their cestuis que trust, and that after being credited upon their demands, and upon the bond by which they are secured, the residue of the bond should stand, as a specialty demand, against the general assets of the obligor. And to this same conclusion I have come, after an attentive consideration of all that has been advanced by counsel, in an argument of unusual extent, and uncommon ingenuity, discrimination, and learning.

The question is as to the validity and operation of the instruments referred to, and what effect is to be allowed them in the distribution of the funds in the possession of the court; and the objections to their operating in the manner contended for by the creditors interested in them, are rested on the rights of Mr. Stoney, and the other creditors, which are supposed to be thereby infringed.

I suppose it is hardly necessary to observe, that whatever would conclude Mr. Stoney himself, must be equally conclusive on his personal representatives, and distributees; and that although they, and not he, are the parties before the court, urging the objections, the case must be considered as if he were the actual party in their place. Nor need I say, that as to the validity of the instruments, the objecting creditors must be concluded with Mr. Stoney, except in the single instance where their execution might operate as a fraud upon them; and that, as to the influence of these papers, in the distribution of the fund, their right of objection must be restricted to such equities as the rules of this court recognize in the administration of funds in like cases.

I proceed, now, to consider the objections urged by counsel.

They may be summed up thus:

That, irrespective of the terms exacted by the instruments from the creditors intended to be secured, no consideration proceeded to Mr. Stoney, either from the trustees or creditors; wherefore the papers are to be regarded as purely voluntary: and, as such, neither of legal obligation, nor enforcible in equity.

That the creditors did not bind themselves to the terms, either by becoming parties or by assenting, so as to impart a consideration, and entitle themselves to enforce the instruments.

That the latter are ineffectual in law, not only as being voluntary, but incomplete.

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*And that the rules of this court forbid it to give them any effect calculated to disturb that equality among creditors which is so much favored here.

There is no such condition expressed on the face of these papers, as that they shall not begin to operate until the creditors, respectively, shall become parties, or assent; much less is a condition or intention expressed, (as seems to have been done in Atherton v. Worth, 1 Dick. 375, one of the cases quoted,) that they shall not take effect unless all the creditors shall do so. Therefore, I shall consider them as proceeding from Mr. Stoney, with his free consent, that they shall operate,—but that they shall operate only upon the terms expressed in them; and that they are good for those intended to be benefitted by them, so far as the law allows them to avail themselves of their benefits; with this single proviso, that if they claim the benefits they must abide by the terms.

And, in the first place, I am of opinion that it was not necessary that the creditors intended to be secured, should be parties or assenting at the execution of the instruments. As observed by Chief Justice Marshall, in Brooks v. Marbury, (11 Wheat. R. 97 [6 L. Ed. 423],) "deeds of trust are often made for the benefit of persons who are absent, and even for persons who are not in being;" and the interests of all such would be defeated, if their concurrence were deemed a pre-requisite to the operation of the deeds. Accordingly, he follows what I have quot-

ed by the position, that "whether the deeds are for the payment of money, or for any other purpose, no expression of the assent of the persons for whose benefit they are made, has ever been required as preliminary to the vesting of the legal estate in the trustee." In the same case, it was held that a subsequent assent in terms, or by substantial acts, was a sufficient acceptance.

In this branch of the discussion, I am assuming, of course, that the instruments are voluntary, as proceeding from and executed in fulfilment of no contract between the cestuis que trust and Mr. Stoney. It is impossible to put a deed, made with the motive of securing creditors, upon precisely the same footing with one creating a trust for pure volunteers. But taking them as such, the case of Ellison v. Ellison, (6 Ves. 656,) sustains the position, that wherever the instrument effectually constitutes a trust, even for volunteers, they may enforce it. Lord Eldon observes, (Ib. 662,) "I had no doubt, that from the moment of executing the first deed, supposing it not to have been for a wife

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*and children, but for pure volunteers, those volunteers might have filed a bill in equity, on the ground of their interests in the instrument, making the trustees and the author of the deed parties. I take the distinction to be, that if you want the assistance of the court, to constitute you cestui que trust, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you cestui que trust."

The same doctrine was held by the same great Chancellor, in Pulvertoft v. Pulvertoft, (18 Ves. 84.) He says "the distinction is settled, that in the case of a contract merely voluntary, (I do not speak of valuable or meritorious consideration,) this court will do nothing. But, if it does not rest in voluntary agreement, but an actual trust is created, the court does take jurisdiction."

The case of Walwyn v. Coutts, (5 Cond. Eng. Ch. 7,) has been referred to for a contrary doctrine. The grounds upon which the order was made in that case are not disclosed by the note of it which has been reported.

The difficulty, in subsequent cases, has been to discover upon what principle, consistent with his own decisions in Ellison v. Ellison and Pulvertoft v. Pulvertoft,—the authority of which has been constantly acknowledged —Lord Eldon could have rested his judgment. Sir Launcelot Shadwell, in commenting upon it in Garrard v. Lauderdale, (3 Sim. 1, 5 Cond. Eng. Ch. 1,) supposes that the principle of the case is, that where a debtor, for his own convenience, makes a disposition between himself and a third person, constituting him trustee as between themselves for the payment of his debts, and this without concert with or notice to his creditors, he may countermand it. Lord Brougham, before whom the last mentioned case afterwards came, (2 Rus. and Mylne, 451, 13 Cond. Eng. Ch. 121,) says of the instrument in Walwyn v. Coutts, that it was not so much a conveyance, vesting a trust in A, for the benefit of the creditors of the grantor, but rather an arrangement made by a debtor for his own personal convenience and accommodation, (for the payment of his own debts, in an order prescribed by himself,) over which he retains power and control.

Upon these views the authority of Walwyn v. Coutts was sustained in Garrard v. Lauderdale; and upon the same principle the latter case was also itself decided. It will be seen at once, that the application of the principle depends upon the construction of the instrument, and the intention with which it

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was *executed. If it appear that the trustee was not intended to be the trustee of the creditors, but of the grantor, his mere agent, and that the conveyance was executed simply with a view to enable him to perform the acts directed, these cases say the deed is revocable: though it is not clear that it could be revoked after the transaction has come to the knowledge of the creditors, and against their wish, expressed before the revocation.

This is the interpretation put upon these cases, by Sir C. Pepys, in Bill v. Cureton, (8 Cond. Eng. Ch. 103,) who remarks that "the distinction between them and the prior cases, is somewhat refined;" "but it is obvious that the distinction has good sense for its foundation, and that the rule, as established by them, is adopted to promote the views and intentions of the parties."

I have thus brought together the two decisions of Lord Eldon, in which the rule is firmly laid down on the one hand, and the cases, one of them decided by himself, which have been supposed to oppose it on the other, and I have shewn that the rule was not intended to be shaken by these cases.

I have purposely abstained from a reference to other cases in support of the rule; reserving, for that purpose, an extract from the judgment of the master of the rolls, in Bill v. Cureton, already mentioned, which will not only shew the strength of its authority, but the fact that it was never intended to be drawn in question. "That a voluntary settlement," says he, "where the trust is actually created, is binding upon the settlor, has been so long, and is so fully established, that no attempt to raise the question would probably have been now made, were it not that the modern cases of Walwyn v. Coutts, and Garrard v. Lauderdale, have been supposed to be inconsistent with that doctrine.

"The doctrine itself has never been disputed, and has been the subject of repeated decisions, from the cases of Villers v. Beaumont, (1 Vern. 100,) in the year 1682, and of Brookbank v. Brookbank, (1 Eq. C. Ab. 168,)

in 1691, down to the modern cases of Ellison v. Ellison and Pulvertoft v. Pulvertoft. It must, indeed, have been coeval with the statute of the 27 Eliz. inasmuch as the second section of that Act declares that voluntary conveyances shall be void only as against purchasers for valuable consideration; assuming, therefore, that as against the authors of such settlements, they were good. If, therefore, the cases of Walwyn v. Coutts

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and Garrard v. Lauderdale, were *inconsistent with this doctrine, there would be no doubt on which side the weight of authority would be found. But, in fact, those decisions were not intended to interfere with the general doctrine, and the grounds upon which they were founded are perfectly consistent with all the preceding cases. It cannot be supposed that Lord Eldon, who decided Ellison v. Ellison and Pulvertoft v. Pulvertoft, and several similar cases, intended to overturn the doctrine upon which they proceeded, in his decision in Walwyn v. Coutts; and the Vice Chancellor, in Garrard v. Lauderdale, expressly draws the distinction, and leaves that doctrine untouched. These two cases, indeed, so far from deciding that a cestui que trust becoming entitled under a voluntary settlement, had not a good title against the settlor, proceeded upon this—that the character of trustee and cestui que trust never existed between the creditor and the trustee of the trust deeds; but that the settlor himself was the only cestui que trust, and that, therefore, he was entitled to direct the application of his own trust fund. Whether such views of the relative situation of the creditor and the trustee were correct, or not, is immaterial for the present purpose. The grounds upon which the judges who decided those cases professed to proceed, are sufficient to prevent their decisions from being considered as authorities against the former well established doctrine."

I might refer to innumerable other authorities, English and American, in support of the rule, but I have already dwelt too long upon this point.

It is not necessary to contend that such instruments are not revocable. I suppose they would be, if, after notice to the cestuis que trust, they disputed, or refused to accept and be bound by any terms imposed on them. But, in point of fact, those executed in this instance were never revoked; nor does it appear that Mr. Stoney ever repented his act, or made a different disposition. On the contrary, he constantly recognized their validity, and the interests of his creditors under them, by settlements and payments of interest, in which he was imitated by his executors after his death.

But suppose Walwyn v. Coutts were authority for the position, that voluntary trusts for the payment of debts, to which the creditors are not parties, nor assenting, are not only revocable, but null. That can only be so, as that case has been explained, where the creditors were not intended to be parties, or assenting. But the instruments here,

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on their face, shew an *entirely different intention; and, to take notice of nothing else, the very fact that terms are proposed to the creditors on the face of these instruments, goes far to shew that the securities were intended for their acceptance.

I have no doubt, therefore, that this case can, by no possibility, fall within the principle of the cases relied on. The creditors had an interest here, as soon as the papers were executed by Mr. Stoney and the trustees; such an interest, according to numberless cases, as entitles them to accept now, if they have not done so before; never having dissented, and the instruments (in which no time is set for their accepting,) never having been in fact revoked—and the fund still remaining for distribution. See 14 Peters's R. 20, 32; 1 J. C. R. 529; 10 Com. L. R. 64; 1 Vern. 260—1.

Heretofore, I have examined the transaction as if the creditors were not actual parties, or assenting; as if it were questionable, in some degree, whether the instruments were executed upon consultation with them. But on their face there is enough to conclude Mr. Stoney on all these points. The bond recites that "the parties to whom the above bound John Stoney is so indebted, have agreed," "that the said John Magrath and James Hamilton be appointed trustees, for and in behalf of the said creditors, to take of and from the said John Stoney good and sufficient security for the payment of the said debts," and then follows the stipulation, secured by a penalty, for their payment. Then ensues the deed, in which, after reciting the terms upon which the creditors are to be paid, and the bond taken by the trustees to secure their payment, the real estate and slaves are conveyed to Hamilton and Magrath, "for better securing to the said John Magrath and James Hamilton, trustees for the said creditors, the parties of the third part the payment of the said bond, according to the condition thereof." Could Mr. Stoney have denied the fact, thus stated, above his own signature, that these trustees were appointed by the creditors to take the bond and conveyance from him? Certainly not.

It is true the creditors might have denied it, and were not bound by the terms of the trust until they accepted, but the relation of trustee and cestui que trust was completely and conclusively established, under the hands and seals of both the grantor and the trustees, in their favor, and whenever they accepted they were bound by the terms.

Independently of all this, the evidence

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shews that Mr. Stoney *was not acting for his own benefit, and apart from the creditors,

The fact that a single creditor was engaged in the treaty which led to the execution of the securities, is sufficient, of itself, to shew that Mr. Stoney was not proceeding of his own head; and whether such creditor acted for himself alone, or for others also, can make no other difference than this, that if he acted for others he cannot exclude them from the benefits acquired. Now, the evidence shews that the terms of this arrangement were proposed to the Bank of Charleston; that it was entered into with their approbation after deliberate consideration; that a settlement was made in reference to it, although, in some respects, inaccurate, (upon which point we concur with the Chancellor;) that interest has been paid under it; and can it be doubted, that the creditor thus acting has accepted, and is bound? The same remark applies to the Bank of Cheraw.

As respects Phelps, Dodge & Co., I have already expressed the opinion, that they might come in now, if they had not already accepted. They have done nothing inconsistent with the terms imposed on the creditors. Their bringing suit was no infringement of the terms, that they were to wait to a certain time for their money, and if it would otherwise have been so, it was done in ignorance of their rights, and should not prejudice them. As to the assignee of Levy, he must come in upon principles already announced, and we have determined, in another suit, that he comes in for the whole of his demand.

I am sorry that there still remain several points, the consideration of which must necessarily protract an opinion already too prolix.

It is said that the bond and deed are ineffectual at law. It is argued that no suit could be maintained on the former, by the gentleman who has succeeded General Hamilton in the Presidency of the Bank of Charleston, and who, as successor, is substituted for him as trustee, by virtue of a provision in the deed. The precise objection is, that suit could not be brought in the joint name of this substitute and Mr. Magrath, the other trustee. No doubt of this, but the provision referred to contemplates merely a transmission of the trusts, and in no manner affects the legal obligation of the bond, which may still be enforced in the name of the obligees, or the survivor of them, or under our own Act, in the name of the assignee of both.

Then it was argued, that the deed is inoperative at law, for incompleteness; that it purports to be a deed tripartite, and al-

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*though executed by Mr. Stoney and the trustees, the first and second parties, it was not executed by the creditors, who were to be the third party.

The deed was delivered, being as completely executed, as between the grantor and grantees, as they could execute it. As between these parties, the conveyance was complete; and it must operate as a conveyance, unless the accession of the third party, by signing and sealing, was a prerequisite to its operating as such. I have already said that no such condition is required in terms upon the face of the paper. Still, the necessity for its execution by the creditors might be implied. This must depend upon what was exacted from them by the terms of the deed; as if, for instance, something were required of them essential to the completeness of the conveyance. But the only thing expected from these creditors, as appears from the instrument, was their assent, in a binding form, to certain indulgencies and abatements on their demands, a matter which, in no sense, concerned the validity of the grant, but only affected the terms of the trust, and restricted them in the enforcement of their interests under it. They were in no manner the owners of the property to be conveyed, nor necessary parties in its conveyance. Now if, as all the authorities shew, the assent of the creditors as effectually imposes its terms upon them as if they had sealed it, what is to prevent its operating upon the fact of the actual assent given, at least by the Bank of Charleston, at its execution?

Having thus before us a trust completely constituted,—so constituted as to create a responsibility on the part of the trustees to their cestui que trust, for its execution, which responsibility entitles the trustees, for their own indemnity, to enforce it against the author of it, and the trust having been partly executed, and consisting in instruments of legal validity, we feel no hesitation in declaring that the cestui que trust are entitled to the benefits of those instruments, according to their legal force and effect, and that to that extent they are conclusively available against Mr. Stoney, and his estate, in the hands of his executors.

His general creditors can raise no objection to this. To the validity and original operation of the instruments, as I have said, they can object only on the score of fraud; and there is no fraud here. The character of the transaction has been somewhat misapprehended in the argument. It does not purport to have been a general assignment or composition, but merely a security given to certain creditors, limited to certain por-

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tions of the debtor's es*tate, upon terms advantageous to him, and no otherwise disadvantageous to his general creditors, than as all liens and special securities must necessarily be; and to regard such arrangements as obnoxious to the stigma of fraud must, as I think is satisfactorily argued in one of our own cases, (Niolon v. Douglas, 2 Hill's Eq. 443 [30 Am. Dec. 368], cut up all securities, and destroy that freedom which is essential to commerce.

But the general creditors raise another objection, not directly striking at the validity

[illegible] instruments, but the effect to be given them by this court, in the distribution of the funds before us.

It is said that the preferred creditors are here demanding an enforcement of the instruments, and this will be allowed only upon terms of equality. It must be remembered, however, that these creditors are here resisting an attempt either to set aside the provision made in their favor, or to reduce their rights under it to a scale below the legal rank of their securities. Property having been sold belonging to their trustee, by legal conveyance, and an estate being about to be distributed, upon which their trustee holds a bond, they have been called in to exhibit their claims upon the funds; and they come in not to invoke the active interposition of equity, or to ask that a different or more extensive operation should be given to the instruments under which they claim, than the law gives them, but to claim their benefit, according to their legal rank and operation. Being brought into court, they, in the person of their trustee, insist upon their legal rights, and those only, which are vested in him, and which, if they were not in court, he would be bound, in the faithful discharge of his duty, to demand and enforce.

Can there be any doubt, that in the distribution of the assets of a deceased debtor, a bond debt, whether held by a trustee or any other person, is to be paid, under our statute, before simple contracts?

Then as to the property covered by the deed; is there any doubt that the grantee is entitled to the avails of it? In what I have heretofore said, I have not thought it necessary to draw any distinction between the different species of property,—realty and personalty—embraced in the deed, nor to advert to the fact, that the deed was not intended as an absolute conveyance, but as a security. There is no doubt that the instrument vested the title of the personalty in the grantee. Then, as to the lands, some doubt has been intimated, whether the deed,

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substantially *a mortgage, comes exactly within the purview of the Act of 1791. This doubt, I think, is not well founded. But without deeming it necessary to decide that point, and assuming that that Act applies, so as to reserve the title to the grantor, and reduce the conveyance to a mere lien; still it was one enforceable at law. The grantee was under no necessity to come here to enforce it, but might, upon obtaining judgment upon his bond, have disposed of the fee under his judgment, if no other judgment intervened; and if a judgment intervened, he might have disposed of the fee under his mortgage, by pursuing the directions of the statute in such case. Shall this court dispose of property thus liable; and shall he who was entitled to these remedies, when he comes to ask that he shall not be prejudiced by the act of the court, be turned away with a declaration that there is a rule in the forum forbidding it to reinstate him in the legal rights of which it has deprived him?

This court, in the distribution of funds, constantly recognizes liens. Professor Story, (1 Story's Eq. 522, ch. 9, sec. 553,) after observing that, in the course of the administration of assets, courts of equity follow the same rules in regard to legal assets, which are adopted by courts of law, and give the same priority to the different classes of creditors which is enjoyed at law, says, "in like manner, courts of equity recognize and enforce all antecedent liens, charges and claims, in rem, existing upon the property, according to their priorities; whether they are of a legal or equitable nature, and whether the assets are legal or equitable."

It was faintly urged, that the whole of the funds in hand were to be administered as equitable assets. There are no equitable assets before us in this case, nor any attempt to bring into the fund for distribution, by the intervention of equity, any subject matter not already constituting part of the fund, by legal operation, without the aid of this court. If the assets were equitable, however, and not legal, we have just seen that the lien of the mortgage must be allowed.

As I have said, at the outset, so far as the mortgaged property may extend, it must be applied in extinguishment of the bond, and the demands secured by it. Then, if any portion of those demands remain unsatisfied, the bond, as a legal obligation, is a good demand, according to its rank, against the assets in the hands of the executors, for that balance. A law court—every court—must look to its form, in assigning it its rank as

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against *the assets; and being a bond, the statute points out the order in which it shall be paid. The Chancellor supposes that the demands secured, and not the bond by which they are secured, must be looked to, for the purpose of ascertaining the order of payment, after the security of the mortgage shall have been exhausted; and that as the bond does not extinguish the demands, to which it is collateral, these alone, as they form the real claim, so they must give rank and character to the claim, as against the assets. But upon this point we differ from the Chancellor. It is difficult to conceive why we should give efficacy to one of the securities, (the mortgage,) so far as it extends, to sustain the interests of the creditors for whose benefit it was executed, and yet deny its proper legal rank and efficacy to the other security, (the bond) when proposed as a further means of sustaining the same interests. If it is a security, it must be allowed to operate as one; and it cannot operate as a security unless it be allowed the rank of a specialty—which is its proper legal rank—against the assets. If it be not allowed this

operation, it is no security at all; it is a nullity, and no bond.

Before we part from the claims of these creditors, it may be as well to say, that we concur with the Chancellor in so much of his decree as strikes from the demands of the Bank of Charleston, and the Bank of Cheraw, the excess of interest, and the exchange, costs of protest and postage, charged in their settlement with Mr. Stoney. If these had been paid by Mr. Stoney, it is not perceived that either he or his creditors could have complained of it, although varying from the terms of the securities given to the preferred creditors. But they were merely included in the new notes given upon the settlement, and which remain yet to be paid; and, therefore, the demands of these creditors must be reduced, so as to conform to the terms of the securities upon which they insist.

There is another point proper to be noticed here. We approve the Chancellor's decision, that those among the preferred creditors who received partial payments from Mr. Stoney himself, are not bound to bring them into account, as a condition of receiving further satisfaction of their demands, either from the special fund arising from the mortgaged property, or from the general assets; nor are they, on account of such partial payments, to be postponed until the others are put upon an equality; and nothing need be

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added to the Chancellor's reason*ing on these subjects. But as to payments made them, either out of the mortgaged fund, or the general assets, since the death of Mr. Stoney, the rule must be different. The preferred creditors are entitled, pro rata, to the benefits of their common securities; and, if it becomes necessary, the accounts must be so cast as to give them these benefits; and, (to dispose of the whole subject,) so, also, as to do no injustice to the general simple contract creditors, who are entitled to the benefit of the general assets, after the demands of the preferred creditors are satisfied.

We concur in the Chancellor's decision, in relation to Mrs. Stoney's dower, and for the satisfactory reason he has given. Whether the amount to be allowed her for dower should be set off against any balance which may be due by her as executrix, upon the account of the administration of her husband's estate, need not be determined until a balance of that character shall be ascertained against her; and as the accounts will go back to the master, the question is reserved until the necessity for its decision shall arise. The point may be made on the reference.

We also concur, generally, in the decision of the Chancellor in relation to the claim of Mrs. Stoney and her children, founded upon the receipt given for Ashby's bond. The view he has taken of the nature of Mrs. Stoney's interest in this trust, does not appear to us, however, to be quite accurate; and the inaccuracy may affect the claim, so far as she is concerned. Where a conveyance is made to the husband of a married woman, for her sole and separate use, the husband is constituted her trustee, and for her sole and separate use—confining the trust to the nature of the interest expressly intended to be given her. Where, however, the conveyance to the husband is simply for the use of, or in trust for, the wife, and not for her sole use, the husband is trustee for the wife, according to the quantity of interest given her, and no more. It is an interest which survives to the wife, upon the death of the husband; but during the coverture, the husband is entitled to the usufruct, in her right. This distinction can in no otherwise affect the decision of the Chancellor, however, than as respects the interest of so much of the trust fund, during Mr. Stoney's life, as accrued upon Mrs. Stoney's share. In casting the accounts, this must be taken notice of, if insisted on.

Again, we concur with the Chancellor with respect to the expenses of the negroes between their sale and delivery to the purchasers; and also with respect to the demand

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brought in for *shoes; with this qualification, that it would not be sufficient to establish the insolvency of the executors. The claimants must, also, shew that they are either in advance with the estate, or at least not in arrears with it; in other words, that the accounts between the executors and the estate stand in such a position, that the executors could, if they had paid the demand, rightfully claim to be reimbursed out of the trust fund.

With regard to the grounds of appeal taken by the executors, they are all substantially disposed of, so far as they have been explained to this court, except that one which asks that the surviving executor of John Williamson be made a party. He is a party, in the person of the defendant, Magrath; and when the accounts go back to the master, the executors will have an opportunity to raise an account against him, or to present such grounds for the modification of the accounts in the matters complained of, and not already adjudicated, as they may deem for their interests.

It is ordered, that the decree appealed from be modified according to the foregoing opinion; that the cause be remanded to the Circuit Court, and the accounts recommitted to the master.

HARPER and DUNKIN, CC., concurred.

1 Rich. Eq. *265

*WILLIAM B. YATES, Administrator of James S. Mitchell, v. CAROLINE D. MITCHELL and WILLIAM D. PORTER, Executrix and Executor, et al.

(Charleston. March, 1845.)

[*Wills* ⇐545.]

Testator directed that his estate should be kept together during the life of his wife, and devised one half of the income to her and the other half to his children. At her death he gave the estate to his "children, to be equally divided among them, to them, their heirs, executors, &c. forever; and should any of my said children die, without leaving issue living at the time of his, her, or their death, then the share or shares of such child or children so dying as aforesaid, shall go to the survivor or survivors of my said children," &c. *Held*, that the limitation to the survivors was not confined to the life of the wife, and that the share of a son who survived her, and then died without issue, went over to the surviving children of the testator.

[Ed. Note.—Cited in Blum v. Evans, 10 S. C. 81; Mendenhall v. Mower, 16 S. C. 314; Mangum v. Piester, Id. 322; Marshall v. Marshall, 42 S. C. 443, 444, 20 S. E. 298; Bischoff v. Atlantic Realty Corp., 95 S. C. 285, 287, 288, 78 S. E. 988.

For other cases, see Wills, Cent. Dig. § 1174; Dec. Dig. ⇐545.]

Before Johnston, Ch., at Charleston, February, 1844.

The principal object of this bill was to ascertain the interest which James S. Mitchell had in the estate of his father James Mitchell. James Mitchell died testate in the year 1831, leaving surviving him, his widow, Margaret, and nine children, of whom James S. Mitchell was one. The widow Mrs. Mitchell died in 1838. James S. Mitchell died in 1842, unmarried and without issue, leaving seven brothers and sisters surviving him. The clause in the will of James Mitchell on which the question arose is as follows:

"Item. I will, order, and direct, that all the rest, residue, and remainder of my estate, both real and personal whatsoever and wheresoever, be kept together, and rented, hired, or employed, to the best advantage, so as to raise therefrom as large an annual income as conveniently may be, for and during the life of my dear wife; and after paying all taxes, repairs, and expenses, in any manner accruing on the said rest and residue of my estate, I give, devise, and bequeath, one net moiety or half part of the said clear annual income, yearly, and every year, unto my said wife, for and during her natural life. And I give, devise, and bequeath, the other net moiety or half part of the said clear annual income, for and during the life of my said wife, unto my dear children, to be equally divided among them, share and share alike. And I will, order, and direct, that the provision made in this will for my dear wife

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shall be in lieu and bar of *dower and thirds, and all else she can have or claim against my estate. And from and after the death of my dear wife, then I give, devise, and bequeath, all the said rest, residue, and remainder of my estate real and personal, unto my dear children, to be equally divided among them share and share alike, to them, their heirs, executors, and administrators, or assigns, forever; and should any of my said children die, without leaving lawfully begotten issue, living at the time of his, her, or their death, then the share or shares in my estate of such child or children so dying as aforesaid, without leaving lawfully begotten issue, living at the time of his, her, or their death, whether specifically given, or other wise accruing under this will, shall go to the survivor or survivors of my said children, and to the issue of such of my said children as may have previously died; the issue, if more than one, of any deceased child or children taking among them only the proportion or proportions to which the parent or parents, if alive, would have been entitled."

The defendants contended that upon the death of a child at any time without issue, his share of the estate went over to the survivors.

The complainant contended that the limitation was confined to the case of a child dying in the life time of the widow, the tenant for life, and that James S. Mitchell having survived his mother was entitled to an absolute and unqualified share in the estate.

His Honor, the Chancellor, adopted the construction contended for by the defendants. The complainant appealed.

Petigru and Yeadon, for the complainant, cited Speers Eq. 403; 5 B. & P. 55; 3 M. & R. 71; 2 Ib. 52.

King and Porter, contra, cited 2 Ves. Sr. 505; 4 Ves. 313, 319, 327, 331, 340; Bail. Eq. 535; 1 Swanst. 164.

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1 Rich. Eq. 266

BENJAMIN DEHAY and Wife et al. v. ISAAC PORCHER.

(Charleston. March, 1845.)

[*Wills* ⇐545, 594.]

Testator devised his plantation to his wife during life or widowhood. To his two daughters "and to their issue" he gave the whole of his estate, including the reversion of the plantation, to be equally divided between them; and in a subsequent clause devised as follows, "in case of the death of either of my two daughters, without lawful issue living at her death, I then give the whole of my estate, as subject to division between them, to my surviving daughter, her heirs, executors, administrators, or assigns."

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The *widow married, whereby her estate in the plantation was determined, and both the daughters had issue. *Held*, that the contingency, on which the property was to vest in the issue as purchasers, or go over to the survivor, was determined by the determination of the life estate, and that each daughter had at least a

fee conditional in the plantation, and having issue could alienate the same.

[Ed. Note.—Cited in Badger v. Harden, 6 Rich. Eq. 148; Blum v. Evans, 10 S. C. 81.

For other cases, see Wills, Cent. Dig. §§ 1174, 1311; Dec. Dig. ⟸545, 594.]

Before Dunkin, Ch., at Charleston, February, 1845.

Robert Foxworth, by his will, after devising his plantation and a part of his personal estate to his wife, during her life or widowhood, devised as follows, viz:

"To my two children, Jane Maria Dehay, and Julia S. Foxworth, and to their issue, I give and bequeath all the rest and residue of my estate, real and personal, to be equally divided between them, including therein the reversion of my plantation and other property above given to my wife, during her life or widowhood."

And by a subsequent clause, as follows, viz:—"In case of the death of either of my two daughters above named, without lawful issue living at her death, I then give the whole of my estate above mentioned, as subject to division between them, to my surviving daughter, her heirs, executors, administrators, or assigns."

The widow's estate for life or widowhood being determined by her marriage, and both the testator's daughters being married, a contract was made with the defendant for the sale of the plantation to him for $1,650, whenever good titles could be made by any proceeding in law or equity. The daughters being both married and having issue, the bill was filed by them and their husbands and children, for a specific performance of the contract—the children being made parties, with a view to have the titles made under a decree of the court, in case it should appear that the testator's daughters had not such estates in the land as to enable them, by joining with their husbands, to convey a fee simple estate to the purchaser.

The defendant's answer admits the will and the contract, and submits that the daughters and their husbands have not such estates as to be able to make him a good title in fee simple, but professes his readiness to comply with the contract, provided a good title can be made in any way.

By the Chancellor.—Subject to the interest

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of his wife during *life or widowhood, the testator devises and bequeaths the rest and residue of his estate to his two children, "and to their issue," "to be equally divided between them." After several intermediate specific bequests, the testator then declared "in case of the death of either of my two daughters above named, without lawful issue living at her death, I then give the whole of my estate above mentioned, as subject to division between them, to my surviving daughter, her heirs, executors, administrators or assigns."

It seems quite clear, that this latter clause refers to the death of a daughter prior to the period of the contemplated division; that is, prior to the death or marriage of the testator's widow. In that contingency, he gives an absolute estate to the daughter surviving, in terms of the most ample character.

The period for division has passed by. Both the daughters are alive and have issue. Adopting this construction of the will, it is difficult to raise an argument against the validity of the complainants' title. "If a testator gives to one and his issue, and stops there," says Chancellor Harper, in Bail. Eq. 545, "he must be understood to intend that they shall take in indefinite lineal succession, and the word will be one of limitations." That is this case.

It is ordered and decreed, That the defendant pay to the complainants the sum of one thousand six hundred and fifty dollars, with interest from the time he took possession of the premises, on receiving from them the title as heretofore tendered. Each party to pay his own costs.

The defendant appealed, on the ground:

That by the will of the testator Robert Foxworth, his daughters have only estates for life in the land in question, with contingent remainder to their issue living at their deaths respectively.

Mazyck, for the appellant.

———— ————, contra.

Curia, per HARPER, Ch. There can be no doubt with respect to the ground of appeal in the first stated case. Nothing can be plainer or more explicit, than the limitation to survivors, in the event of the death without issue, of either of the testator's children, at whatever time of life the death may happen, without any thing to restrain it. The case of Vidal v. Verdier, Speers Eq. 402, which it relied upon to govern the present case, has no application to it whatever. That

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case was de*cided on this principle—that when a testator, giving in remainder after an estate for life, uses one set of expressions denoting that the remainder-man is to take an absolute estate—and another set of expressions limiting him to an estate for life, with remainder to his issue, and a limitation over in the event of not having issue; this apparent repugnancy may be reconciled by restricting the dying without issue, to the life time of the tenant for life, thus permitting every part of the will to have its proper effect. If he dies during the life time of the tenant for life, leaving issue, the issue will take as purchasers under the will—if without issue, the limitation over will have effect; but if he survives the tenant for life, the estate is absolute. Such is, in every case, a reasonable and probable intention; and in that case, there were circumstances to satis-

fy me very fully that such was the actual intention.

But this has nothing to do with the case before us—though in another and peculiar sense, different from that in which the words are used in Vidal v. Verdier, the devisee, in one event, is said to be restricted by the terms of the will to a life estate. It enters into the very definition of an executory devise, that a fee simple or absolute estate may be given, with a provision that it shall determine and go over on a future contingency —most commonly, the contingency of dying without leaving issue; and this is what is very clear in the present instance. The testator devises to his children, "their heirs, executors, administrators or assigns forever." He gives an absolute estate, and an absolute estate only—though, to be sure, it may be said, that in one event it turns out to be no more than a life estate. In a sense still somewhat different, every man may be said to have only a life estate in any of his property. In the present case, if the devisee had left issue, his estate would have been absolute, so that he might dispose of it at his pleasure, to his issue or any one else. In Vidal v. Verdier, on any other construction than that which was adopted, he could have had an absolute estate in no event whatever.

The case of Dehay v. Porcher, stands upon a different footing. If there were nothing more than a devise to the daughters and their issue, this would give a fee simple conditional; and having performed the condition by having issue, they might alienate in fee simple. In the case of Henry & Talbird v. Archer, Bail. Eq. 535, however, we have determined that if there be a devise to one

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and his issue, with a limitation over, in *the event of his not leaving issue living at the time of his death, the issue take as purchasers in remainder, and the parent is restricted to a life estate. Such is supposed to be the present case.

The decision in Henry & Talbird v. Archer was made upon this reasoning—that as, in the limitation over, the testator, by the word issue, must, of necessity, mean persons living at that time, to answer the description of issue, that is, children or other descendants; so, he must be taken to have used the word in the same sense in his direct devise to issue—to A, and the persons who shall, at his death, answer the description of issue; and not to A and the heirs of his body in indefinite lineal succession. According to this reasoning, the word issue, in its double application in this case, must be understood in the same sense.

I think the limitation over, on the event of dying without leaving issue, must mean dying in the life time of the tenant for life. This is plain, from the words "as subject to division between them." The testator gives the land to his wife for life, and at her death to be equally divided between his daughters; but in case of the death of either of his daughters without issue living, the whole property, as subject to division between them, to go to the survivor. This, of course, can relate to no period beyond the mother's death, when the property, being divided as directed, could no longer remain subject to division. If the contingency means, if she shall die without issue, during the life time of her mother, the property to go over; then, to give an equivalent effect to the word issue, as first used, it must mean, if she shall die in the life time of her mother, to go to her issue then living. Such being the meaning of the word, not of limitation to fix the quality of the estate, but of purchase, on a particular contingency being determined, it amounts to no more than a simple unqualified devise of land without words of inheritance or perpetuity. This, by our law, gives a fee simple; and this is strengthened by the circumstance, that in giving the whole estate to the survivor, the testator gives an express fee simple. This may not be material, however. If I have given a proper effect to the limitation over, then, although the daughters took no more than a fee simple conditional, they are still able to make a good title. This decree is also affirmed.

The whole court concurred.

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1 Rich. Eq. *271

*THE EX'ORS OF EDWARD FRANCIS v. THE EX'OR OF ANN LEHRE and Others.

(Charleston. March, 1845.)

[*Gifts* ⇐43.]

A. purchased land on credit, giving bond and a mortgage of the land to secure the payment of the purchase money, and shortly thereafter made a voluntary gift of the land. *Held*, that A and her executor were bound to pay the bond and release the land from the lien of the mortgage, for the benefit of the donee.

[Ed. Note.—Cited in Lawton v. Hunt, 4 Rich. Eq. 252; Reilly v. Whipple, 2 S. C. 282; Latimer v. Latimer, 38 S. C. 385, 16 S. E. 995.

For other cases, see Gifts, Cent. Dig. § 76; Dec. Dig. ⇐43.]

Before Johnston, Ch., at Charleston, February, 1844.

The late Mrs. Ann Lehre purchased from the executors of Edward Francis, a plantation in Charleston district, and gave therefor a bond, conditioned for the payment of $3,075, in three equal annual instalments. The bond was secured by a mortgage of the premises. Soon after the purchase, Mrs. Lehre made a deed of gift of the said plantation to J. B. Campbell, in trust for the sole and separate use of Ann Finley, wife of L. B. Baker. Mrs. Lehre paid up about one third

of the amount of the bond and then died. This bill was filed against her executor, Campbell the trustee, and Baker and wife, praying that the balance due on the bond might be paid out of the estate of Mrs. Lehre, or that the plantation be sold. The executor of Mrs. Lehre contended that the estate of his testatrix was liable only for the deficiency which might remain after the plantation had been sold to pay the bond.

His Honor the Chancellor decreed that the executor of Ann Lehre pay to the complainants the amount due on the bond, with all costs, from the assets in his hands, which he admitted to be sufficient, and in case of his failing to make such payment that the mortgage be foreclosed, and the premises sold, &c. He further ordered, "that in case of a foreclosure, in consequence of non-payment of the debt by the executor of Mrs. Lehre, the executor shall reimburse the trust estate, in the hands of Mr. Campbell, for the value of the property sold under the mortgage."

The executor of Mrs. Lehre appealed.

A. G. Magrath, for the motion.

H. A. Desaussure and Campbell, contra.

Curia, per JOHNSTON, Ch. The proposition presented by this appeal is, that if a man purchase property on credit, and then make a donation of the property, he may

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substantially re*voke the gift, by compelling the donee to pay the donor's debt. But as long ago as Villers v. Beaumont, 1 Vern. 100, it was determined, that if one make a gift of which he afterwards repents, this court has no right to free him from the fetters with which he has voluntarily bound himself, but he must lie down in his own folly.

As regards the grounds suggesting the injury to Mrs. Lehre's creditors, it may be observed that the creditors are not before the court, and are in no manner affected by the decree, and the executor is not entitled to take grounds for them; and as to the executor himself, the fact is recited in the decree, that he, at the hearing, admitted assets extending to the bond.

Ordered that the appeal be dismissed and the decree affirmed.

The whole court concurred.

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1 Rich. Eq. 272

JAMES DUNLAP v. JOHN O'DENA.

(Charleston, March, 1845.)

[1 *Account* ⇐19; *Contracts* ⇐202.]

Defendant, who owned a large saddlery and harness manufactory and two negro workmen employed in the factory, contracted with the plaintiff "to pay to him one third of the net proceeds." *Held*, on bill for an account, 1. that defendant was entitled to credit himself with his own labor and the labor of the two negroes; and 2. that this question was properly raised before the Chancellor, and was not one to be reserved for the reference.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 106; Dec. Dig. ⇐19; Contracts, Cent. Dig. § 921; Dec. Dig. ⇐202.]

Before Johnson, Ch., at Charleston, June, 1844.

The Chancellor.—The complainant states in his bill, that in April, 1837, the defendant purchased of the administratrix of the late Andrew M'Feeters, the stock in trade for carrying on the saddlery and harness making business, of which he died possessed, consisting of harness, leather and saddlery, together with the tools and implements of trade employed in a large saddlery and harness manufactory, two negro workmen brought up to the said trade and employed in the

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factory, &c. That the purchase *was made on a credit of five years, and that the defendant, in consideration that complainant would join him in a bond for the payment of the purchase money, agreed that he would give complainant one third of the net proceeds of the business. That complainant did accordingly join him in the bond, and that defendant afterwards, on the 25th February, 1839, did, in pursuance thereof, make and deliver to him a bond, to which the following condition is annexed, that is to say.

"Whereas, I, John E. O'Dena, purchased the stock in trade of Andrew M'Feeters & Co.," &c. "And whereas, James Dunlap was my security, and by agreement with me, was to receive one third part of the net proceeds of what might be made therefrom.

"Now the condition of the above obligation is such, That if the said John E. O'Dena shall account with the said James Dunlap, at the end of the said credit," &c. "and pay to him one third of the net proceeds thereof, then the above bond to be void," &c. and he further states that defendant did carry on the business until the end of the time limited for the credit, and he prays an account of the profits, &c.

The bill states various circumstances by way of inducement to the contract, which are denied in the answer, and repelled by contradictory statement. These are not thought necessary to the determination of the question now to be decided, and are therefore not stated. It will be enough for the occasion to state that the agreement set out in the bill is admitted, and the defendant has filed an account with his answer, in which he credits himself with his own labor, and the labor of the two negro workmen. On the reading the bill and answer, Mr. M'Crady, the defendant's solicitor, offered evidence to shew that according to the general understanding and usage, "the net profits of what

might be made therefrom," that is, "the stock in trade," was exclusive of the services of the defendant and the negro workmen. This was opposed by Mr. DeSaussure for complainant, principally on the ground that the question whether the defendant was or was not entitled to compensation for his own and the workmen's labor, under the agreement set out in the bill, would properly arise on the reference of the accounts before the master. I think the question properly raised here, as it involved the question whether, according to the legal interpretation of the agreement, the defendant was or was not entitled to make these charges, because on the

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event of its being decided that he was *not, it would save the inquiry before the master. But I rejected the evidence, because it went to establish what, in my judgment, is the necessary and legal deduction from the contract itself, that the net profits of this business was what remained of the receipts after deducting the costs of the raw material, and of the labor and expense of carrying it on, including, of course, the labor of the defendant and his two negro workmen.

It is therefore ordered, that the accounts of the defendant be referred to the master, and that he report thereon, crediting the defendant with a reasonable allowance for the labor of himself and the two negro workmen, in carrying on the business.

The plaintiff appealed, on the following grounds.

1. It is respectfully submitted, that the Chancellor should have granted the motion of complainant, for the usual general reference to the master, of all the accounts involved in the case, and not have decided an isolated important fact, without evidence: viz what constituted the stock in trade, according to the understanding of the parties.

2. That by the strict construction put by the Chancellor on the agreement, for a share of the net profits, he has excluded the complainant from all compensation for his services to the concern, in conducting the pecuniary arrangements of the establishment, receiving part of its funds, purchasing materials, paying debts, advancing his own funds, &c.

3. That the effect of the Chancellor's decision is, to give all the benefit of the agreement to the defendant, and to exclude the complainant from all advantages therefrom.

H. A. Desaussure, for the appellant
McCrady, contra.

PER CURIAM. We concur in the decree of the Circuit Court. Appeal dismissed.

JOHNSON, HARPER and DUNKIN, CC., concurred.

*ELIZABETH STONEY v. THE BANK OF CHARLESTON.

(Charleston. March, 1845.)

[*Dower* ⟸62.]

Where a bill was filed by the creditors of a testator against his executrix, who was also his widow, praying that the real estate of the testator might be sold to pay his debts; and, under the order of the court, the land was sold for the payment of the testator's debts, the widow making no claim of dower; *Held*, that the widow was barred by the proceedings, from afterwards claiming dower from the purchaser.

[Ed. Note.—Cited in Hibler v. Hammond, 2 Strob. 107; Abbeville Electric Light & Power Co. v. Western Electrical Supply Co., 66 S. C. 342, 44 S. E. 952.

For other cases, see Dower, Cent. Dig. § 204; Dec. Dig. ⟸62.]

Before Johnson, Ch., at Charleston, February, 1843.

The Chancellor. The complainant, in her bill, demands dower in certain real estates, whereof her husband, John Stoney, died seized and possessed.

The defendant pleads in bar to this demand, that the said John Stoney, by his last will and testament, nominated the said complainant and two of his sons the executors thereof, all of whom qualified. That in November, 1840, one Stephen Catley Tennant, administrator with the will annexed of one Francis Dalcour, of the island of Cuba, filed his bill in this court against the complainant and the other executors of the said John Stoney, and divers other persons having interests in his estate, in which he prayed an account of all the real and personal estates whereof the said John Stoney died seized and possessed, and that the same might be decreed to be sold to pay certain demands by the said Stephen Catley Tennant against the said John Stoney; that to this bill the complainant filed her answer, in which there is no claim or demand for dower or thirds in the said real estates; and that such proceedings were had in the said cause, that on the 10th of July, 1841, an order was made that the estates, real and personal, of the said John Stoney, in the State of South Carolina, including, of course, the lands in which the complainant now demands dower, should be sold, on certain terms therein prescribed, without any reservation of the complainant's right of dower; and that in pursuance of the said order, the said real estates were sold by one of the masters of this court, and purchased by the defendant, without any reservation of the right of dower. Such is the substance of the plea. The claim of dower is much favored, but it cannot be permitted to ride over other well settled rules of law. A wife may be barred of dower, by accepting a legacy or jointure in lieu thereof. It may be barred by the statute of limita-

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tions, and like all other *rights, it may be waived, if the party claiming neglects to maintain or assert it when an opportunity occurs, and the occasion requires that it should be asserted. In McDowall v. McDowall, 1 Bail. Eq. 330, Chancellor Harper says that "when the question is de re judicata, the true rule is, that what the party has once had an opportunity of litigating in the course of a judicial proceeding, he shall not draw into question again; but that whatever might have been properly put in issue, shall be concluded to have been put in issue and determined," unless the party was under some disadvantage, or was prevented from making the defence by surprise or accident, circumstances in themselves forming a distinct ground of equity jurisdiction. Such is the doctrine of all the authorities, and the necessity of adhering strictly to the rule is enforced by the consideration, that if it were otherwise, there never could be an end to litigation. If a party defendant might, by carelessness or wilfulness, omit to make an appropriate defence, and thus entitle himself to an action against the plaintiff, the same thing might again be played off in the second suit, and so on ad infinitum. The bill filed by Tennant against the complainant and the others, prayed expressly that the estates, real and personal, might be sold to pay debts. The complainant then had an opportunity of asserting her right to dower, and having neglected it, she is concluded by the rule. It is but just to the purchaser, who might, and would reasonably conclude, that the rights of all the parties to the proceeding under which the sale had been made, had been adjusted. It is ordered and decreed, that complainant's bill be dismissed.

The complainant appealed, on the following grounds:

1. That the complainant's claim of dower out of the lands of her husband, was not in issue, and could not properly have been put in issue, in the suit mentioned in the defendant's plea in bar, and in which the order was made for the sale of the estates, real and personal, of the testator John Stoney.

2. That the decretal order under which the sale was made, at which the defendant purchased the lands in question, directed, "that the estate, real and personal, of the testator, John Stoney, be sold by the master," and the complainant's right of dower in the lands whereof her husband was seized during the coverture, was no part of his estate, but a right or interest in her, distinct from his estate, and was, therefore, not embraced in the said decretal order.

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*3. That the complainant's right of dower in the lands purchased by the defendant, is not barred or concluded by any thing in the plea contained, nor by any thing which has occurred before or since the death of the said John Stoney.

Mazyck, for the appellant.
The Attorney General, contra.

PER CURIAM. We concur in the decree of the circuit court. The appeal is, therefore, dismissed.

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1 Rich. Eq. 277

B. F. HUNT, Assignee, v. WILLIAM C. SMITH et al.

(Charleston. March, 1845.)

[*Injunction* ⟸148.]

The court has no power, by interlocutory order, to grant an injunction to stay proceedings at law, either before or after judgment, without requiring the applicant to give bond and security or deposit the money.

[Ed. Note.—Cited in Columbia Water Power Co. v. Nunamaker, 73 S. C. 555, 53 S. E. 996.

For other cases, see Injunction, Cent. Dig. § 324; Dec. Dig. ⟸148.]

On the 26th February, 1845, at Georgetown, B. F. Hunt presented a petition to his Honor, Chancellor Johnson, praying an order to the commissioner to sign a writ of injunction, to the following effect.

"The petition of B. F. Hunt, assignee of Charles T. Brown, sheweth that, on 2d February, 1832, this honorable court granted an injunction against Peter Cuttino and W. S. Smith, administrators of Savage Smith, restraining them from proceeding at law on the bond of the petitioner given to the commissioner of this court, until the further order of the court. A suit was then brought, in the name of the commissioner in equity. For the time being, proceedings were, accordingly, suspended. Since then, the said Cuttino and Smith died, and William C. Smith has administered de bonis non, and now represents the estate of Savage Smith, and a new suit has been commenced in the name of the present commissioner, so that the same suit in the same right has been again com-

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menced, and the order *for an injunction stands unreversed. Wherefore, your petitioner prays that the commissioner be ordered to sign the writ of injunction, pursuant to the original order, to be directed to the present commissioner and the present administrator of Savage Smith, to the same effect as the original order."

The order referred to in the petition was as follows.

"It is ordered, that an injunction issue according to the prayer of the bill, and that all the proceedings in the action now pending at law on the bond of the complainant to Robert Heriot, commissioner, at the suit of Peter Cuttino and W. S. Smith, or either of them, be stayed till the further order of this

court, with leave to the defendant to come in and file his answer, and move to set aside the injunction. Henry W. DeSaussure.

2d February, 1832."

The application was resisted on the part of William C. Smith and others, on the ground that the injunction prayed for, in effect, by the petition, was different from that ordered by Chancellor DeSaussure thirteen years ago—and that, after so great a lapse of time, and the filing of the answer, it should not now be granted without looking into the merits of the case. This the Chancellor refused to do, and, overruling the objection, granted the order, in the following words.

"On motion of Memminger and Jervey, on behalf of the complainant, ordered that the order of injunction formerly made against the former administrator of Savage Smith, be revived against the present administrator, and the commissioner do sign the writ accordingly."

It was afterwards ascertained from the commissioner, by certificate after search, that there was no injunction bond to be found in the office, if any had ever been given—and a motion was made before his Honor at Charleston, that the order just before granted at Georgetown should be amended, so as to require security from the petitioner, in conformity to the provisions of the statute. This was refused, and his Honor's decision in the above matter was appealed from for error—

1. In reviving an injunction formerly ordered, after so great a length of time, against new parties, without considering the merits of the petitioner's case.

2. In not ordering bond and security, in

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conformity to the *provisions of the statute regulating the granting of injunctions.

[For subsequent opinion, see 3 Rich. Eq. 465.]

Mitchell and Yeadon, for the appellants.

Petigru and Memminger, contra.

Curia, per JOHNSTON, Ch. The statutory law applicable to the point made by this appeal, is contained in the Acts of 1721, 1734 and 1784. (7 Stat. 164, § 5; 188, § 15; 209, § 9.)

The first of these Acts, after prescribing the conditions upon which applications for injunctions shall be made, provides, that where the application is to stay, (of course by interlocutory order) suits before judgment, brought upon money demands secured by promissory note, bill of exchange, bond, single bill, or other specialty, or to stay execution after judgment for money, no injunction shall be granted until the sum of money so secured and sued for, or for which the judgment was given, be deposited in this court.

The next statute, after characterizing this requisition as too rigorous, enacts that defendants at law may be entitled to an injunction of the proceedings against them, upon giving security to the master or register in chancery, not exceeding the damages laid in the declaration, to perform the order or decree of this court.

It would seem that this latter statute was supposed to be confined to proceedings prior to verdict and judgment, so that, as to the latter, the money must still be deposited, for the Act of 1784 provides as follows: "Whereas the obliging a complainant, seeking relief from a verdict or judgment at law, to deposit the sum for which such verdict or judgment was obtained, before an injunction can issue to stay execution," "would be attended with much inconvenience," &c. "Be it therefore enacted, that a party applying for an injunction to stay proceedings in an action at law, or judgment or execution, or the levying of execution, shall be entitled to such injunction, on giving bond to the plaintiff at law, with security, to be approved by the master in chancery, for such sum, and with such condition, as the court shall direct," &c.

It is very apparent that the latitude here given, as to the sum and condition of the bond, arose from the fact, that judgments and prior proceedings are all embraced together; and whereas, where the debt was ascertained by judgment, it would have been sufficient to require bond to secure that amount, no

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*such definite direction could be given where the suit was still pending. But still the court has no power to dispense with bond and security, unless the money be deposited. Its only discretion is over the amount and condition of the bond; and in cases where judgment has not been obtained, the discretion, as to the amount, is merely to limit the penalty to the contract sued on, or extend it to the damages claimed.

In this case, an injunction had been ordered, but no bond was given. On the further application for an order requiring the master to sign the writ, we are of opinion that it should have been refused, except upon the applicant's complying with the law, by giving bond with sufficient security; and it is ordered that the Chancellor's decision on this point be reversed, and his order set aside.

JOHNSON and HARPER, CC., concurred.

1 Rich. Eq. 280

ROSA D. SHULTZ, Executrix, v. M. E. CARTER and Others.

(Charleston. March, 1845.)

[*Contempt* ⟸56.]

An attachment cannot issue to compel a female to pay the amount of a money decree.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 166; Dec. Dig. ⟸56.]

Before Dunkin, Ch., at Charleston, February, 1845.

In obedience to a decree made in this case in June, 1843, (for which see the report of this case in Speers Eq. 533,) references were held before Edward R. Laurens, one of the Masters, who reported, inter alia, that the account of the complainant as executrix showed a balance of assets in her hands of four thousand eight hundred and seventy-five dollars sixty-seven cents. In June, 1844, the report of the Master was, in this respect, confirmed by Chancellor Johnson, who "ordered and decreed that the complainant do pay into the hands of Mr. Laurens, one of the Masters," the said sum of money, "be-

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ing the *amount to be accounted for by the complainant as executrix of Wade H. Schultz deceased."

The complainant failed to pay the amount of the decree, and this was a motion, made on the return of a rule to shew cause, for an attachment to compel the complainant to pay the amount of the decree.

The Chancellor.—This is a motion for an attachment against Mrs. Schultz. A money decree has been obtained against her as the executrix of her deceased husband. It was alleged by the actors, that she had no property out of which the money might be levied by the ordinary process of a fieri facias. This proceeding is analogous to a capias ad satisfaciendum at law, and is a substitute for it.

By the Act of 1824 (6 Stat. 237) it is declared, "that no female shall hereafter be liable to be arrested by any writ of capias ad satisfaciendum." It seems to the court that this is a clear indication of the will of the legislature, that no female should be imprisoned on final process, to enforce the payment of money, and that this court should follow the law.

The motion is discharged.

The defendants appealed, on the ground:—

That the Act of 1824, abolishing the writ of capias ad satisfaciendum as to females, does not apply, nor was intended to apply, to the process of contempt in the Court of Chancery to compel performance of its decrees, and that the silence of that Act, in relation to such process, is a clear indication of the intention of the legislature not to interfere with the same.

H. A. DeSaussere and Yeadon, for the motion.

Crafts, contra.

PER CURIAM.—We concur in the decree of the circuit court. Appeal dismissed.

Signed by JOHNSON, HARPER, and DUNKIN, CC.

JOHNSTON, Ch.—I entirely dissent from the application of the Act of 1824, in this case.

Where the decree is for a demand of a legal character, and the remedy at law would be a ca. sa., it may be that an attachment should be regarded as a substitute for it, and this statute should perhaps be applied

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by analogy. But where the demand *arises out of a trust, the decree necessarily implies a breach of trust, and to apply the statute in such a case, comes neither within its letter nor spirit; and must operate fatally in this jurisdiction, whose principal function is the enforcement of trusts.

The exception of female trustees must prove peculiarly embarrassing in complicated cases, where many trustees may be before the court at the same time, whose liabilities and remedies, as against one another, must necessarily be greatly,—I fear inextricably—disturbed; and great injustice may be done by a partial enforcement of the demands of justice among them. I feel that this decree endangers estates in South Carolina to a most alarming extent.

While, as in Dawson's case, I would apply the insolvent laws to discharge a trustee in confinement, who, in conforming to their provisions, might be regarded as having purged the contempt, and done all in his power towards performing the decree, I would not voluntarily relinquish an essential means of enforcing trusts and punishing frauds, without which this court does not deserve its name.

1 Rich. Eq. 282

SARAH PRINCE v. GEORGE PRINCE.

(Charleston. March, 1845.)

[*Marriage* ⟸50.]

Jewish marriage in England established on evidence against the oath of the husband. (*a*)

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 81; Dec. Dig. ⟸50.]

[*Husband and Wife* ⟸283.]

Alimony will be decreed against a husband, who has the means of supporting his wife, though he has no visible property, or fixed and permanent income.

[Ed. Note.—Cited in Messervy v. Messervy, 80 S. C. 284, 285, 61 S. E. 442.

For other cases, see Husband and Wife, Cent. Dig. § 1068; Dec. Dig. ⟸283.]

[*Marriage* ⟸29.]

[A marriage between Jews, valid according to the Jewish law, will be valid.]

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 43; Dec. Dig. ⟸29.]

Bill for alimony. The bill stated that about the year 1834, the plaintiff intermarried with defendant; that for some time she faithfully and affectionately discharged all the duties of his wedded wife; that she bore unto him one son; and that about one year after their marriage, he neglected and ill treated her and the child; that he finally entirely deserted his family, and has since continued to live in open and unconcealed profligacy with a concubine, leaving his family dependent for support on the exertions of the plaintiff. That the defendant is an apothecary, in comparatively easy circum-

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stances, making from fifteen to *twenty dollars per day; that he had not, for several years, contributed at all to the support of his family, and that the plaintiff had great difficulty in supporting herself and family. The prayer was that the defendant be compelled to allow the plaintiff a sufficient portion for the maintenance of herself and child, and for further relief.

The defendant in his answer denied most positively that he had ever intermarried with the plaintiff; that although he had intercourse with her, he did not believe that the child was his. He denied that he ever ill treated her, but admitted the desertion. He admitted that he carried on business as a dealer in botanical medicines, and thereby made a comfortable subsistence, but by no means equal to the amount stated.

The case came on for trial in Charleston, in January, 1841, before Dunkin, Ch., when the following testimony was taken.

For the Plaintiff.

Rev. J. Bachman.—Thinks he met the High Priest Herchell once two years ago at a friend's house in London; his friend shewed him a note from the High Priest, in English; looked at it, only saw it once; there is a similarity in the handwriting of the note and of the certificate produced; if he had received a letter with this signature, he should not have doubted that it was his—Herchell is the High Priest, and is a very respectable man. Christians as well as Jews spoke well of him—witness did not meet him at this friend's house, but afterwards in company he saw him.

Mr. Poznanskie—A member of his congregation applied to him as the Pastor on the part of the law to obtain a divorce; to the best of his knowledge the defendant agreed to give her the divorce; it was made out, but afterwards recalled; defendant was several times at his house and had conferences with him on the subject; would think he agreed to the divorce; the certificate was first handed to witness by the gentleman who applied in her behalf; saw it several times, and at last translated it into English; cannot tell whether defendant saw it in his, witness's, presence; believes he spoke to him (Prince) about it; told him she had a certificate; he related to him circumstances by which he did not admit she was regularly his wife; that he had been forced to it by fear; did not deny that a marriage had taken place, as stated in the certificate, though he had at the time some mental reservation; that his mind did not correspond with his actions.

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*The mode of marriage as stated there, is the form prescribed by the law in presence of two witnesses, whether performed by a minister or not. This is not a marriage certificate, it is only a memorandum of the reader as to the statement made to him.

Very seldom that a marriage takes place merely in the presence of two witnesses, without more witnesses or a clergyman.

Cross-examined.—Certificate is in Hebrew, the other part is in German. This is not the form of a marriage certificate; it is never executed after the marriage has taken place at a previous time.

The signatures of the witnesses is not to the certificate, only that of the Priest. Defendant did not originally apply for a divorce, but he came also, and it was to take place with his consent; defendant said to him that he had some mental reservations, that his mind did not accompany the act of marriage, that he did not give her the ring with a view of remaining; he said that he had been frightened into it; he had been cohabiting with her before that; that in consequence of this he had married her; he said that he had commenced the word but had not continued the right words, but had substituted words of cursing; considered himself frightened into it; did not deny it had taken place in presence of two witnesses; can't say he spoke of it as a frolic; might have considered it as serious, as he said he had been frightened into it: that it was not voluntary; it is a very serious ceremony; some celebrate it for two or three days, always that day; if done according to the requisitions of the law, it is a marriage; thinks that defendant requested him to attend to it, to grant the divorce. Witness told the defendant that the divorce could only be valid in a religious view; believes that he mentioned to a gentleman the necessity of seeing Prince to obtain his name; defendant came in consequence; he certainly consented to a bill of divorce being entered according to their laws; he was under the impression that as he did not read all the words she was not his wife; witness explained the contrary; witness recollects no similar marriage to this; in the process of divorce, the

writer is requested to divorce such a person as his wife; it was so understood; the divorce was not executed.

Joseph Hurtz—Carried money, $10, from defendant to Mrs. Mengy's, to pay Mrs. Prince's board.

Mr. Cohen.—Mrs. Prince was in his house over a week; defendant paid $3 for the board; she and her child.

Cross-examined.—Witness asked defendant for the money.

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*Witness lived at Portsmouth 10 years; was a teacher; this is not a certificate of marriage; there are two kinds of marriages; one before the reader, another clandestine, which must be in the presence of two witnesses; this is not a certificate of betrothment.

High Priest never puts his name to a certificate in English; never saw English and Hebrew on the same paper; would not give credit to this as a certificate of marriage.

For Defendant.

Solomon Moses.—Complainant came here, with letters to witness, requesting his good offices; stated the case; witness called on her at Mr. Cohen's in consequence of what passed; thought Prince was her husband; witness called on Prince, gave a day or two to consider it; witness called on Mr. Moise, as her lawyer; met at his office with defendant, and endeavored to persuade him to have no difficulty. She said, if she could get 3 or $400, and get a divorce, she would be content; witness persuaded defendant to do it, who expressed his willingness; defendant borrowed $200. Mrs. Prince observed, she would not give him a divorce 'till the amount was paid; he said the other $100 should be soon paid; then something was said about board 'till the $100 was paid; he agreed to do that; that sum being ready, witness called on Mr. Poznanskie, and every thing was arranged, the consent of trustees was obtained, and after all was ready, complainant declined to take the $300, as it was not enough.

Defendant is a poor man, does not believe he possesses any property; knew the defendant two or three years by sight.

Cross-examined.—She did not agree to go away without a divorce; Mr. Poznanskie has been reader or Priest four years; four years in this city; very learned Priest.

Hart Levin.—Knew complainant in Portsmouth five years ago; never knew her as Mrs. Prince, (two persons said that was Mrs. Hyams;) she was travelling with her pack of jewelry; met her in New-York; was six weeks in Portsmouth.

Mr. Ottolengui.—Produces common marriage certificate—this produced by complainant does not purport to be a certificate of marriage; there are two kinds. It has been done in the street; Mrs. Hyam's marriage corner of Horlbeck's Alley.

Cross-examined.—Has known a woman to resume her name when deserted by a husband; were people of low standing.

Mr. Harris.—Lived four years in London; not the form in which a certificate is given.

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*Albert Lyons.—He is well versed in Hebrew, and in Poland was a Priest of the Hebrew Congregation. Is acquainted with the Hebrew law of marriages. Putting on a ring and proper words. Thou shall be betrothed to me according to the laws of Israel and Moses, in presence of two witnesses, constitutes a betrothment only, and not a marriage. Betrothment does not authorize cohabitation. It subjects the parties to punishment by stripes. She is not thereby entitled to support, but if she wishes to destroy that tie, there must be a divorce. To perfect this into a real marriage, it is necessary she should come to the canopy, and have seven blessings pronounced with the ceremonies; merely living together without these ceremonies, is only prostitution; never knew it otherwise; law of the Israelites same every where; the words are essential.

By the Chancellor. From the testimony of Mr. Poznanskie, the court has come to the conclusion that a ceremony took place between the parties, which, according to the Hebrew law, constituted a valid marriage; but it was very informal; such, according to Mr. Poznanskie's evidence, as he had never before known.

The ceremony took place at Portsmouth, England, on the 2d March, 1835. The defendant was a traveller, and the witnesses were accidentally present. The condition in life of the parties was probably very humble, and does not appear since to have been much improved. This court can only interfere for the purpose of giving alimony. No satisfactory testimony was given as to the pecuniary means of the defendant. One witness thought he depended on his daily labor for his support. If the condition in life of the parties is such that neither had property, and they were both to labor for subsistence, it is very questionable whether a case for alimony is presented.

But the complainant alleges that she has a child by the defendant, and that the income of the defendant, from his occupation as an apothecary, or as one of the witnesses styled him, a root doctor, was not less than four or five thousand dollars.

Let it be referred to the Master to enquire and report what is the pecuniary condition of the defendant, and that the Master have leave to report any special matter.

In February, 1844, this case again came up, on exceptions to the Master's report, before Johnston, Ch., who pronounced the following decree:

This case comes up again, upon the report

of the Master, accompanied by evidence, and exceptions put in by the defendant.

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*The bill states that the parties, who are Jews, were married in England several years ago, and that after a short period of cohabitation, the defendant deserted his wife, who has a child by him, came to this State and took another woman to his bed, and now lives with her in comfortable circumstances, the fruits of his income as a druggist.

The answer denies the alleged marriage with the plaintiff, although it admits that the defendant cohabited with her; and repudiates the child, although born after the cohabitation. It evades the charge of illicit intercourse and cohabitation with another woman; but admits that the defendant is living comfortably, and in the enjoyment of a reasonable income from his employment of a druggist.

The case was heard by Chancellor Dunkin, who delivered a decree on the merits in February, 1841. This decree establishes a marriage between the parties on the 2d of March, 1835. This fact being established, the answer sufficiently sustains the charge of desertion. Proceeding upon this assumption, as I suppose, the Chancellor regarded the case as having been made out by the plaintiff; the only remaining question before the court was as to the remedy to be administered. Upon this, the Chancellor remarks: "This court can only interfere for the purpose of giving alimony. No satisfactory testimony was given as to the pecuniary means of the defendant. One witness thought he depended on his daily labor for his support. If the condition in life of the parties is such that neither had property, and they were both to labor for subsistence, it is very questionable whether a case for alimony is presented. But the plaintiff alleges that she has a child by the defendant, and that the income of the defendant, from his occupation as an apothecary, or (as one of the witnesses styled him) a root doctor, is not less than four or five thousand dollars. Let it be referred to the Master to enquire and report what is the pecuniary condition of the defendant, with leave to report any special matter."

The report which now comes up, states that "the Master does not find any proof that the defendant is in possession of any estate, either real or personal; but from the testimony submitted, he finds that he is in the receipt of money; that he lives comfortably and well; and that in the Master's own mind there is little doubt that he is in possession of funds sufficient to meet any decree that may be awarded against him."

Every question raised in the exceptions is

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expressly, or by *necessary implication, concluded by the decree, except the single one whether alimony can be decreed in respect to the income of the husband, arising not from capital, but from his daily labor and diligence; and if it can, then what should be the amount of it in this case.

The evidence reported shews the existence of considerable income. The answer admits it. It appears that the defendant has been in the habit of taking boarders; that he vends medicines, and occasionally administers them; that he lives in a hired house, for which he regularly pays a considerable rent; and that he supports a woman who lives with him; and one of the witnesses, who collects for him, leaves the impression that his income may, reasonably, be estimated at not less than $1800 per annum. The question is whether a husband, in these circumstances, is not bound to contribute to the support of his wife whom he has deserted.

Let us look into this question with a view to principle, as well as to authority. It is one of most serious import, especially to the humbler and more defenceless classes of the community. If the wealthy man denies to his wife the duties of the marriage relation, there is no difficulty in compelling him to sustain her out of his property. But it seems to be doubted whether the poor may not desert their duties with impunity. Is this so? And if so, upon what principle can the distinction be sustained.

By marriage the husband becomes entitled to whatever personalty the wife may possess, and to all her earnings. She is reduced to a state of comparative servitude. She cannot change her situation by another marriage, more agreeable or more beneficial to her. She is deprived of the power of making contracts; and, of course, of the means of accumulating property, or laying by the means of subsistence in sickness or old age. Will it do to say that the husband, entitling himself to all these advantages, and subjecting the wife to all these disabilities, by the marriage, is not bound, by all the means in his power, to sustain her? And if he deserts her, shall his desertion, which is, itself, a wrong, excuse him from the performance of this obligation? Certainly not. It would be a reproach to the law if it were so. God knows, the condition of all women, but especially of married women, is bad enough by the common law of England, and advancing civilization loudly demands its amelioration. But that law, which almost enslaves the wife, makes the husband liable for her support. It

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is a duty he has undertaken, with her *aid, if he chooses to avail himself of it; and for which he is bound, if he rejects that assistance.

No doubt, circumstances must have their influence in determining the amount which should be decreed to an abandoned wife. If the parties are laboring people, the wife needs less. If she is in bad health, however, the amount should be increased. If the labor

of the husband is of a comparatively unprofitable character, or if he is sickly, allowance should be made for these circumstances. If, on the other hand, he is in good health, and skilful, and is actually realizing considerable profits, the partner of his fortunes should not be refused a reasonable participation in them. Every case must be governed by its circumstances.

Certainly most of the reported cases shew that alimony has been decreed out of visible property, or fixed and permanent income. But the visible property is only evidence of the income: and permanent and fixed income, such as annuities, and the like, is only resorted to because of its greater certainty, and as furnishing a surer means of administering redress. But when income is proved to exist, although not fixed, but dependent upon the daily exertions of the husband, this shall not be exempt; and he, in respect to it, will be compelled to do what law and moral duty require of him.

Thus in Biggs v. Biggs, and in Dawson v. Dawson, mentioned by Sir John Nicholl, in Cooke v. Cooke, 2 Philim. 44, 45, and cited by Shelford, 494, alimony was decreed out of the income of a seller of venison, and a working jeweller.

The principle in fact is, that in all cases you are to look to the means of affording a remedy; and if you can find them, the remedy should be administered.

In this case it is vain to deny that the defendant has the means of supporting his wife. The fact stares us in the face, that he does support another woman, and lives in comfort.

It is said, however, that casualties may hereafter reduce his means. The same argument would apply if he were in the possession of tangible property. The act of God may strip him of that. If this were a suit for debt, we should feel no hesitation in decreeing it, without reference to any contingency. Is the right of a wife of a less sacred character than a creditor's demand? We only refer to the means of the husband in the one case, and not in the other, because the wife has embarked with her husband in

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a common bottom, and is bound to share *in his fortune, whether good or bad. But another answer is that a decree for alimony is not unchangeable. Under a change of circumstances, the amount may be either increased or diminished: though this is seldom done, and never for light or trivial causes.

(See Shelford on Marriage and Divorce, 596.)

But, unquestionably, the same amount should not be allowed out of a contingent, as out of a fixed and permanent income. It would be unreasonable to do so. We have an example to this effect in Hawkes v. Hawkes, 1 Hagg. Eccl. R. 526, where the allowance was limited, because the husband's income arose not from substantial property, but from his pay, which was of uncertain duration.

I will close what I have to say on this head, by repeating that the allowance is a matter of sound discretion, and that in making it, all the circumstances must be considered: with this further observation, that more is to be allowed to the wife when, by a decree on the merits, the husband is decided to be in the wrong, than pendente lite, when this must necessarily be unascertained; and by adverting to the general rule, that a greater proportion is to be allowed out of a small than a large income. See the case of Cooke v. Cooke, before referred to. Having now determined the general principles, by way of direction to the Master, I shall recommit the report: that he may, upon the evidence already before him, or which shall be offered, report a reasonable estimate of the defendant's income, and a specific sum to be allowed out of it, for alimony.

Something is said in one of the exceptions, with respect to the child, as if it were disputed that this child is the child of the plaintiff, or born within wedlock. The Master will hear evidence on this point, if offered, and report accordingly; and if the child shall, from the evidence, appear to be defendant's, its support and education will also be considered and reported upon.

The defendant appealed from the decree of Chancellor Dunkin, on the following grounds:

1. Because there was no proof of a marriage between the complainant and the defendant.

2. Because the testimony shewed that there was no intention to consummate a marriage.

3. Because the ceremony which is alleged

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to have taken place *was informal, and insufficient, according to the Jewish law, to constitute a marriage.

4. Because the answer denied the marriage, and no sufficient proof to contradict the answer was produced.

1. And, also, from the decree of Chancellor Johnston: Because this was not a case where alimony could be allowed.

2. Because alimony cannot be decreed out of the profits of daily labor; nor can a decree for alimony be granted in any case, unless the party charged as the husband has some fixed income, which is permanent and certain, and from which, as out of something certain, alimony can be decreed to be paid.

3. Because there was no proof that the woman was herself unable to get her living by her labor.

4. Because the parties being both aliens, recently arrived in this State, and not here married, our courts will not interfere, where there is no property under its jurisdiction.

5. Because there was no proof that the woman making the claim had ever occupied

the station of wife to defendant, or that there was any cohabitation subsequent to the alleged marriage.

6. Because the certificate admitted in evidence, was not verified by oath or cross examination of the witnesses, who should have been examined on commission.

Magrath and Yeadon, for the appellant. Elliott, contra.

Curia, per JOHNSTON, Ch. The court sees no reason to differ from the decree as to the fact of marriage, nor from the instructions under which the report was recommitted to the Master. Certainly, there is nothing in the instructions to preclude the Master from enquiring what income the wife makes by her own labor and exertions; or from taking that into consideration, in estimating the alimony to be allowed her. On the contrary, the import of the instructions is, that every circumstance may be taken into consideration.

It is ordered that the appeal be dismissed and the decree affirmed.

(*a*) Vide Shelf. on Mar. & Div. chap. 2, sec. 4, p. 67 et seq.

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1 Rich. Eq. *292

*BANK OF THE STATE OF SOUTH CAROLINA v. JAMES ROSE and Others.

(Charleston. March, 1845.)

[*Equity* ⟸359.]

It is within the discretion of the court to refuse a complainant permission to dismiss his bill, if the dismissal would work a prejudice to the other parties.

[Ed. Note.—Cited in Latimer v. Sullivan, 37 S. C. 121, 15 S. E. 798; State v. Southern R. Co., 82 S. C. 15, 62 S. E. 1116.

For other cases, see Equity, Cent. Dig. §§ 749–755; Dec. Dig. ⟸359.]

[*Equity* ⟸359.]

Whenever, in the progress of a cause, a defendant entitles himself to a decree, either against the complainant or against a co-defendant, and the dismissal of the bill would put him to the expense and trouble of bringing a new suit, and making his proofs anew, such dismissal will not be permitted.

[Ed. Note.—Cited in Ancker v. Levy, 3 Strob. Eq. 210; Adger & Co. v. Pringle, 11 S. C. 547; Latimer v. Sullivan, 37 S. C. 122, 15 S. E. 798; Dunham v. Carson, 37 S. C. 281, 15 S. E. 960; Forrest v. City Council of Charleston, 65 S. C. 501, 43 S. E. 952; Shelton v. Southern Ry., 80 S. C. 74, 61 S. E. 220; Inman & Co. v. Hodges, 80 S. C. 458, 459, 61 S. E. 958.

For other cases, see Equity, Cent. Dig. § 749; Dec. Dig. ⟸359.]

[This case is also cited in Bank of the State of South Carolina v. Campbell, 2 Rich. Eq. 182, as to facts.]

The bill in this case was filed to foreclose, in the reverse order of their dates and record, two mortgages in favor of the Bank of the State of South Carolina, upon premises in Charleston, known as the Charleston New Theatre. The parties defendants, are James Rose and others, trustees of the Charleston New Theatre Company, a body corporate; James R. Campbell, the purchaser of the property at sheriff's sale, and the Charleston New Theatre Company.

The trustees and the corporation, by their answers, admit the claim of complainants, and that the prayer of their bill ought to be granted.

The defendant, Mr. Campbell, resisted the foreclosure of one of the mortgages, being the senior in date, upon various grounds, and among others, that said mortgage was no longer a valid subsisting lien, but had, at the execution of the second mortgage, and before his purchase, been discharged and waived in consideration of other ample security; and alleged that the complainants were only nominal parties to the suit, which was instituted at the instance of the defendants, James Rose and his co-trustees, who are fully indemnified without the aid of this mortgage, from any liability they may have incurred.

The cause was heard before Johnston, Ch. March 1st, 1844. On the 25th November following, no decree or decretal order having at any stage of the proceedings been pronounced or entered, the complainants moved before his Honor, Chancellor Johnston, at Columbia, to dismiss their bill, on payment of costs.

This motion was refused, and on the 29th November following, the Chancellor pronounced his decree, and appended thereto the following order, overruling the motion to dismiss:

November 25th, 1844.—This decree has

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been written some *time, but is yet in my hands, no opportunity having occurred for transmitting it to the register.

To-day, a motion is made by the plaintiff's counsel, for leave to dismiss the bill, on payment of costs.

I have been notified that the trustees object, and they have filed a cross bill. The case of Bethia v. McKay, Cheves, 93, decides that a plaintiff cannot discontinue to the prejudice of any defendant who may have claims on him that may thereby suffer prejudice. The trustees do not appear to have any claims on the plaintiffs in this case, but they may be prejudiced as between themselves and their co-defendant, Mr. Campbell. In my present position, without the aid of argument, I conceive it most prudent to make a merely formal decision, leaving the rights of the plaintiffs to dismiss their bill, to be discussed upon appeal. No party can be prejudiced by this.

It is therefore ordered, that the motion for leave to dismiss the bill, be overruled.

The cross bill referred to by the Chancellor above, was not at the time known to the complainant's counsel at Columbia, who made the motion to dismiss the original bill.

The cross bill, it appears, was filed late in the evening of November 23d (Saturday,) at Charleston, and the subpœnas were served on Monday, the 25th November, near nine months after the final hearing in the original cause.

The complainants appealed from the above order, and insisted upon their original motion to dismiss their bill, upon the following grounds:

1. Because the complainants before decree filed or pronounced, are entitled to dismiss their bill on payment of costs.

2. Because the said motion ought to have been granted.

The defendant, Campbell, appealed, upon the following grounds:

1. Because the complainants having, before decree, moved to dismiss their bill, on payment of costs, it should have been so ordered, and this defendant is entitled to the benefit of a dismissal; and the more so as the complainants are now but nominal parties, having no interest in the result.

2. Because the said motion ought to have been granted.

Bailey, for the complainant, cited 1 Bail. 262; Dick. 280, 612; Smith's Ch. Pr. 312; Chev. Eq. 93; 15 Cond. Eng. Ch. Rep. 255; 4 Myl. & Cr. 194.

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*Petigru, contra, cited Cowp. 255; 2 Sch. & Lef. 718.

Memminger, in reply, cited 4 Johns. Ch. 357; Story Eq. Pl. 315; Coop. Eq. Pl. 87; 1 Smith Ch. Pr. 459.

Curia, per HARPER, Ch. The general rule is, as contended for, that the plaintiff, at any time before the decree, perhaps before the hearing, may dismiss his bill as of course, upon the payment of costs; but certainly it cannot be said that the rule is without exception. The exception, stated in general terms, is, that it is within the discretion of the court to refuse him permission to do so, if the dismissal would work a prejudice to the other parties; and I gather from the cases, compared with each other, that it is not regarded as such prejudice to a defendant, that the complainant, dismissing his own bill, may at his pleasure harrass him by filing another bill for the same matter. But whenever, in the progress of a cause, a defendant entitles himself to a decree, either against the complainant or against a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit and making his proofs anew, such dismissal will not be permitted.

It is upon this principle that the case of Lashley v. Hogg, 11 Ves. 602, our own case of Bethia v. McKay, Cheves Eq. 93, and the other cases there cited, were decided. The complainant is not permitted to dismiss after a decree to account, or order of reference, though before a final decree—because upon such order being made the defendant will be entitled to a decree if the balance shall be found in his favor.

In the case of Booth v. ——— (*a*) the plaintiff to a cross bill was not permitted to dismiss, after the original and cross cause had been set down for hearing.

I do not understand this to have been because it was a cross bill; it would seem as if the original cause might have gone on as well as if the cross bill had never been filed. It was because it would work a prejudice to the original plaintiff. A case was stated in the cross bill, which enabled the plaintiff to go on with his cause, without making a new party, which he would otherwise have been compelled to do, and have thus been delayed. I gather from the argument that it had been agreed that the evidence taken in one cause should be read in the other. The master of the rolls said that he was, at first, under the impression that a plaintiff might dismiss his bill upon pay-

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ment of *costs at any time, "but upon enquiring into the practice, he found the rule to be otherwise; and it certainly was quite reasonable that the plaintiff ought not to have the power of dismissing his bill, when by so doing he might prejudice the defendant."

I may observe that in this case a cross bill was actually filed. It was argued, that according to the English practice, a cross bill cannot be filed after publication. But with us, where the taking evidence by commission is an exception to the general practice of taking it before the master, in the presence of the parties or in open court, there is nothing analogous to the English publication.

In Handford v. Storie, 2 Sim. & Stu. 196, 7 Eng. Cond. Ch. R. 196, it was held that a creditor suing on behalf of himself and other creditors, might be permitted to dismiss his bill before decree to account; because it was held to be no prejudice to the other creditors, who might sue for themselves. In Curtis v. Floyd, 4 Myl. & Cr. 194, the question was made solely on the circumstance of the cause being set down for hearing. There was no suggestion of any prejudice to be worked to any one by the dismissal.

The Chancellor says he "cannot see why a plaintiff should be in a worse situation, because he informs the court that he does not intend to proceed with the cause, than if he made default." But in this case the plaintiffs have appeared, and on the pleadings and proofs, one defendant has established his right to a decree against his co-defendant. What more has the complainant to do with the matter? If he has any other remedy which he wishes to prosecute, the court will not restrain him from doing so.

The practice of this court is derived from a

(*a*) The Reporter has been unable to find this case.

different source, and depends upon different principles, from that of a Court of Law.

In the case of a bill of inter-pleader, after the parties have inter-pleaded, what would be thought of the plaintiff's motion to dismiss his own bill as of course? Yet in justice and on principle this is the same case. The remarks of Lord Eldon in Chamley v. Dunsany, 2 Sch. & Lef. 718, are appropriate to the case. Speaking of the power of the court to decree between co-defendants, he says "further, my Lords, a Court of Equity is bound to do so. The defendant chargeable has a right to insist that he shall not be lia-

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ble to be made a defendant in ano*ther suit, for the same matter that may then be decided between him and his co-defendant; and the co-defendant may insist that he shall not be obliged to institute another suit for a matter that may then be adjusted between the defendants." It would be a reproach to the administration of justice, as said in the case of Bethia v. McKay, if "after a defendant has been put to establish his demand, at great expense of time and labor, and of money too, which costs will not reimburse—he should be disappointed of the fruit of his exertions, at the arbitrary will of another."

The motion is dismissed.

The whole court concurred.

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1 Rich. Eq. 296

EDWARD R. LAURENS, Administrator with the Will Annexed of Mary R. Green, v. A. G. McGRATH, Executor of Ann Lehre.

(Charleston. March, 1845.)

[*Wills* ⇐832.]

Testatrix directed that her debts should be "paid and satisfied in such manner and way," as her mother, Ann Lehre, (her executrix) should "deem most advisable for her own interest," and then made several specific devises and bequests, some of which were to her mother. *Held*, that Mrs. Lehre, the executrix, in paying debts, was bound to conform to the rules laid down in Warley v. Warley, Bail. Eq. 397, and that she was not authorized to pay them out of one or more of the specific legacies, in exoneration of the others.

[Ed. Note.—Cited in Hull v. Hull, 3 Rich. Eq. 92.

For other cases, see Wills, Cent. Dig. § 2153; Dec. Dig. ⇐832.]

[*Appeal and Error* ⇐1151.]

An error, in the directions in the decree for stating the accounts, corrected, though not set down as a special ground of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4504; Dec. Dig. ⇐1151.]

[*Executors and Administrators* ⇐271.]

Where personal estate, specifically bequeathed, is taken for the payment of debts, the whole is taken; and there is no foundation for a distinction between that which is directly and absolutely given, and that which is bequeathed to one for life, with remainder in fee to another.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1044–1051; Dec. Dig. ⇐271.]

Before Johnson, Ch., at Charleston, June, 1841.

This case came before the court on exceptions to the report of Mr. Gray, one of the masters. The report is as follows.

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*"This case was referred to me to inquire and report thereon, and especially to take the account of Mrs. Ann Lehre executrix, with the estate of her daughter Mrs. Mary Ann Greene, on which the complainant has recently administered with the will annexed. I have examined the account of Mrs. Ann Lehre, the executrix, with her daughter's estate aforesaid, and find the items properly vouched, showing a balance in favor of the executrix, on the 22d March, 1839, of $704.11; and I find that in addition to that balance, there is also due from Mary Ann Greene, to the said Ann Lehre, by a written acknowledgment, the further sum of $468.

I find that the amount of debts of the estate of Mary Ann Greene, paid by her executrix, is $5,514.74, leaving the two items of $704.11 and $468, yet unpaid.

I also find that Mary Ann Greene, by her last will and testament, dated the 24th November, 1825, and by two codicils thereto, after directing that all her just debts should be "paid and satisfied in such manner and way as my beloved mother, Ann Lehre, shall deem most advisable for her own interest," proceeded to make the following disposition of her estate.

1. She gives half of a house and lot in Charleston to Mrs. Lehre for life, and after her mother's death to Mrs. Baker for life, with remainder to Mrs. Baker's children.

2. Half of a pew in St. Michael's Church, to Mrs. Lehre for life, and afterwards to Mrs. Baker, and her children, as before.

3. Nancy and her children, Julius, Edward and Charles, to Mrs. Baker and children, in like manner.

4. Nelly and Hagar, to Mrs. Eliza Murden, for life with remainder to her children.

5. Gives her share of her grandmother, Mrs. Mary Lehre's, estate, to Abigail Greene, of Rhode Island.

6. 200 acres of her moiety of land in Sumter district, to build an Episcopal Church thereon, and the residue of said moiety to Ann Lehre, in fee simple.

7. Moiety of lands in St. Stephen's Parish, carriage, horses, furniture; a moiety of Fountain Grove plantation, utensils, cattle, &c., to Ann Lehre for life, with power of appointment by will.

8. Gives thirty slaves, viz: Aberdeen, Old Davy, Adam, Eve, Penelope, Beck, Cate, Katy, Dinah, Bess, Rose, Little Guy, Nat, Caroline, Simon, Lucy, Amaritta, Rebecca, Willoughby, Sophia, William, Sylvia, Ann, Henry, Hannah, Rynah, Beck, James, Emma, Matilda and Susan, to Ann Lehre for life,

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at her death *one moiety to Mrs. Baker and her children as before, and the other moiety to be sold, and half the proceeds to Abigail Greene, the other half as follows:

To the Society for the advancement of Christianity in South Carolina,... $200,00
To a Sunday School,..... $100,00
"Bishop Bowen." $500,00

And the residue to the children of Mrs. Eliza Murden.

9. This bequest is revoked by the first codicil, which gives Betty and her family, Penelope and Mary, to Ann Lehre for life, then to Mrs. Query for life, and then to Mrs. Baker and her children, on the same terms as the other gifts to Mrs. Baker.

10. The second codicil specially bequeaths James, Matilda, Beck, Emma and Susan, to Mrs. Baker and her children, on the same terms, thereby revoking the bequest of the thirty slaves, in which they are included, to that extent.

The testatrix then proceeded to appoint Mrs. Ann Lehre her executrix, and adds, "with full power and authority, if she shall deem proper, to designate such part of my slaves as shall belong to Ann Findlay Query, (Mrs. Baker,) under this my will, and such part as shall be sold."

I further find that Ann Lehre, the executrix, duly qualified, and for payment of the debts sold the following slaves, Simon, David, Adam, Eve, January, Sam, Amaritta, Willoughby, Sophia, William and Nelly, all of whom, except January, Sam and Nelly, are included in the bequest of the thirty before named, and these three are not specifically given to any person.

That the slaves now remaining of the estate of Mrs. Greene, in Mrs. Lehre's possession at her death, are Gay, Bess, Rose, January, Little Guy, Nat, Dinah, Caroline, Harriet and Stepney, and another named Oliver; that the remainder of the thirty slaves have died.

I also find that the residuary estate of the testatrix consists of three slaves, William, Sam and Nelly, and the household furniture.

The complainant contends that such of the estate as was not specifically bequeathed, should have been applied first to the payment of the debts; that if the residuary estate was insufficient to pay the debts, the balance ought to have been charged on the estate generally, so as to require the specific legatees to abate pro rata; and that the ex-

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ecutrix had no right to sell any portion *of the estate to suit her interest, when she thereby injured the right of others having an interest under the will.

It appears, however, from the foregoing statement, that none of the specific bequests were affected by the sale made by the executrix, except that of the thirty slaves, in which she had the exclusive interest during her life; and she appears to have selected from them, and from other slaves which were part of the residue, under the general authority given in the will, and the special authority to designate such of her slaves as should belong to Mrs. Baker, and such as should be sold. It does not seem to me to be a proper case to call upon the other specific legacies to abate.

I submit, therefore, that the remaining property of the estate be divided and sold, and applied according to the provision of the bequest of the thirty slaves."

To this report the complainant filed the following exceptions.

1. That the account is stated on incorrect principles, inasmuch as Mrs. Lehre should have paid the debts of her testatrix, Mrs. Greene, before entering upon and taking to her own use the income of the whole estate, while for several years the debts were increased by accumulation of interest, to the injury and prejudice of the devisees in remainder.

2. Because the residuary estate proving insufficient for the payment of the debts, they should then have been charged upon the estate generally, and the specific legacies would have been reduced pro rata.

3. That Mrs. Lehre, the executrix, had no authority to apply any one or more of the legacies to the exclusive payment of her testatrix's debts, thereby extinguishing some of said legacies, while others remained unimpaired, and the master erred in his report sustaining the account made accordingly.

By the Chancellor.—On hearing the bill and answer, with exhibits, and the report of Master Gray, with the exceptions of complainant thereto, it is ordered that the exceptions be sustained and the report be referred back to the master, with instructions to reform the account as follows:

1. By charging the debts of Mrs. Greene, as they were at the time of her decease, upon her estate, and disallowing all charges and payments made for interest accrued on said debts after the death of Mrs. Greene.

2. By charging the payment of Mrs. Greene's debts upon her residuary estate in the first place, and that being exhausted,

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*then upon her estate generally, thereby reducing the specific legacies pro rata.

The defendant appealed, on the following grounds.

1. Because the will of Mrs. Greene gave liberty to Mrs. Lehre to pay the debts in the way she might deem best, and the legatees of Mrs. Greene must take subject to the exercise of such a discretion.

2. Because the decree is in other respects contrary to equity, and the same should be reversed or modified.

A. G. Magrath, for the motion.
Campbell, contra.

Curia, per JOHNSON, Ch. It is not very clear what was in the mind of the complainant's testatrix when she directed by her will that her debts should "be paid and satisfied in such manner and way" as her mother, Ann Lehre "should deem most advisable for her own interest," and the direction strikes me as altogether inappropriate to the subject. It does not provide or point to the means of payment, and if it has any application at all, it must refer to time and circumstance. It might have been most to the interest of the mother that the debts should be immediately paid, or under other circumstances, that the payment should be postponed to a definite period, the means being those pointed out by the law. It never can be supposed that the testatrix intended, by this direction, to authorize the executrix to pay the debts out of one or more of the specific legacies, in exoneration of the others. That would defeat her expressly declared will.

There is an obvious error in the directions for stating the accounts, as regards the interest on the debts, doubtless the consequence of mere inadvertence; and although it is not set down as a special ground of appeal, it is so palpable that the defendant is entitled to have it corrected. The effect of the directions would be to charge the property bequeathed to Ann Lehre with the payment of all the interest which has accrued on all the debts since the death of complainant's testatrix. The idea seems to have been, and I suppose the instructions were prepared by the counsel, that the tenant for life is bound to keep down the interest on the debts as between the tenant for life and the remainder man. That is the correct rule in regard to the debts which are a charge upon the estate. Now, according to the rules laid down in Warley v. Warley, Bail. Eq. 397, the residue of the personal estate is first chargeable with the payment of debts, when no fund has been specifically set apart for that purpose, and if that prove insufficient, they are

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to be paid out of the *personal estate specifically bequeathed, the whole of course; for there is no foundation for a distinction between that which is directly and absolutely given, and that which is bequeathed to one for life with remainder in fee to another. Here, therefore, the debts, after exhausting the residue of the estate, must be charged rateably on all the specific legacies of personal property, so as to operate as a pro rata abatement of all those legacies. This, I suppose, is an abundant fund for the payment of the debts; if it should prove otherwise, descended real estates, according to Warley v. Warley, and last of all real estates specifically devised, are chargeable. The master in stating the accounts will therefore conform to these rules.

The whole court concurred.

1 Rich. Eq. 301

THE EXECUTOR AND DEVISEES OF WILLIAM EDINGS v. THE ADMINISTRATORS OF BENJAMIN WHALEY and Others.

(Charleston. March, 1845.)

[*Parent and Child* ⇐9.]

Where a parent, upon the marriage of his daughter, puts her in possession of slaves, or other chattels, without reserving the right to reclaim, or otherwise qualifying the possession, an intention to give will be presumed, and the gift perfected by the act of delivery.

[Ed. Note.—Cited in Watson v. Kennedy, 3 Strob. Eq. 7; Brown v. Wood, 6 Rich. Eq. 172; Cloud v. Calhoun, 10 Rich. Eq. 368.

For other cases, see Parent and Child, Cent. Dig. §§ 129, 130; Dec. Dig. ⇐9.]

[*Gifts* ⇐47.]

As to real estate, it seems that an intention to give will never be implied from the mere naked possession with the assent of the parent.

[Ed. Note.—Cited in McKee v. Mobley, 3 S. C. 250.

For other cases, see Gifts, Cent. Dig. § 81; Dec. Dig. ⇐47.]

[*Judgment* ⇐590, 645.]

Where a bill was filed to recover possession of a plantation and slaves, with an account of the profits, and, upon the suggestion of the court that an issue at law be applied for to try the title to the plantation, an action of trespass to try titles was brought, and a verdict, without damages, rendered for the plaintiffs, which, on appeal by the defendants to the law Court of Appeals, was confirmed. *Held*, (1) that the decision at law was conclusive in this court; (2) that the complainants, being entitled to the common law writ of habere facias possessionem, were not entitled to the aid of this court in obtaining possession; (3) that having neglected to claim damages at law, they were not entitled to an account of the mesne profits.

[Ed. Note.—Cited in Jenkins v. Jenkins, 83 S. C. 544, 65 S. E. 736.

For other cases, see Judgment, Cent. Dig. §§ 1102, 1158; Dec. Dig. ⇐590, 645.]

The bill states that William Edings, by his

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will, bearing date *23d May, 1834, gave three plantations on Edisto to his widow for life, and after her death to his son John Evans Edings for life, with remainder to his issue living at the time of his death that should attain the age of 21 years, or dying before 21 should leave children that should live till such time as the parent would have attained 21; to be divided per stirpes; and in case of the failure of such issue to testator's right heirs. To his grand-sons, William James Whaley and Benjamin Seabrook Whaley, his plantations, Slann's Island and Chehaw, and all the negroes and stock thereon belonging to testator, for life, with remainder to their issue, on the same terms as in the devise to the issue of his son John Evans Edings. To his daughter Sarah Chisolm, Indian Field and the slaves and stock thereon, for life, with like limitation. To his daughter Mary Fripp, Campbell's and Archfield, with the slaves, &c., for life, with like limitation. That the complainants, George

Chisolm and John A. Fripp, two of the executors therein named, proved the said will, and are willing to execute the trusts thereof. But they cannot execute the will as to the devise to William James Whaley and Benjamin Seabrook Whaley, as they do not know what negroes, stock, &c., on Slann's Island pass by the said will to the devisees. That Benjamin Whaley married the testator's daughter Eliza on the 30th March, 1819, and soon after, the testator put Benjamin Whaley in possession of the plantation on Slann's Island, and all the negroes, stock, &c., on the plantation, but made him no deed, and they believe he never intended to give the same to Benjamin Whaley, nor to dispose of the same, except according to his last will.

That about the 26th June, 1823, Eliza Whaley died, leaving two sons, the said William James Whaley and Benjamin Seabrook Whaley. That Benjamin Whaley married again, and about 11th March, 1832, died intestate, leaving his widow and three other sons, Edward, Joseph, and Francis, the issue of his last marriage. That administration of his estate was committed to Edward Whaley and Joseph Whaley, who are in possession of Slann's Island and negroes, and claim the same as the estate of Benjamin Whaley. That complainant George Chisolm, on 14th January, 1823, married with Sarah the testator's daughter, and soon after, by testator's direction, took possession of Indian Field and seventeen negroes, and held the same from that time. That Sarah Chisolm died 19th October, 1834, leaving issue. That complainant John A. Fripp, on the 12th February, 1822,

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*married with testator's daughter Mary, and soon after, by testator's directions, took possession of Campbell's and the negroes thereon, and held the same from that time. That they have inventoried the personal property on these plantations as part of testator's estate, but they were in fact held in the same manner as Benjamin Whaley held Slann's Island and negroes; and if the property in the last mentioned plantation and negroes is adjudged to be in Benjamin Whaley or his heirs, complainants claim the benefit of the same rule, as the circumstances of their possession were in all respects similar to the occupation of Benjamin Whaley, and the testator intended to place, and did place, the three daughters on the same footing. Complainants pray for the directions of the court and that the trusts of his will may be executed. To this bill all parties having any interest were made defendants.

Edward Whaley and Joseph Whaley answered, claiming Slann's Island and negroes as the proper estate of Benjamin Whaley. The infants answered, submitting their rights. Afterwards George Chisolm, one of the complainants, died, and the suit was renewed against his executor and heirs.

The cause came before his Honor Chancellor Johnson on the 3d June, 1840, when his Honor delivered the following judgment, on a motion made by the defendants Edward Whaley and Joseph Whaley to dismiss the bill.

The only question submitted to the consideration of the court, arises out of the following facts stated in the bill, and answers of the defendants interested in the matter. The complainants' testator, who died in 1836, by his will, bearing date the 23d May, 1834, devised to his grand-sons William J. Whaley and Benjamin S. Whaley, amongst other things, his plantation on Slann's Island, and all the negroes and stock thereon belonging to him, for life, with divers remainders over; and the bill states that these legatees, the said Wm. J. and Benj. S., were the issue of the testator's daughter Eliza, who intermarried with their father Benjamin Whaley in March, 1819. That at or soon after the marriage, the testator delivered to his said daughter, or her husband, a slave called Rose, and at or about the same time put her said husband in possession of the plantation on Slann's Island and about thirty slaves that were then settled and employed thereon, but made no deed to the said Benjamin Whaley for the said plantation or any

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of the negroes, and the complainants *believe never meant to dispose of them finally or irrevocably, except by deed or by his last will and testament; and that the said plantation on Slann's Island and the slaves referred to in the said will are the same of which the testator did put the said Benjamin Whaley in possession. The bill also states that the testator's said daughter Eliza died in 1823, leaving issue, the said devisees Benj. S. and William J. who were then and still are minors; that the said Benjamin Whaley afterwards intermarried with Maria Ferdinand, by whom he had three sons, Edward, Joseph, and Francis, and died in 1832, leaving surviving him the said Maria and his said three sons, all of whom are now minors, and are defendants in this suit; that from the time the said Benjamin Whaley was put in possession of the said plantation and negroes, he remained in the possession thereof until his death, and that since his death Joseph Whaley and Edward Whaley, his administrators, also defendants in this suit, and his said widow, have continued in the possession of the said plantation and slaves up to the time of filing the bill. The prayer of the bill is for an account, and that the trusts of the will may be declared, and for such other and further relief, &c.

The defendants, Maria the widow, and Joseph Whaley and Edward Whaley, the administrators of Benjamin Whaley, have answered the bill fully, but do not materially deny the facts stated in the bill. They insist, however, that the testator's putting Benja-

nam Whaley in possession of the slaves on his marriage with his daughter, and his subsequent possession of them, amount in law to a gift, and that the property in them vested absolutely in him; that from Benjamin Whaley's long, quiet and uninterrupted possession of the plantation, and the defendants' since his death, they are protected by the statute of limitations; and that both land and negroes are distributable between his widow and all his children, in the manner provided by the Act of distributions.

It is now, however, insisted on the part of these defendants, that conceding all the facts stated in the bill to be true, the court has not jurisdiction of the cause, and that as to them the bill ought to be dismissed.

1st. Because the complainant has a plain and adequate remedy at law for the recovery of the negroes, in an action of trover or detinue.

2nd. Because the devise of the land is directly to the testator's grand-children, William J. and Benjamin S., who are not com-

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*plainants in this bill, and who moreover have a remedy at law, by the action of trespass to try titles, a matter in which complainant has no interest.

This objection admits therefore that Slann's Island, and the slaves thereon, (at the time Benjamin Whaley went into possession,) belonged to the complainants' testator; and that he devised them to his grandsons William J. and Benjamin S. Whaley; and under the prayer for general relief, the complainant, the testator's executor, asks that their possession may be decreed to be delivered to him, to enable him to execute the will of his testator; and the only question is whether this court has jurisdiction of the matter.

In the infinite variety of the transactions of men, cases frequently arise in which the modes of proceeding in the common law courts do not furnish remedies suited to their particular justice. As organized here, these courts have no power to compel a discovery, often necessary to the ascertainment of the truth—they cannot in anticipation restrain the perpetration of a wrong, although if committed it might be irreparable—they cannot enforce the specific performance of contracts, nor compel the specific delivery of chattels, without which the remedy would often prove inadequate,—with few exceptions, their whole remedial power consists in substituting money as an equivalent for a wrong done or right withheld; hence the jurisdiction of the Court of Chancery: the necessities of mankind required that the defects in the powers of the law courts should be supplied; unless they had been, justice could not have been meted out according to the right of the matter, and it follows that generally this court will not entertain a cause when the party complaining has a full and complete remedy at law.

Both lands and slaves are the subject of controversy here, and generally it is true that this court will not entertain a cause in which the titles to land are directly involved, because the writ of habere facias possessionem of the law courts is a perfect remedy; and yet, in a few instances, causes in which the title to lands are incidentally involved are entertained. Injunctions to stay waste, and to restrain the continuation of a trespass, are familiar examples.

In England the Courts of Chancery disclaim the power to compel the specific delivery of personal chattels, on the ground that the courts of law furnish a remedy by an action for damages for their conversion and

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detention, and the principle has not *been departed from but in a few and very peculiar instances. In this, our own courts followed the English courts for a long time, I think with too much servility, not correctly distinguishing between the subject to which the principle is applied there and here. In England there are no slaves; personal chattels there consist for the most part of things incapable of reciprocal attachments, and are valued only on account of the use to which they are applied, and may be replaced by an equivalent in money; not so with regard to slaves. Their moral qualities, which money cannot buy, enter largely into their value, and who in this country has not witnessed how painful is the necessary or compulsory separation between the master and the slave? more intensely felt by the slave, when the government has been such as characterises the great mass of slave owners. Is there any thing in a family picture, or a Pusey Horn, however precious they may be, to compare with the moral relations between the master and the slave?

These considerations, doubtless, induced our courts slowly and cautiously to carve out a new exception in the case of slaves; at first it seems to have been intended to confine it to body and house servants, such as were in some sort indispensable to the owner. (Sarter v. Gordon, 2 Hill Eq. 121, is the sequel.) There the specific delivery of slaves was decreed, on the ground that they were brought up in the family, and I am prepared to leave the owner himself to judge, whether or not damages will compensate him for the loss of his slave.

A planter has a plantation well peopled with slaves, purchased if you please but yesterday. He has constructed houses for their accommodation. It is supplied with live stock, implements of husbandry, and every thing else necessary to successful planting. His employment and delight is to look over the rich prospect before him, and direct and superintend the whole. His neighbor enters

upon him, and with a strong hand drives off his slaves in a body, and is he to be told that his remedy is at law, by an action of trover, where he will recover damages to be measured by their value, and their hire during the time the wrong doer has had them in his possession? will this remunerate him for his own loss of time and enjoyment—for the decay of his buildings and fences—for the profits arising from the cultivation of his fields, which are grown wild.—for the live stock which has perished for the want of the means of subsistence, or to prevent which,

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have been sold at a sacrifice? must *he wait until the tardy process of the law shall put him in possession of funds to repeople his plantation, purchased perhaps at fifty or an hundred per cent. higher than the value at which his own were estimated?

The testator here gives to his grandsons William J. and Benjamin S. his plantation on Slann's Island, and all the negroes and stock thereon which belonged to him. The effect of this is to invest his grandsons with the legal estate in the lands, and the complainant, his executor, with the legal estate in his negroes; and there is no question that the complainants might recover the value of the negroes in trover, and the grandsons the land at law; but of what value would the land be without the slaves? Lands are so abundant and cheap, that almost every one is a land-holder. There may be no one to rent, and besides this, all know, in the hands of a tenant, if even one could be found, both the lands and improvements always suffer great deterioration. This is the case which I have before supposed, and if the principle is correct, the complainant is entitled to the specific delivery of the slaves.

It is objected, however, that the title of the land is in the grandsons, and therefore the complainant is not entitled to the possession as executor. The legacy is of the land and the slaves, and live stock on it, and their principal practical value consists in their unity. The slaves and stock are as necessary to the plantation, as the impelling power is to a piece of machinery, and the testator never could have intended to separate them; that is deducible from the subject matter of the legacy—no one here buys a plantation for the purpose of leasing, nor field hands for the purpose of hiring them out: and it will not be supposed that the testator intended to put this legacy in a condition to render it less productive than the whole together might be made in the hands of a prudent man. I conclude, therefore, that he must have intended that his executor should have the possession and management of the plantation, with a view to the employment of the slaves. He never could have intended that the plantation should be abandoned. And the devisees being infants, the management of it must devolve on the executor, until they arrive at full age, or until his authority is superseded by the appointment of a guardian. Mitchell v. Richardson, decreed in the Court of Appeals here, at February Term, 1840, is in point. He cannot maintain trespass to try titles at law, because, as before remarked, the legal estate is not in him, and his only remedy, if he has rights, is in this court.

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*The claims of the defendants to the land rest entirely on possession, and that question, although collateral to the point directly involved, was fully gone into in the argument, and I have made up something like a settled opinion, unfavorable to the claims of the defendants; but the practice of the court has usually been to direct an issue at law in all cases where the titles to land come in issue, and I am not disposed to depart from it now, and will lend a willing ear to an application from either of the parties for an issue at law, to decide the title between the devisees and the defendants.

It is ordered and decreed, that the motion to dismiss the bill be dismissed.

In pursuance of the suggestion of the court, an action of trespass to try title for Slann's Island, was brought by the devisees, William James Whaley and Benjamin Seabrook Whaley, against Joseph Whaley and Edward Whaley, who defended under the title of their intestate, and at May term, 1841, was tried before his Honor, Judge Earle, when the plaintiffs obtained a verdict; the defendants moved for a new trial, and upon the hearing of the appeal at Columbia, in May, 1843, the motion for a new trial was dismissed, and the judgment confirmed.(*a*)

The cause came on to be heard at Charleston, before his Honor Chancellor Dunkin, on 29th June, 1843, who pronounced the following decree.

The principal object of this bill is to recover possession of a plantation on Slann's Island, and fourteen negroes, with an account of the profits.

The complainants claim under the will of William Edings, deceased, executed on the 23d May, 1834. The defendants rest their title on the possession of Benjamin Whaley, deceased, (under whom they hold,) from 1819 to March 1832, and on their own possession from that time until the death of William Edings, in April, 1836. The original title of William Edings, anterior to 1819, is not questioned. The difficulty arises on the subsequent possession of Benjamin Whaley, and those claiming under him. The law under which the heirs of Benjamin Whaley claim, is thus noticed by Judge Waties, delivering the judgment of the court in Cholett v. Hart, 2 Bay, 160. "The great object of the limita-

(*a*) Whaley v. Whaley, 1 Speers, 225, [40 Am. Dec. 594.]

tion Act, which was passed so long ago as the year 1712, and which has remained in

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force to the present *day, with scarcely a single alteration, was to quiet the inhabitants of this State in the possession and quiet enjoyment of their estates both real and personal. This was deemed by our ancestors a matter of primary consideration, tending to give security and permanency to property of all kinds, and to prevent as much as possible, every species of litigation, so injurious to society." "The second and third clauses of the Act were intended to secure actual settlers in the possession of their lands, and hundreds of suits have been determined in this country in favor of possessory rights alone, against the clearest titles by grants, deeds, &c. The fifth and sixth clauses of the Act were intended to give the like security to personal property of every kind, in the actual possession of our citizens, in the same manner as was afforded to the possessors of landed property; five years possession completed the title to land, and four years possession the title to all kinds of chattels, as no suit can be maintained for either without being commenced within the above periods."

In Cockfield v. Hudson, 2 Bay, 425, the court, setting aside a verdict in favor of a defendant, declare that "four years peaceable possession of a negro or other chattel, by a person claiming it in his own right, will, under our limitation Act, give a title to the possessor, and bar any other person, however high his title may have been, from a recovery." It cannot be doubted that precisely the same rule is applicable to the possession of lands, excluding only the period when the title is completed.

It will simplify the consideration of the case, and certainly do no injustice to the plaintiffs, by supposing that on the 1st March, 1832, William Edings the testator, had instituted proceedings against Benjamin Whaley the intestate, to recover possession of the plantation and negroes on Slann's Island. The defendant resisted the action by proving a peaceable and uninterrupted possession by him of the lands and negroes, for twelve years prior to the institution of the suit—prima facie, according to the uniform decisions of this court, this gave him a complete title, afforded him a perfect protection against the plaintiff's action. But it was competent for the plaintiff to defeat the effect of this possession by proving that he, the plaintiff, was a minor, was beyond seas, or that the possession of the defendant was a mortgagor, lessee, tenant, &c.—that it was not in his own right, but in the right of the plaintiff—that it was fiduciary and not adverse. Such matter it was the privilege of the plaintiff to shew in order to bring his case within the exceptions of the statute,

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*or to defeat the effect of the defendant's possession. As in all other cases, the onus is on the party insisting on the exception. It was proved by the witness, Cato Ash Beckett, that he was living in the family of William Edings in 1819, when Benjamin Whaley married his daughter. "That in January, 1820, he heard Edings tell Whaley to go and take possession of Slann's Island and the negroes." It was abundantly proved and not contradicted, that Whaley took possession, and held the property from that time until his death in March, 1832, exercising, during all the intermediate period, all the usual acts of ownership, such as selling the crops, paying taxes, &c. The reply on the part of the plaintiffs is, and on the part of Mr. Edings in 1832, might have been this possession of Benjamin Whaley was under a loan from him, by which Whaley was bound to give up the land and negroes whenever Mr. Edings required it. It is here to be borne in mind, that Whaley's defense has no reference to a gift or any other origin to his possession. He relies on his possession alone. The legal effect of that possession is to confer title. The plaintiff must prove that it was under a loan. It is not enough that Mr. Edings may have intended, in his own mind, to reserve a control over the property. The language of the court in Byrd v. Ward, 4 M'C. 231, would apply with much stronger reason to this case. If the possession of the defendant was such as prima facie completed his title, "no mental reservation" on the part of Mr. Edings, could defeat this legal consequence. "There must have been some express stipulation at the time, distinctly understood by both parties, in order to give effect to such an intention. It is not a question what he intended, but what he actually did."

So in M'Cluney v. Lockhart, 4 M'C. 251, it was held that the presumption of a gift where a slave was sent to a married daughter twelve months after marriage, and suffered to remain in her possession, can only be rebutted by "an express stipulation," that it was a loan and not a gift. The defendants here are entitled to the full benefit of this language. It is admitted that the silence of the party cannot confer title to the real estate. For ten years a mere mental reservation on the part of Mr. Edings would have entitled him, both in law and conscience, to resume the possession of the plantation. It is only after the "peaceable and quiet possession of the estate," for more than the statutory period, has conferred a right on the defendant "stronger" (in the terms of Judge Waties) than the clearest

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title by grants *and deeds, that the plaintiff is not permitted to impair this right in consequence of any mental reservation, or any condition not expressed, and distinctly understood by both parties.

It is not, perhaps, too much to say that from the period when Benjamin Whaley took possession in January, 1820, until his death in March, 1832, there is no evidence whatever that he held this property under a loan from Mr. Edings, except that which arises from the fact that he had married the daughter of Mr. Edings, and perhaps the negative proof, that Mr. Edings had executed to him no conveyance of land, or deed of gift of the negroes. The effect of such testimony has already been considered and determined in some adjudicated cases. The relative position of the parties (where personal property was involved.) has been repeatedly held to warrant a contrary presumption.

In Brashears v. Blassingame, 1 N. & M'C. 224, Mr. Justice Nott, delivering the judgment of the court, says "if a gift of property to a son or daughter, on their marriage (which may be literally considered in consideration of marriage.) to be taken back at any indefinite period of time, at the capricious and arbitrary will of a parent, can in any case be viewed as a loan, I certainly think it a kind of loan not much to be encouraged." And in Hatton v. Banks, 1 N. & M'C. 223, he regards it "as questionable whether these pretended loans ought not always to be construed into absolute gifts, whatever parol condition may be annexed to them."

Then as to the plantation. The situation of the parties and the want of a conveyance, authorize, as it seems to the court, no other presumption than that of which they are proof, namely, that Whaley had no title under Mr. Edings. They no more prove a loan than a gift. It is perfectly consistent with both circumstances, that Mr. Edings may have originally intended to give the plantation to Mr. Whaley, and put him in possession of it, as he did of the negroes, without any condition or reservation. Whaley regarded the property as his own, and treated it as his own, and Mr. Edings intended, or was willing, that he should so regard and treat it.

As Mr. Justice Johnson says in Teague v. Griffin, 2 N. & M'C. 95. "The very delicate relationship which subsists between the father-in-law and the son-in-law, is a complete barrier to the latter's making any demand upon him, as to the precise terms on which property is put into his possession."

It is probable that neither party was ig-

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norant that a convey*ance was necessary in a transfer of lands, and that Mr. Edings could not make a perfect title to Mr. Whaley, or the latter receive a perfect title from the former, in any other way. Although Mr. Edings originally intended a gift, and only postponed making a conveyance until he knew more of Mr. Whaley, or perhaps from the reluctance, not uncommon, to part with the muniments of title, although the property itself is given up, he is permitted by the law to continue in this condition of mind, and at any moment within ten years, to enter on the premises, and dispossess the defendant of that which he had so long held as his own. But when the ten years had expired, the legal rights of the parties were entirely changed. The law then vested a perfect title in Mr. Whaley, and prohibited the interruption or disturbance of his long continued possession, unless it could be shewn, not that Mr. Edings had executed to him no conveyance, or that he was his son-in-law, but that a possession which is presumed adverse, was in fact fiduciary—that the possession was not for himself, but for Mr. Edings. The question would not be merely, whether he did not originally enter by the permission of Mr. Edings, (about which there was no doubt,) but whether he did not enter and hold for himself, and possess for himself, and not for another, for ten years prior to the institution of the suit. If Mr. Edings had called witnesses to prove that he freely gave the plantation to Mr. Whaley when he put him in possession, it is hardly necessary to say that the right of Mr. Edings to recover the land at any time within ten years, would have been just as perfect as if Mr. Whaley had been a mere intruder or trespasser. The only effect of proving a gift, would be to place beyond doubt the character of the possession. On this subject the Judge says, in Sumner v. Murphy, 2 Hill, 491, [27 Am. Dec. 397,] "it is true, it is a tenancy at will in its commencement, and I will add, until the time limited by the statute has run out; then it becomes a good and indefeasible title in law against the grantor. The occupant is in possession in his own right, and claiming it as his own; and although this possession is permissive, that is, by the consent of the grantor, and may be ended by him at any time he thinks proper so to do, provided it is before the time limited by the statute, yet after that time has run out, he cannot claim to defeat it because it commenced under him." In that case, as well as in Simmons v. Parsons, reported in the notes, it is said that adverse possession is not always a hostile possession to the title of him who claims against the occupant. It very often com-

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mences and is perfected under *that very title, and derives its effect from it; "adverse possession is actual occupation, or pedis possessio, of land as one's own."

The title to personal property passes by delivery. In the case before cited, of Byrd v. Ward, it is said "there must be some express stipulation at the time, distinctly understood by both parties," in order to repel the presumption of a gift. The same rule, in the judgment of the court, should apply to the possession of lands. If the delivery of possession is not accompanied by some stipulation, distinctly understood by both parties, it should be presumed that he is holding pos-

session for himself; and if that possession is continued without interruption for ten years, his title is perfected by the statute, and cannot be defeated by mere proof of the situation of the parties and the want of a conveyance.

It has been said that from 1820 till the death of Benjamin Whaley in 1832, there was no evidence of any act done, or declaration made, on the part of Mr. Edings, qualifying, in any manner, the character of the possession by Mr. Whaley. Of course, if the title of Whaley was complete prior to his death, the right of his heirs could not be affected by the subsequent declarations of Mr. Edings, even if such declaration was competent testimony. But it is quite clear that the will of Mr. Edings does not evince any consciousness of right to resume the possession of the property, to take back that with which he had already parted, but rather to direct the succession in the family of his son-in-law. This he perhaps always intended, and might have executed at any time, if such intention had been distinctly understood by Mr. Whaley, as well as himself. But the declarations of Mr. Whaley, during this period, (which were properly in evidence, Hall v. James, 3 McC. R. 222, Martin v. Simpson, 4 Ib. 263,) clearly indicate the character of his possession. The witnesses Beckett, Hanahan, Geo. W. Seabrook, Jos. Whaley and W. Rice, all concur on this subject, and prove, in the language of some of them, that he regarded and treated "the property of which Mr. Edings had put him in possession as bona fide his," "as much his own as his property on Edisto Island," (where he lived.)

After the death of Benjamin Whaley in March, 1832, the negroes were appraised as part of his estate, and the plantation on Slann's Island, and the negroes, were held by the defendants, and employed for the estate,

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without any notice or demand by *Mr. Edings, who survived Mr. Whaley more than four years, and died in April, 1836.

It appears to the court, that according to settled adjudications, the right to the personal property cannot now be disputed, and the court would experience scarcely more difficulty in regard to the real estate, if some embarrassment were not interposed by the verdict of the jury. Some remarks are proper in reference to that matter.

It is not a verdict by which the heirs of Benjamin Whaley are necessarily concluded or affected. At the former hearing of this cause, the Chancellor intimated a desire that an issue should be asked by one of the parties. It does not appear that this trial was had on any order for an issue, but the action seems to have been intended to answer that purpose. It is believed that no other effect was desired from it than if the issue had been directed by this court. On a motion for a new trial, the judges of the Court of Appeals were divided in opinion, three being in favor of sustaining the verdict and two for granting a new trial.

Since that time several witnesses have been examined, one by the complainant: and three by the defendants, whose testimony had not been previously heard. Cato Ash Beckett proved "that he was intimate with Benj. Whaley from a very early period; that in 1819, at the time of Whaley's first marriage, the witness resided in the family of Mr. Edings—was present at the marriage with Miss Edings—knew that in 1820 Mr. Edings gave Whaley a plantation and negroes which he had bought in 1818 from Dr. Glover; he (Mr. Edings) planted it in 1819, and in 1820 gave possession of it to Mr. Whaley—does not know how many negroes there were, but thinks there were eight or ten workers. Mr. Whaley continued in the use and possession of the negroes up to his death; clothed them and paid taxes for them; he always spoke of the Slann's Island place and of the negroes as his, just as he did of his plantation and negroes on Edisto. It was notorious throughout the Island that Mr. Whaley claimed the Slann's Island place and the negroes as his own. He has no doubt but that Mr. Edings knew that Benj. Whaley claimed this place and the negroes as his own. In January, 1820, he heard Mr. Edings tell Whaley to go and take possession of Slann's Island and the negroes; never heard any thing more pass between Mr. Edings and Mr. Whaley about the land and negroes. The land and negroes were given at the same time and in the same way and same words. The impres-

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sion *made on witness's mind when Edings told Whaley to go and take possession, was that Edings intended a gift to Whaley."

It is perhaps not unwarrantable to say, that if this evidence had been adduced on the original trial, the judgment of the Appeal Court on the motion would have been different. The concurrence of Judge O'Neall was, avowedly, on the ground that "there was no proof whatever of a parol gift."

Certainly it was very late to offer this testimony—but no objection was offered or suggested on this score. On the contrary it was the manifest object of the parties to shut out no light which could be thrown on the subject. It may not be improper to add, that Mr. Beckett was known to the court as a person entitled to entire confidence, for intelligence and respectability.

It is not common, (and it ought not to be) to set aside or disregard the verdict of a Jury on a question of this character. It has been repeatedly done, however, both in England and this country. In Powe v. Ellerbe, determined some years since at Columbia, this court ordered a second trial at law, and ultimately went so far as to decree against two concurring verdicts.

Entertaining a strong conviction that this

verdict is founded in error, the court can only decline to give the plaintiffs any advantage from it in this tribunal. So far as the bill seeks a delivery of the Slann's Island plantation and the negroes, it is the opinion of the court that it should be dismissed, and it is so ordered and decreed.

The complainant and the devisees W. J. Whaley and B. S. Whaley, appealed, on the following grounds:

1. That the statute of limitations runs only in favor of adverse possession, and that the possession of Benjamin Whaley was not adverse to the testator.

2. That the possession of a person entering without any gift or adverse title, is a possession in support of the title of the true owner, and that a possession of land or negroes in such circumstances does not bar the true owner.

3. That the character of possession is determined by the circumstances in which the possession begins, and possession supports the right in which the party enters. And if there was any right in this case, it was in virtue of a gift to the testator's daughter, and the possession could not confer on Benjamin Whaley a right hostile to his wife.

4. That no action accrued to William Edings till demand of the possession, and as no

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demand was proved, the statute did *not run against William Edings either in respect of the land or negroes during his lifetime.

5. That as to the land, the right of the devisees was res judicata; and as the land and negroes were held together, the finding of the jury against the statute as to the land is conclusive as to the negroes also.

Petigru, for the appellants.
Rice and McCready, contra.

Curia, per JOHNSON, Ch. I concur entirely in the decree of the Circuit Court in relation to the gift of the negro slaves on the Slann's Island plantation. The authorities cited, and they are all one way, shew conclusively, that if a parent, upon the marriage of a daughter, puts her in possession of slaves or other chattels, without reserving the right to reclaim, or otherwise qualifying the possession, an intention to give will be presumed, and the gift perfected by the act of delivery. The presumption arises out of the moral obligation of a parent to provide suitably for his children, and the necessity for it is the more cogent upon their marriages, when they usually leave the parental roof and set out to provide for themselves. It is seen in the almost universal habit of the country. No parent, who has the means and the will, ever permits a child to commence life on his own account, without aiding him in proportion to his means, and when nothing but an absolute gift is intended nothing but a delivery is necessary. If it is intended to qualify it, the parent ought to, and I think would, express it. He would not be so unjust to his child as to raise expectations with the secret intent of mortifying him by defeating them.

I concur also in the order of the Circuit Court dismissing the bill as to the real estate, upon other grounds, however, than those relied on in the decree. The suggestion in the decree of the court of June, 1840, was that a feigned issue should be made and tried at law to determine the title to the real estate; but that was not followed up. The complainants brought an action of trespass to try titles, in the name of the devisees of their testator, and the jury found for them. The parties might have regarded that suit as a substitute for the feigned issue, and then an appeal would have lain directly to the Equity Circuit Court, but the defendants themselves, without any objection on the part of the complainants, thought proper to treat it as an action at law, and carried up an appeal to the Law Court of Appeals,

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where the *verdict was sustained, and that judgment is binding on this court as res judicata. No appeal lies from that court to this. It is binding, too, as authority upon the precise point raised here, for this court is not only bound, on general principles, but by the express enactment of the legislature, to follow the decisions of the law courts.

It is said that the evidence in favor of the gift is stronger here than that offered in the law court, and might possibly have influenced that court to come to a different conclusion, and it is true that other witnesses have been examined and possibly some new facts have been elicited, but after all, the fact of the gift rests upon the fact stated by the witness Cato Ash Beckett, that in January, 1820, he heard the complainants' testator tell the defendants' intestate, after the latter had married his daughter, "to go and take possession of Slann's Island and the negroes," and the subsequent possession of the defendants' intestate, and that was the substance of the evidence before the law court. But I am satisfied to rest the case upon the ground of res judicata.

The complainants clearly have a right to the common law writ of habere facias possessionem, and do not require the aid of this court in obtaining possession of the land. But the jury have found no damages, and they insist that they are entitled to come here for an account of mesne profits. That would have followed as a matter of course if the case at law had been tried on an issue directed from the Court of Equity, but the proceedings at law were in form an action of trespass to try titles, and both parties thought proper to treat it as such. In that form of action the plaintiffs were entitled to recover the mesne profits in the form of damages, and having neglected to submit

that matter to the jury, they cannot obtain relief in this court. It strikes me, too, that it was not a case for damages.

The gift of the land and negroes was at the same time and expressed in the same words, "go and take possession of Slann's Island and the negroes," and the complainants insist that as the land has been adjudged to belong to the devisees of the complainants's testator, the negroes follow it as an incident. The case in 2 Dyer, 212, establishes, I think very clearly, and as a general rule I should be disposed to follow it, that if lands and chattels be demised together, and a round sum be reserved as rent, if the lessor aliens the land before the expiration of the lease to a stranger, he will be entitled

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to the whole sum reserved *for rent, upon the principle that the land being the principal and most important matter, draws after it all incidents of less importance. It ought, perhaps, to depend on the character and value of the chattels, and the use to which they are applied, and it may well be doubted whether the principle would apply to slaves regarded as chattels, which, although in legal contemplation of less dignity and importance than lands, are for the most part of more value and importance, and constitute rather the principal than the incident. But the principle does not apply here. The decision of the law court is, that the lands belong to the devisees of the complainant's testator, and this court have decided that the defendant's intestate had an absolute property in the negroes as the gift of the former; and as a further authority for the opinion of the court on this point, it may be here stated, that one of the negroes that belonged to the Slann's Island plantation ran away from the defendants's intestate after the death of his wife, the daughter of complainant's testator, and took protection at the plantation of the latter, and Joseph Whaley testified, that at the request of the defendant's intestate, he called on the complainant's testator and inquired if he had any claim to her, and he replied no, and that he would order her off his plantation. A tenancy at will of the real estate and an absolute property in the slaves, are by no means incompatible.

But it may be asked, how can that be, when the lands and the slaves were given at the same time and in the same words?

Every one knows, that slaves and other chattels may be transferred even by parol, and that real estate cannot except by deed, and that the terms of a deed or will in relation to real estate which would only give or grant a fee simple conditional at common law, would give an absolute and unconditional property in chattels.

There are numerous cases in our own courts, in which the possession of a child of real estates, under a parol gift from the parent, has been held to be adverse to the rights of the parent, but I apprehend that a gift of real estate never will be so implied from the naked possession with the assent of the parent. As before remarked, every one knows that the title to lands cannot be transferred but by deed, and when a parent suffers a child to take possession of his lands without a legal conveyance, the inference would seem to be that he did not intend to give. Some positive declaration or some decisive act indicating the intention would therefore be indispensable; but the further prosecution of

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*this enquiry is rendered unnecessary by the judgment of the law court.

Appeal dismissed.

HARPER, Ch. I concur so far as respects the land.

DUNKIN, Ch. I concur in the result for the reasons stated in the circuit decree.

JOHNSTON, Ch., absent at the hearing.

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1 Rich. Eq. 319

ROBERT BROWN, Survivor, v. SUSAN M. CLEARY and Another.

(Charleston, March, 1845.)

[*Husband and Wife* ⇐223.]

Where a woman, as cestui que trust, has a life interest in property in the hands of a trustee, and owes a debt, her creditor, if she owns no other property to which he can resort for the satisfaction of his demand, may, in equity, subject her income in such property to the payment of his debt.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 795; Dec. Dig. ⇐223.]

Before Johnston, Ch., at Charleston, February, 1844.

The bill stated that Robert Brown is the surviving co-partner of Brown & Tunis, of Charleston, factors. That some time prior to January, 1833, Brown & Tunis were the factors of Mrs. Susan M. Graves, and during the course of their dealing, Mrs. Graves intermarried with Nathaniel G. Cleary, and the said Susan M. Cleary and her husband, N. G. Cleary, became indebted to them for advances and supplies furnished; upon which claim complainants obtained a judgment at law against the said Cleary and wife, and lodged execution. That Cleary had no property, and the property to which Mrs. Susan M. Cleary was entitled, was so conveyed that she had no right in the corpus or capital of the estate, but only in the income and profits; and the interest to which she was then entitled was not in law subject to a levy under a fi. fa.; and Mrs. Cleary being a married woman, no ca. sa. could be issued to compel her to assign her interests. That Brown & Tunis thereupon filed a bill in this

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*court, setting forth the above facts, and praying the payment of their debt. To this bill, Susan M. Cleary, Nathaniel G. Cleary, and James R. Pringle, trustee of Mrs. S. M. Cleary, filed their answers; and upon the hearing of the cause, at January term, 1833, Chancellor Johnston, inter alia, decreed, that the trustee do, from year to year, when required by plaintiffs, until the further order of the court, account with them, before the master, for the income of the trust estate, and pay over the net balance thereof to them until the demand, with interest and costs, be paid; the amount of which was also referred to the Master. But the said trustee has never so accounted, and the debt is still unpaid.

That the plantation, for which the supplies were furnished which constituted complainant's debt from Susan M. Cleary, has been sold; but the said Susan M. Cleary is still entitled to a considerable income from certain bonds, negroes, and real estate; and complainant insists that Susan M. Cleary should be compelled to account for such income and profits, according to the decree of the court of January, 1833.

That Charles H. Tunis is dead, leaving complainant the surviving co-partner of Brown & Tunis. Nathaniel G. Cleary, her husband, is dead, and Susan M. Cleary is unmarried. James R. Pringle, who was Mrs. Cleary's trustee at the time of the decree in 1833, is dead; but that H. A. DeSaussure, Esq., is the trustee of Mrs. Cleary, and holds for her use certain property consisting of certain lands, negroes, and bonds, from which a certain annual income is derived by, and exclusively appropriated to, the said Susan M. Cleary.

The prayer of the bill was that Susan M. Cleary may be compelled to pay the debt; that H. A. DeSaussure, her trustee, may be required to account annually to complainant for the income of the trust estate in his hands, and to pay from such income the debt due by Susan M. Cleary to the complainant.

The defendant, Mrs. Cleary, in her answer admitted that prior to her intermarriage with Nathaniel G. Cleary, she was indebted to her factors, Brown & Tunis, for a negro purchased, and for some supplies for a plantation and negroes on Pon Pon River, in Colleton district, wherein she had a life estate under her deed of marriage settlement with Samuel C. Graves, of which deed James R. Pringle, deceased, was trustee; and that on 14th February, 1829, the said Brown & Tunis obtained and entered up a judgment against

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herself and Nathaniel G. Cleary, her *second husband, for said debt. That shortly afterwards, the said Brown & Tunis filed their bill of complaint in this honorable court against this defendant and her husband, N. G. Cleary, and James R. Pringle, the trustee under her marriage settlement with Samuel C. Graves; and on 28th January, 1833, this court decreed, that the greater part of the above stated judgment was settled by the delivery to the complainant of the negro purchased by them for her; that other items of their claim under the judgment were inadmissible, and that only about $213.76, with interest, was due thereon, (but referred the matter to the Commissioner to ascertain the exact amount due;) and further decreed, that James R. Pringle, the trustee, should account for the income of the trust estate, and pay the complainants's demand, and costs of suit.

The defendant further admitted, that a judgment was obtained and entered up against the said Nathaniel G. Cleary, in his life time, at the suit of the Treasurers of the State, in the court of Common Pleas at Charleston, 1832, upon which a writ of fieri facias was issued, and delivered to the sheriff of Colleton district, by virtue whereof he took in execution the plantation and negroes included in this defendant's marriage settlement, and on 3d June, 1833, sold and conveyed all the right, title, and interest, of the said Nathaniel G. Cleary and of this defendant, in the same, to B. F. Hunt, Andrew M'Dowall, and J. H. Read, and under the said sale, the purchasers entered and held possession of the said plantation and negroes. In consequence of this sale, the said plantation and negroes passed out of the possession of this defendant and her trustee, James R. Pringle, and the latter had no rents and profits to account for to the complainant, and this defendant no means to pay the debt.

The defendant further admitted, that her mother, Mrs. Susan M'Pherson, in and by her last will and testament, bearing date 20th August, 1834, devised to H. A. DeSaussure, in trust for this defendant, some property for life, with remainder to her daughter, the income of which has been regularly paid to her by her trustee, and constitutes her means of subsistence. She denied that the income of the said trust estate is liable to the complainant's claim, inasmuch as none of the supplies furnished by complainant were for its benefit, or to effect the objects of the trust; and she insisted, that each trust estate must bear its own burthens; or, instead of effecting the objects of the trust, they will be defeated.

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*The defendant H. A. DeSaussure in his answer submitted that the trust estate in his hands was not liable for the complainant's claim.

The case was referred to the Master, who made the following report:

"The order of reference directs me to ascertain and report what is due to the complainant under the decree of Chancellor Johnston, of January, 1833. I have been attended by the solicitors of the parties, and find

that the amount due is $213.76, with interest and costs. Calculating interest to the 28th February inst., 1844, the debt amounts to $379.59, exclusive of costs. I find, further, that although the particular trust property for the use of which the supplies from Brown & Tunis were furnished, has been long since lost, and the trustees are dead, yet there are other trust funds in the hands of another trustee, of another trust estate, created long after the trust estate was lost, and these, it is alleged, are liable for this debt. The facts are so, but the trustee, in his answer, sets forth that the funds in his hands are derived from another and entirely different source, and can, in no event, be made to answer for this old debt. The question raised is one of law, not of fact, and is for the court to determine, not the Master."

Per Curiam.—On the hearing of the case, it is ordered and decreed, that the claim of the complainant be established as a claim on the profits of the trust estate in the hands of Henry A. DeSaussure, trustee for his co-defendant, and that Mr. Laurens, one of the Masters, take a report of the whole amount due to the complainant, and of the trust estate of Susan M. Cleary, in the hands of H. A. DeSaussure; and also of the amounts that can be appropriated to the payment of the debt due to the complainant, without interfering with the previous liabilities that the trustee may have already incurred on account of Mrs. Cleary.

The defendants appealed, on the following grounds:

1. That one trust estate is not liable for the debts of another trust estate, but each must bear its own burthen.

2. That the trust estate from which the complainant seeks the payment of his debt, and to which his advances were made, has long since been sold by the sheriff, and passed into other hands.

3. That the debt of Mrs. Susan M. Cleary to the complainant, was contracted by herself and her late husband, N. G. Cleary, during the life time of the latter, and was due long prior to the death of Mrs. M'Pherson,

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and prior to the existence of the trust *created by her will, for the sole and separate use of Mrs. Cleary, in the hands of the trustee in this case.

4. That the complainant not having advanced money, or given credit to advance the objects of the trust in the hands of the present trustee, is not entitled to be reimbursed out of this fund.

5. That though Mrs. Cleary may still continue personally liable for the complainant's debt, the complainant has no claim against the present trustee, nor any lien on the trust property in his hands for the same; and as to the present trustee the bill should have been dismissed.

H. A. DeSaussure, for the appellants, cited 1 Hill Eq. 228.

Magrath, contra, cited Chev. Eq. 163.

Curia, per JOHNSTON, Ch. Perhaps the opinion, (which, from ill health at the time, I delivered orally,) in this cause, was not sufficiently distinct to show that I did not put the decision upon the grounds indicated by the appeal.

I took it that the judgment obtained at law against Cleary and wife, was in itself conclusive that the demand upon which it was rendered was the debt of the wife before the coverture; and that if there was any doubt of this, it was ended by her answer in this case, which (as appears by the brief) admits the fact to be so. This judgment survived against the wife, upon the death of her husband, and constitutes a present debt against Mrs. Cleary, for which she is as conclusively bound as for any debt she may now contract. We are not to go behind the judgment and enquire whether it was rendered upon a purchase for this or that trust estate. We are to regard it as the personal debt of the wife, irrespective of the purpose for which it was contracted.

There being no unsettled and unincumbered property of Mrs. Cleary, to which the plaintiff can resort for satisfaction of his demand against her, and she being exempted from a ca. sa., the question is, whether he is not entitled to a remedy out of the income of her trust estate, in the hands of her co-defendant: and of this no doubt has been expressed if the demand against her were only for her own personal contract; and I have just remarked that that is its character.

Certainly there is nothing in the decree or the case, from which it can be fairly inferred that the demands upon one trust estate are chargeable upon another. The principle upon which the decree manifestly rests, is, that a

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contract for which neither *trust is liable, as being the contract of neither of the trustees, but of the cestui que trust herself, may be satisfied out of her income from either trust estate, if there be no other remedy.

It is ordered that the appeal be dismissed and the decree affirmed.

The whole court concurred.

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1 Rich. Eq. 324

CAROLINE WITHERS and Others v. RICHARD YEADON, Adm'r.

(Charleston, March, 1845.)

[*Powers* ⇐9; *Wills* ⇐686.]

Testator devised his real estate and negroes to his son G. W. in trust, (1) to apply the rents, issue and profits, to the use of himself and family, and the education of his children; and (2) to give or devise by deed or will, the said property, (and the rents, issues and profits thereof,

over and above what he should apply to the uses aforesaid) "unto all or any child or children by him begotten, or to be begotten, in such way and manner, and in such proportions, and for such uses, estates and interests, as he shall think fit and proper." G. W. died, leaving a will in force, whereby he devised the whole of his estate to his wife, with directions to his executrix and executor, (his wife and son) to act under his "father's will, in trust in every respect and manner intended by their grand-father." *Held*, (1) that the legal title was vested in G. W. coupled with a power or trust, to appoint at his discretion, among his children; (2) that the power could not be delegated; (3) that as G. W. had neglected to execute the power, his children were entitled to divide the property equally.

[Ed. Note.—Cited in Atkinson v. Dowling, 33 S. C. 424, 12 S. E. 93; Mobley v. Cummings, 35 S. C. 126, 14 S. E. 721.

For other cases, see Powers, Cent. Dig. § 9; Dec. Dig. ⟸9; Wills, Cent. Dig. § 1631; Dec. Dig. ⟸686.]

[*Trusts* ⟸136.]

The distinction between mere naked powers and trusts considered.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 179; Dec. Dig. ⟸136.]

[*Trusts* ⟸287.]

Equity will never aid the non-execution of a mere power, but where there is a trust, it will interfere, and will not permit accident, or the negligence of the trustee, to disappoint the interests of those for whose benefit he is called on to execute it.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 407; Dec. Dig. ⟸287.]

[*Trusts* ⟸287.]

Where property is given to one, enabling him to execute a power in a discretionary manner, he is a trustee; and if he does not execute the power, the class of persons among whom the bounty was to be distributed, shall not be disappointed by his neglect, but shall take equally.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 407; Dec. Dig. ⟸287.]

[*Ejectment* ⟸142.]

The executrix of G. W. leased some of the lands of the estate of his father, and convenanted that at the expiration of the leases, whatever

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buildings *the tenants might erect should be purchased by her or her representatives, at a fair valuation. *Held*, that the leases were not binding on the children of G. W. but that the tenants were entitled to compensation for their improvements.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 500; Dec. Dig. ⟸142.]

Before Johnston, Ch., at Charleston, February, 1844.

This case came before the court on exceptions to the master's report. The report stated that John Wagner died on the 3d May, 1797, leaving a will, by which he devised his lands and negroes to his son George Wagner, in trust for certain uses and purposes therein expressed. That George Wagner was appointed the sole executor of the will, and that he qualified thereon. That George Wagner died in 1808, leaving a will, of which he appointed his wife, Ann Wagner, executrix, and his son John Wagner, executor. That George Wagner left surviving him, his widow Ann and eight children, some of whom had died before the filing of this bill, leaving issue. Mrs. Wagner, the widow of George, qualified on the will of her husband, and died intestate in 1843. The defendant, Richard Yeadon, administered on her estate, and also on the estates of John and George Wagner severally, with the wills annexed. The report further stated, that in 1840 Mrs. Ann Wagner leased, for seven years, three lots in the city of Charleston, belonging to the estate of John Wagner. Two of these leases contained covenants, "that at the expiration of the leases, whatever buildings the tenants may erect shall be purchased by Mrs. Wagner or her representatives, at a fair valuation, to be made by two distinterested persons, one to be chosen by each of the parties—if they differ, to call in an umpire."

The decree of his Honor, the Chancellor, is as follows:

The only one of the many questions in this cause which has been argued to any extent, before me, relates to the execution of the power conferred on George Wagner, sen. by the will of his father, John Wagner, the elder.

That will is in the following terms:

"I give, devise and bequeath all my real estate, of every kind and nature whatsoever, and also, all the negroes and other slaves of whom I may died possessed, unto my beloved son, George Wagner, upon the special trust and confidence that he will receive, take and apply the rents, issues and profits of my said real estate and slaves, to and for

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the use, behalf, mainte*nance and support of himself and family, and education of his child or children, begotten or to be begotten, in such way and manner and in such proportions as he may, from time to time, deem requisite and proper. And also, upon the further trust and confidence that he, my said son, shall and will give, devise, limit, direct and appoint, by his last will and testament, duly executed, or by any deed in writing, to take effect in his lifetime, all my said real estate and my said slaves, (and the rents, issues, profits and increase thereof, over and above what he may apply to the use, maintenance and support of his family and education of his children as aforesaid,) unto all or any child or children by him begotten or to be begotten, in such way and manner, and in such proportions, and for such uses, estates and interests as he shall think fit and proper; and in case my son shall have no child or children living at his decease, then to such person or persons, and for such uses, estates and interests as he shall and may, by his last will and testament, direct and appoint—provided, nevertheless, that it shall be lawful for my said son, from time to time, to sell or dispose of all or any of the said negroes and

other slaves, to such person or persons, and for such use, and for such prices, as he may think proper; and that he shall or may apply the proceeds of such sales to the use and maintenance of his family and education of his children, as aforesaid. And I give, devise and bequeath the rest and residue of my estate unto my said son, George Wagner, his heirs and assigns forever."

The only alleged execution by George Wagner of the power of appointment thus lodged in him, was by his own will, in the following terms:

"After my just debts and funeral expenses are first paid, I do hereby will and bequeath unto my loving wife, Ann Wagner, all my real and personal estate, of whatsoever nature, as well as all and singular my effects, goods and chattels of every nature, whatsoever they be; and I also constitute and appoint my said wife, Ann Wagner, my executrix, together with my son John Wagner, whom I hereby do appoint and constitute my executor, when the said John shall have arrived to the age of 21 years—and that my wife Ann Wagner, and son John, shall act under my father's will, in trust in every respect and manner intended by their grand-father, in every respect and manner whatsoever."

There is no doubt that the power of appointment conferred by his father's will on

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George Wagner, whether a mere naked *power, or a power coupled with a trust, was created in terms implying a confidence in his personal discretion, and was incapable of delegation.(a) There is as little doubt that his will operates only as an attempt to delegate it.

The interests taken by George Wagner under his father's will, are, in the main, clear of ambiguity. The residuary clause conveyed to him the whole estate except the real estate and slaves; but no part of these, nor any interest in them or either of them, passed to him under that clause.

With respect to his interests in the realty and slaves, there is little doubt that had he left no children, the terms of the will made him so absolutely the owner, that his will would have been supported as a full disposition of them.

But in the event which has happened, of his leaving children surviving him, his power over this property after his death, was restricted to an apportionment among his children. He could not, under the terms of the will, include his wife in his posthumous disposition; that part of the will, (unlike so much as related to the rents and issues during his life time,) confining him not to his family but to his children.

In effect, he has made no appointment—and the question presented is, what is the result of his neglect?

It may be useful, in the first place, to ascertain what interest he took in the subject matter, (the realty and slaves,) he having died leaving children behind him.

The will, divested of the terms importing a power or trust, gives this property to him generally—and there is no doubt that such a bequest was sufficient to endow him with the entire legal title to the slaves. Under our own decisions, such a devise is sufficient to carry a fee, even as to the lands. Then we are to consider him vested with the legal title in both species of property, coupled, however, with a power or trust to appoint, at his discretion, among his children.

If the court can regard this power in the light of an obligatory trust, it can make no sort of difference whether the legal title of George Wagner, the trustee, be considered as having vested, upon his death, as to the land, in his heirs, and as to the slaves, in his personal representative, or to have passed under his will to his wife. In either case the suc-

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cessors to the title are *volunteers, and the trust would still adhere to the property as an obligation binding in conscience.

The great principle announced in Morice v. the Bishop of Durham, 11 Ves. 399, would oblige the court in either case to declare that the indication of a trust necessarily negatives the idea that a beneficiary interest was intended to the trustee; and in obedience to another leading and indispensable principle in this jurisdiction, to control the legal title in such way that the trustee or his assigns shall make no advantage by omitting to perform his duty.

The question then occurs, whether the power of appointment conferred upon George Wagner was a mere naked power, or a power involving a trust.

The distinction between mere powers and trusts, is said by Mr. Sugden to be marked and obvious, and he quotes the observation of Lord Ch. J. Wilmot, that "powers are never imperative; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party entrusted."(b) This is, however, rather a description of the consequences than a definition of these two things. Indeed, it would be difficult to point out the precise distinction in abstract terms. But there is no insurmountable difficulty in distinguishing between them in practice.

The distinction would seem generally to be something like this: that a naked power is a mere authority over any subject matter, enabling the donee to control its disposition, without vesting the thing itself, or any interest in it, in him. A trust, on the other hand, is, where the thing, or an interest in it, is

(a) Ingram v. Ingram, 2 Atk. 88; Attorney General v. Berryman, 2 Ves. Sr. 643.

(b) 2 Sugd. on Pow. 173, sec. 6; 16 Law Lib. 95.

vested in the donee, upon the confidence that he will make a certain disposition of it.

Thus, a distinction early taken between a mere power conferred upon an executor to sell or otherwise dispose of real estate, and a devise of the estate itself, to him, with directions to sell, &c., of which we have many examples mentioned by Mr. Sugden,(*c*) is still recognized. The one is a mere power, the other is a power with a trust.

The incidents of these two things are more obvious than the distinction, in all instances, between them.

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*Mr. Sugden(*d*) infers, from the authorities, that although equity will supply the defective execution of a power in proper cases, yet it is an immutable rule, that a non-execution shall never be aided; nor is it a ground for relief that the party was prevented by death from an intended execution.

He also lays it down(*e*) that where one executes a general power of appointment in favor of a volunteer, equity will exclude the appointee, and subject the fund to the debts of the person executing the power; but if he utterly abstains from executing his power, the court cannot compel him to do so—nor can it affect the fund, subject to the power, in favor of the creditors; for that (says he,) would be against the nature of a power, which is left to the free will and election of the party to execute it or not—for which reasons equity will not say he shall execute it, nor do that for him which he does not think fit to do himself. This, he continues, may seem rather a refined distinction, but it is well established; and the court cannot execute a mere power when the donee declines to do so.

But where there is a trust, the court will interfere. In Brown v. Higgs, 8 Ves. 574, Lord Eldon states the principle of all the cases on this subject to be, that if the power is one which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of his power, and without discretion whether he will exercise it or not; and the court adopts the principle relative to trusts, and will not permit his negligence, accident, or other circumstances, to disappoint the interest of those for whose benefit he is called upon to execute it.

The case of Garfoot v. Garfoot, (M. 15 Car. II, 1 Ch. Ca. 35,) mentioned by Chancellor Kent, in Osgood v. Franklin, (2 Johns. C. R. 21,) is an illustration of the general doctrine; although the trust in that case was inferred not from an interest vested in the person on whom the power was conferred, but from the purpose to be subserved by its execution. It was a case in which a power was given to executors to sell lands after the expiration of a life estate mentioned, to raise portions for younger children. The

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life estate expired, and the executors *died, without executing the power, and the younger children exhibited the bill to compel the heirs to sell. On demurrer by the heir, on the ground that the executors had but an authority, the demurrer was overruled.

Wherever there is an interest vested in the trustee of the power, sufficient to enable him to execute it, or, as it is sometimes expressed, "sufficient to feed the power," it amounts to a trust, and will be executed. Thus, in Osgood v. Franklin, before mentioned, where the question was, whether a power to sell, conferred upon several executors, remained, and might be executed by the surviving executors, upon the death of some of them, Chancellor Kent says. "Here was an interest sufficient to feed the power and keep it alive in the hands of the surviving executor. The executors were vested by the will with an absolute interest in the undivided moiety of the whole residuary estate on which the power was to operate, and they were directed to keep the whole of this residuary estate on interest or rents, for the general benefit. This authority to lease, and this interest in the subject itself, are sufficient to exempt the power from the character of a mere naked authority to a stranger. It is not necessary," he continues, "that the interest coupled with the power should be a legal interest. An equitable estate is sufficient, and is regarded in this court as the real interest;" for which the Chancellor quotes Hearle v. Greenbank, 3 Atk. 714.

The requisites of a trust, so far, appear to exist in this case. But still it is objected, that this must have been a mere power, and not a trust, because no specific directions were given as to the beneficiaries, nor the interest intended for them. The appointment to be made was to such of George Wagner's children as he might select, and of such interests and estates as he might deem proper. The argument is, that he could not have been compelled to determine a matter left to his own discretion; and that having abstained from the exercise of his power, the court cannot exercise it for him, being necessarily ignorant what preferences ought to be made among the beneficiaries.

The first observation to be made on this, is, that the testator did not intend a benefit to his son, (in the case of his having children,) beyond his own life; and that it would be against principle to allow him to accumulate a benefit upon his own estate, or his heirs, by an act of negligence.

The next is that, although he was not, in terms, required to make an appointment,

(*c*) 1 Sugd. on Pow. 128–9.

(*d*) 2 Sugd. on Pow. 173; 16 Law Lib. 95.

(*e*) Tollet v. Tollet, 2 P. Wms. 489; 7 Ves. Jr. 499; 12 Ib. 206; 13 Ib. 114.

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ther› is nothing better established than *that a testamentary expression of a wish or expectation that an act should be done amounts to a testamentary direction to do it.

When the testator gave his son a power to appoint among his grand-children, as he might choose, he, in effect, signified his wish that some of his grand-children should have the benefit of his property, it being indifferent to him, though possibly not indifferent to his son, which. The substance of the power, then, was to enable his son to make an inequality among persons all standing in equal favor with the testator: in plain terms, to enable him to disappoint, to some extent, persons to whom the testator would, but from motives of deference to his son, have made an equal appointment.

The cases shew that, under such circumstances, when the power given is not executed, the court will return to the forefather, and conform the bounty to the original state of his affections.

It is true that the decisions on this subject have not been quite uniform. In Marlborough v. Godolphin, 2 Ves. Sr. 61, where the bequest was of money to testator's wife, for life, and after her death, to be divided and distributed to and amongst such of his children, and in such manner and proportions, as she, by deed, &c., should direct and appoint, Lord Hardwicke held this to be a mere power, and not a trust for the children, in default of appointment; appearing to have drawn a distinction between the case, under the expressions actually used "amongst such of my children," &c. and what would have resulted if the words had been "amongst my children as A. shall appoint," &c.

But in Harding v. Glyn, 1 Atk. 469, the testator, devising certain articles to his wife, desired her, "at or before her death, to give the same unto and amongst such of his own relations as she should think most deserving and approve of." *(f)* This was held to be a trust for testator's relations in default of the appointment; the master of the rolls saying that the power of the wife was to apportion, and the trust was that she should do it, and her non-performance of it should not make the devise void, but the power should devolve on the court.

Brown v. Higgs, 5 Ves. 595; 8 Ves. 561, already mentioned, was a case much considered, having been heard twice at the rolls, again upon appeal to the Lord Chancellor,

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and again before the house of *Lords, and the determination was uniformly the same. The testator empowers A. to apply the residue of certain rents "to such children of my nephew S. B. as the said A. shall think most deserving, and that will make the best use of it," or to the children of another nephew, if any there were or should be. Lord Alvanly, upon a rehearing, as I have said, conceived that the fair construction was that, at all events, in default of appointment, the testator meant it to go to the children, and that the words of appointment were used only to give a power to A. to select some and exclude others, and decreed it a trust for all the children of both nephews.

I consider it settled, and upon clear principles, that in all cases where property is given to one, enabling him to execute a power in a discretionary manner, and he does not exercise his discretion or execute the power, the class of persons among whom the bounty was to be distributed, shall not be disappointed by his neglect, but shall take equally; that the rule of all such powers is that they are trusts, to be executed; especially where a moral obligation lies at the foundation of them, and where by the neglect the trustee would, otherwise, derive a benefit to himself or his heirs.

The result of this enquiry is, that all the children of George Wagner were entitled to the realty and the slaves devised to him; and that his widow and executor had no power or authority to lease, sell or dispose of any part of them.

Then, we come to look more particularly into the several leases made by her. I have, in effect, said that these leases were made without authority, and are not binding on the children.

It is said, however, that the lessees, who have answered, had no notice of the will of John Wagner. They have not denied notice in their answers; and if they had, the character in which Mrs. Ann Wagner executed the leases, styling herself executrix of George, ex'or. of John, was sufficient to put them on the enquiry, and to direct them in it.

Then, they say that, in fact, the whole family, as well as Mrs. Wagner, themselves uniformly entertained the impression that she had full authority, and that for a period of 30 years, they, although most of them adults for a great portion of the time, acquiesced in leases and other dispositions of the property made by her. The satisfactory answer to this is, that whatever may have been their acquiescence in other leases, that can only affect their interests as to those

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other leases. But the present leases *have all been made within a few years, and they have a right to determine for themselves, upon better advice, when their acquiescence shall cease.

But if these children repudiate the leases, they must be content to charge the tenants only for reasonable rents for use and occupation, under the circumstances.

I hold, too, that as these premises must be sold for partition, the tenants are entitled, under the circumstances, to so much of the

(f) 5 Ves. Jr. 501; 8 Ib. 571; 8 Ves. and B. 198.

funds as the improvements, put up by them before the filing of the bill, may contribute to bring, and that they are entitled to an abatement for rent, commensurate to the interests of Mrs. Ann Wagner, acquired by purchase.

The other questions in this case, being matters of account, will be more satisfactorily decided upon the bringing in of the report on all the accounts, which are hereby referred—and I shall, therefore, reserve them here.

The parties to be at liberty to propose an order for the sale of the premises, as also an order for leave to Mr. Yeadon to pay the funds of the different estates into court. I should make orders now, but as some orders were passed at the June term, as I am informed, I abstain, lest in the details I might conflict with them.

The question of costs reserved.

From this decree, some of the parties claiming under the will of John Wagner appealed, on the ground that the lessees of Mrs. Wagner contracted with her at their own risk, and have no equity to call upon the devisees of John Wagner to make good their leases, and that all the relief they are entitled to is to come upon the estate of Mrs. Wagner, as creditors, under the orders heretofore made for taking an account between all the parties. Others appealed, on the ground that the lessees being allowed, by the decree, the full value of their buildings, as compared with that of the land, they are entitled to no abatement of rent, or at all events they are bound to pay so much rent as the use and occupation of the land was worth.

The administrator of Ann Wagner appealed, on the ground that the power to George Wagner, under the will of his father John, not having been executed, the estate became absolute in him, and passed under his will to Mrs. Ann Wagner.

The case was argued by Bailey, Petigru, Walker, Magrath, Porter, Yeadon, McCready, Edwards, Egleston, and Macbeth.

Curia, per DUNKIN, Ch. This court concur in the view which has been taken of John Wagner's will, and of the authority and obligation devolved by it on George Wagner.

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*We also agree with the Chancellor that the lessees under Mrs. Wagner are entitled to compensation for their improvements, to the extent allowed them by the decree.

The legal title to the premises was in George Wagner, and by his will passed to Mrs. Wagner. When the whole of his will is taken together, it is not very certain that he intended to transcend the authority vested in him by his father's will. He expressly refers to and recognizes that instrument, and charges his executrix and executor with the trusts declared by it. Whether he had done so or not, the legal title vested in his devisee, charged with a trust, which the children were at liberty to enforce whenever they thought proper.

The lessees dealt with a person clothed with the legal title, and their leases were valid until the equitable rights of the children were interposed. These rights were never asserted during the life time of Mrs. Wagner, and we think that, to the extent that the actual value of the premises has been enhanced by the improvements, the lessees are entitled to compensation. The decree gives them no more.

It is said in the decree that the lessees, "are entitled to an abatement for rent, commensurate to the interests of Mrs. Ann Wagner, acquired by purchase." This may need explanation. It had been previously declared that the tenants were chargeable "only for reasonable rents for use and occupation, under the circumstances." This fixes the mode and measure of accountability. If the tenants have any demand or set off against Mrs. Wagner, her interest in the premises may be subjected to the satisfaction of it, but they are not entitled out of it to an abatement for rent.

It is ordered and decreed that the appeal be dismissed.

JOHNSON and JOHNSTON, CC., concurred.

HARPER, Ch. I concur, except that I think the tenants were entitled to hold under their leases to the end of their respective terms, the leases being valid at law, and there being no equity to impeach them.

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1 Rich. Eq. *335

*PHILLIP DOUGHERTY et al. v. SAMUEL S. MILLS, Administrator of Constantine Dougherty.

(Charleston. March, 1845.)

[*Executors and Administrators* ⇐86.]

Defendant's intestate was domiciled in Florida, but died in this State, when on a visit here, leaving assets both in Florida and in this State. Defendant, as administrator of the intestate in South Carolina, was possessed of a note drawn by a person residing in Florida; the note was paid by the drawer to the administrator in Florida, and the defendant, upon being informed of the payment, gave up the note to the drawer. Before the payment, defendant had had an opportunity of suing and arresting the drawer whilst on a visit to this State, but had neglected to do so. *Held*, that the defendant was not liable to the distributees of the intestate for the amount of the note.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 370; Dec. Dig. ⇐86.]

Before Johnson, Ch., at Charleston, June, 1844.

By the Chancellor. The defendant's intes-

tate, who was resident in St. Augustine, East Florida, died in this city when on a visit here in 1834, leaving assets both here and in St. Augustine. Administration of his assets found here was granted to the defendant, and administration of those found in St. Augustine was committed, by the proper authorities there, to one Charles Downing. The complainants claim as heirs of the intestate, and the bill prays an account from the defendant of the assets which came to his possession.

Not long before the death of the intestate, he being indebted to the defendant, by way of collateral security assigned him a note for two thousand dollars, dated 1st January, 1831, and payable two years after date, drawn by one V. Sanchez, and made payable to himself, which remained in defendant's hands at the death of the intestate. The debt due by intestate to defendant was satisfied out of other assets which came to his hands to be administered; and the only question in the case is, whether the defendant, although he has not received the money, is bound to account to the complainants for the amount of Sanchez's note, as part of the assets of the estate.

At the time of making the note, Sanchez resided in St. Augustine, and continued to reside there until the matter of the note was settled in the manner hereinafter stated, but he had, in the mean time, (1837) once visited this city, and the defendant neglected to take any legal steps to recover the money here.

In 1838, he again visited this city, and

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brought with him a *receipt in full for the amount of the note from Downing, the administrator in St. Augustine, and an order from him requesting the defendant to deliver the note to Sanchez, which defendant accordingly did.

The defendant has satisfactorily accounted for all the other assets of the estate which came to his hands to be administered, and the only question now is, whether he is liable for Sanchez's note, on the ground of his neglecting to collect it.

That Downing was entitled to recover the money due on the note, cannot admit of a question. The administration had been committed to him by the proper authorities of the domicil of the intestate, and the debtor resided there. Now it is clear that the defendant could not, as administrator, maintain an action there against Sanchez, nor could any one else except Downing, and no one will question that he might, and was, therefore, entitled to receive the money. This conclusion is opposed, on the assumption that the note itself constituted bona notabilia, or assets in the hands of the defendant, but that cannot be supported. The paper, itself, is of no value, except as furnishing the evidence of debt.

The debt itself constitutes bona notabilia, and is identified with the person of the debtor, and exists only where he is found. A different rule seems to prevail in England, in regard to bond and other specialty debts, on the ground that on account of their greater solemnity they are supposed to possess an intrinsic value of themselves; 1 Williams's Ex'ors. 193. But then every diocese had jurisdiction over the bona notabilia found within it, and the rule was laid down to regulate these jurisdictions, and cannot apply to a foreign State.

But the complainants might be answered by asking what injury they have sustained by the defendant neglecting to sue Sanchez when here? The fund has gone into the hands of Downing, who, as before shown, was entitled to receive it, and who is responsible, in the first place, to the creditors of the intestate, if it is wanted for the payment of debts, and if not, then to the complainants, and for any thing that appears here, he is equally able to meet that responsibility. And why, it may be asked, do the complainants seek to charge the defendant, who it is conceded, never received the money, and forbear to sue Downing, who has, and who is unquestionably liable? The complainants will find it difficult to give a satisfactory response to this question.

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*But the case stands, if possible, on still stronger grounds. A debtor of the intestate residing within the jurisdiction of the domicil, will be protected in paying the debt to a foreign administrator, (see 11 Mass. Rep. 256, and 2 Ves. 35) for the obvious reason that either is entitled to receive it, and a priori, it will be supposed that one is as capable to administer it as the other. Sanchez refused to pay the debt voluntarily, and the only means which the defendant had to enforce it, was by action at law. If he had sued, the payment of the money to Downing would have been a good bar, according to the rule. If he had obtained judgment, there was nothing here out of which he could have obtained satisfaction, and he would have been driven to the necessity of bringing suit on it in Florida to recover it. The money was not wanted here for any specific purpose, the debts here having all been paid, and it may well be doubted whether the administrator there would not have been entitled to have it impounded to answer any demands there against the intestate.

One fact of negligence charged against the defendant is, his neglect to arrest Sanchez, and hold him to bail when he was on a visit here; and it is true that he might, by this means, have had the debt secured by the bail or the body of the debtor, and if the debt had been lost by his not doing it, he might have been culpable; but the money

has not been lost, it is in the hands of Downing, who was entitled to receive it.

But it is said, that as the assignee or indorsee of the note, the defendant might have sued Sanchez in his own name in Florida, and in that way have recovered the money, and that his neglect to do so was negligence. That, however, was an assignment for a special object, the securing the debt due by the intestate to the defendant, and that having been paid, the note belonged to the estate, and certainly the defendant was not bound to greater diligence in the collection than he would have been in the collection of the other debts due the intestate.

It is, therefore, ordered and decreed, that the complainants's bill be dismissed with costs.

The complainants appealed, on the following grounds.

1. Because the possession of the note by Mills, was sufficient to make him liable for the same.

2. Because although the note in the hands of Mills may have been assets of the intestate, to be applied to the payment of debts in Florida, yet when there was no proof of

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indebtedness in *Florida, his surrender of the note was sufficient to make him liable for the same.

3. Because there was no evidence that the note had ever been paid bona fide; and his Honor erred in supposing that this was a case where the complainants had any other remedy than in this court, inasmuch as the testimony shows that Downing is dead and utterly insolvent.

A. G. Magrath, for the appellants, cited 5 Stat. 108; 1 Salk. 296; 1 Mason, 421; Story Confl. L. 421; Ib. 7; 2 Pet. 586; 2 McC. 331; 3 Pick. 126; 12 Mod. 573; 2 Bro. Ch. 156; Story Confl. L. 431, note 3, 424-5, 438; 11 Mass. R. 256; 1 Mason, 415; 3 Dyer, 305; 5 Mason, 109; 6 John. Ch. 356; 7 Ib. 45.

Memminger, contra, cited 1 M. & C. 80; 13 Cond. Eng. Ch. R. 304; P. L. 201; Story Confl. L. § 518, § 513, note 2, § 514, p. 425, note 3; 11 Mass. R. 256, 263; 2 Atk. 63; 5 Mason, 108; 6 Johns. Ch. 353; Wms. Ex'ors. 193; 1 Saund. R. 274, note 3.

Curia, per JOHNSON, Ch. The court concur in the decree of the circuit court, but the argument here has given to the case a degree of importance which makes some further notice of it necessary.

It is not doubted that the administration of the estate of a deceased person properly belongs to the jurisdiction of his domicil, but if his bona notabilia lie in a foreign country, administration there, also, is necessary, for although the law of the domicil will govern every where, in the distribution of his estate amongst those entitled by law, after the payment of debts, yet he may be indebted where the bona notabilia are found, and one state is not bound to enforce the laws of another, to the injury of its own citizens, and that would be the effect, if the administrator of the domicil was permitted to carry the assets out of the jurisdiction where they are found, and compel creditors to follow him. Hence, the rule that an executor or administrator cannot maintain an action out of the jurisdiction from whence he derived his authority. This is a right of which all States are tenacious. In Kennedy v. Edwards, the intestate was domiciled and died in this State, leaving personal effects here, and amongst other things, some negroes. After his death, they were taken into North Carolina, where administration was obtained and the negroes sold. Many years after, the defendant, who claimed under the purchase

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from the administrator, brought *them into this State. The plaintiff then obtained administration here, and brought his action of trover to recover the negroes, and it was held that the action well lay, on the ground that carrying them out of the State was a fraud upon the rights of the persons here, who were entitled to the property. The case of Carmichael v. Ray, 1 Richardson's Rep. 116, decided at the sittings of the law court of appeals in Columbia, in December last, went on the same principle. There, the intestate was domiciled and died in this State, and administration of his estate was granted here. He owned a negro, who was, at the time of his death, in possession of the defendant in North Carolina, and coming into this State, the plaintiff brought trover against him for the negro, who still remained in North Carolina, and it was held that the action would not lie. It is the true policy of the States not to suffer the effects of a deceased person to be removed out of their jurisdiction, until at least the demands of the creditors are satisfied, and rather than suffer it, they undertake, in the distribution of the estate, to enforce the laws of the domicil; but where nothing remains but the distribution, and the estate is in the form of money, or other articles easy of transportation, I can see no reason why it should not be remitted to the administrator of the domicil. On the contrary, there would seem to be great propriety in it. Every State has a right to make its own laws, and its own judicatories are supposed to understand them better than those of a foreign State, where they must be proved as any other matter of fact. The distributees have, however, the right to claim the distribution in the jurisdiction where the assets are found. The remarks of Ch. J. Parker, in Dawes v. Head, 3 Pick. 128, are very apposite to this question. In speaking of the conflicting rights of a domestic and foreign administration, he lays it down as a well settled general rule, that

the assets collected in a foreign jurisdiction, should be remitted to the administrator of the domicil, and if any part is retained for distribution, it will be only by virtue of an exception to the rule, or because the parties interested seek it in the foreign jurisdiction, and in that case, it might be in the legal discretion of the court to order distribution, or to remit it, according to the circumstances or the condition of the estate; (see Story Confl. L. § 512) and there is no question that circumstances might exist, which would imperiously require that it should be remitted.

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If there were *no creditors claiming in the foreign jurisdiction, and the assets were in the form of money, it might be wanted in the jurisdiction of the domicil to pay pressing demands, or to save the sacrifice of other property by a forced sale, which would operate as an injury to some or all of the parties interested.

Having thus shown that, if the defendant here had collected these funds, the court might, in its discretion, have ordered them to be remitted to Downing, the administrator in Florida, for distribution, Sanchez was justifiable in paying it to him.

Appeal dismissed.

HARPER and DUNKIN, CC., concurred.

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1 Rich. Eq. 340

REBECCA T. HOLMES, ISAAC E. HOLMES, JAMES G. HOLMES, CHARLES E. MILLER, Trustee of Alexander Frazer, and Mary, His Wife, and JANE NEYLE, Adm'x of Henry M. Neyle, v. JOHN McMASTER.

(Charleston. March, 1845.)

[*Landlord and Tenant* ⇨217.]

Bill by several persons, alleging that defendant, in consequence of his occupancy of a lot and the buildings thereon, was liable to account for the rent to some one or more of the plaintiffs, sustained under the circumstances of the case, and the defendant ordered to account for the rent to one of the plaintiffs.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 866; Dec. Dig. ⇨217.]

[*Landlord and Tenant* ⇨110.]

A tenant held to be justified under the circumstances in quitting the premises before the expiration of his lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 366; Dec. Dig. ⇨110.]

[*Execution* ⇨321.]

The title of a purchaser of lands at sheriff's sale dates from the time the sheriff's deed is executed, and not from the day of sale.

[Ed. Note.—Cited in Bank of South Carolina v. South Carolina Mfg. Co., 3 Strob. 191, 49 Am. Dec. 640.

For other cases, see Execution, Cent. Dig. § 946; Dec. Dig. ⇨321.]

Before Johnston, Ch., at Charleston, February, 1844.

The decree of his Honor the Chancellor is as follows:

This is a bill filed under very peculiar circumstances. The defendant, John M'Master, having for a considerable time occupied a lot of land, and the buildings thereon, into the possession of which he was let by the

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agent of Isaac E. Holmes, one of *the plaintiffs, has refused to pay the rent claimed in consequence of his occupancy, either to the said Isaac E., or to any of the other plaintiffs, who claim under him; and the bill is filed by them all, jointly, alleging that he must be bound to pay to some one, or more, among them. The material circumstances are these:

On the 31st of March, 1836, the said Isaac E. Holmes purchased the lot of land in question, extending from King street to St. Philip's street, in the city of Charleston, from Charles E. Miller, a plaintiff in the case, for a price stipulated, consisting partly in cash, and partly in credit: and having made the cash payment, he gave his three several bonds to the said Miller, bearing date the day and year aforesaid, to secure the credit part of the purchase; one conditioned for the payment of $5000; another for $2000; and the third for $1000; and all to fall due the 31st of March, 1837; and the better to secure the payment of said bonds, he, on the same day, mortgaged the premises to him. It is not said, in any part of the pleadings or of the evidence, that this mortgage was ever registered.

The said Miller, afterwards, at some time not stated in the pleadings, or disclosed by the evidence, assigned these three bonds as follows: the bond of $5000 to the plaintiffs, Alexander Fraser, and his wife, Mrs. Mary Fraser; and the two bonds for $2000 and $1000, to Henry M. Neyle, who has since departed this life, and to whom the plaintiff, Jane Neyle, has administered.

These bonds, thus outstanding and unpaid, as they still continue to be, a judgment by confession was obtained and entered up by the Bank of Charleston against the said Isaac E. Holmes, on the 27th of November, 1839, for about $32,000, and fi. fa. lodged, accordingly, on the same day.

These incumbrances being on the aforesaid lot, with its buildings, the defendant, M'Master, entered into a verbal agreement with James G. Holmes, the agent of the said Isaac E. Holmes, for the rent of the premises. Under this verbal agreement, whatever it was, he was let into possession about the 8th of March, 1840. He says, in his answer, that he understood that he was to have the whole of the lot, as well that part which fronts on St. Philip's street, and is separated from the residue by a partition fence, as that part which extends from said partition fence to King street, and on which the buildings are.

The plaintiffs represent that he was to have only the latter portion.

Depending upon the terms of the agree-

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ment, by which he *was to be allowed a certain portion of the rent in repairs, he expended considerable sums for that purpose.

In this state of affairs, the defendant, in April, 1840, drew up the following instrument, which, as he says, was in conformity with his understanding of the verbal agreement, and sent it by his son to Mr. James G. Holmes, the agent of Isaac E. Holmes, to be signed by him:

"Charleston, South Carolina:

"I agree to lease the four and half story brick house and lot, with all its appurtenances, known as No. 349 King street, to John M'Master, for the term of four years, commencing on the 8th day of March, 1840, for the sum of $1000 per year, to be paid in quarterly instalments. And I further agree to allow to the said John M'Master the sum of $600, to be paid out of the first part of the first year's instalment of rent, for tinning the roof and shelving the store of the said house."

Mr. James G. Holmes appended the following words to the foregoing instrument, and then subscribed it so amended:

"The said lot extends only to the fence which separates it, at present, from that part of the same lot which fronts on St. Philip's street. Mr. M'Master, at the close of the lease, is to return the property in good repair, excepting only ordinary wear and tear from time; and is to execute, when required, the regular lease, with the usual covenants therein."

No date was put to this paper when subscribed by James G. Holmes, as aforesaid; but it was executed in April, 1840, as I have stated.

The defendant received the paper in this condition, and did not insist on the whole lot, nor did he relinquish his possession extending from the partition fence to King street. He paid rent punctually, in conformity to the said instrument, for the whole of the first year, ending the 8th of March, 1841.

On the 27th of March, 1841, at the request of the said Isaac E. Holmes, and for his accommodation, he accepted four drafts drawn by him in favor of Messrs. Potters & Kelsey; the three first being for $250 each, and payable, respectively, on the 8th days of June, September, and December, following; and the fourth, for $215 17, payable the 8th of March, 1842; the said acceptances being in full for the quarters rents falling due on the days of payment of said drafts, respectively. These drafts he paid as they came to maturity.

Besides this, the said Isaac E. Holmes took

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up goods at the *said defendant's store, between the 8th of March and 31st of December, 1841, to the amount of $493.80, to wit, $372.97, for himself, and $120.83, for his sister. Moreover, the defendant expended $13.-25, for necessary repairs. All these sums were, by agreement, to be discounted from the rent to accrue, and before the expiration of the second year, (March 8, 1842,) placed the defendant in advance of his payments for rent up to September, 1842.

On the 28th of December, 1841, the said Isaac E. Holmes, sinking under accumulating embarrassments, assigned and conveyed the whole of his property, including the lot in the possession of the defendant, to James G. Holmes, in trust for the payment of his creditors.

In the month of January, 1842, the sheriff having levied the execution of the Bank of Charleston upon the premises in the possession of the defendant, advertised said premises for sale.

The defendant being thus notified of the existence of this incumbrance, caused the instrument given him by James G. Holmes, already mentioned, and under which he occupied the lot, to be put on record; which was done the 2d of February, 1842.

The sheriff proceeded, and sold Isaac E. Holmes's equity of redemption in the said lot, on the 4th of April, 1842. Being sold subject to the mortgage, the lot brought only $85; and was knocked down at that sum, which was bid by James G. Holmes. The name of the real purchaser was not made known at the time, nor for a long time afterwards. At length, on the 10th of June 1843, the sheriff made a title to the plaintiff, Miss Rebecca T. Holmes.

In the mean time, to wit, on the 1st of May, 1843, a bill was filed by Miller, the mortgagee, and his assignees of the bonds given by Isaac E. Holmes, to secure the purchase money of the lot still due from the said Isaac E., against the said Isaac, and against James G. Holmes, the assignee of the said Isaac, and the ostensible purchaser of said lot at the sheriff's sale, and against M'Master, who was in possession of it, seeking to foreclose the mortgage. M'Master answered the bill some time in June following, and there the proceeding rested.

M'Master having his mind thus awakened to the liens of the mortgage and judgment; feeling uncertain to whom he could safely pay his rent; seeing that his landlord had no longer any power to protect him in his possession, his title being broken down by paramount incumbrances, and he being in-

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solvent and *incapable of indemnifying him; and that his possession depended upon the caprice of the purchaser (whoever that might be,) of the equity of redemption, and of the mortgagees, and those who might become purchasers under a foreclosure sale, when that might be ordered, became anxious about his situation. The landlord was already in his debt, and unable to settle. Would the

purchaser of the equity of redemption assent to his longer continuance on the premises, unless upon condition of his paying rent to such purchaser? Would that purchaser claim the arrearages of rent? If so, would he be allowed credit for the sums anticipated by the original landlord? In either case, would he be safe in making payment, and in depending on the ability of this purchaser to continue his possession? Must not that depend on the will of the mortgagee, and of the purchaser under a foreclosure?

Under these anxieties and perplexing uncertainties, he, as early as March, 1843, began to meditate an abandonment of the premises. For this purpose he sought the consent of one of his own tenants, who was in possession of premises belonging to himself, to put those premises at his disposal: and having obtained his consent, he, at considerable expense and sacrifice, set about making such alterations in said premises as were necessary to fit them for his accommodation: and was on the eve of removing to them, when, on the 15th of June, 1843, the said Isaac E. Holmes, James G. Holmes, Rebecca T. Holmes, Alexander Fraser and wife, and Jane Neyle, being all the parties who could possibly have an interest in the premises, or the rents, joined in the following papers, endorsed on a copy of what has been called the lease:

"We consent that John M'Master continue peaceably and quietly to occupy the house and lot in King street, within referred to, leased to him by I. E. Holmes, until the expiration of the lease, without interruption from

(Signed) James G. Holmes,
James G. Holmes,
Assignee of I. E. Holmes.
I. E. Holmes,
Rebecca Holmes,
Northrop & Walker,
Solicitors of Dr. Alex'r Fraser and Wife.
Jane Neyle."

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*"Charleston, 15th June, 1843.

"Mr. John M'Master, King street, Charleston, S. C.

Pay James G. Holmes, or order, whatever rent you now, or hereafter, may owe to us, or either of us, on the premises you occupy in King street, Charleston, S. C.

(Signed) I. E. Holmes,
Rebecca T. Holmes,
James G. Holmes,
Assignee of I. E. Holmes.
Northrop & Walker,
Solicitors of Dr. Alex'r Fraser and Wife.
Jane Neyle."

(Indorsed.) I do hereby assign and transfer this order, to Chas. E. Miller, trustee of Alex'r Fraser and wife, and Jane Neyle, Adm'x.

(Signed) James G. Holmes.

Isaac E. Holmes also indorsed on the same an assignment to Miss Rebecca T. Holmes, and her assigns, of all his right, title, and interest, in the said lease, authorizing and empowering her to receive the rents due, and to become due.

These papers were put into the hands of Messrs. M'Cready & Caldwell, the defendant's solicitors, while he was yet on the premises. He quitted them within a few days, and shortly afterwards his solicitors made the following answer:

"Mr. M'Master does not recognize the right of any one, or all of the above named individuals together, to demand rent from him; insisting, that he has paid more than the value of the premises already, for the use and occupation he has had of them: and that he is not bound by any lease.

M'Cready & Caldwell.

29th June, 1843."

And thereupon this bill was filed.

The defendant cannot insist on his disappointment in not getting the whole lot. There is no other evidence of the contract than the memorandum signed by James G. Holmes. He must be held to have waived all objections to that, and to have accepted it by retaining possession, and continuing to pay rent under it, and by causing it to be registered.

But while I hold him bound by this evidence of recognition, I cannot regard it in any other light than as an executory contract, to be enforced according to the equitable circumstances of the case. How should

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it be enforced here? It is true, that *there is no regular demise of the premises to the defendant, nor has he subscribed any stipulation to pay the specific rents set forth in the memorandum. But by acquiescing in the memorandum, when delivered to him, he authorizes us to consider it as having relation back to the time he took possession; and to regard him as having entered under the instrument, and according to its terms. Then, suppose him to have been let in under that paper: it is too clear to admit of doubt, that he must be held to the performance of every thing therein required of him; which must be looked upon as conditions of his gaining the possession, and of which he was warned by the face of the paper; and this court, at least, must regard the case, as if a regular lease, which ought, according to the memorandum, to have been executed, had been actually executed, containing all the stipulations indicated in the memorandum.

But suppose that had been done, which equity would have required: and that this memorandum is to be regarded as a regular lease, and binding on both parties. What then? Would Mr. Isaac E. Holmes, the landlord, in the face of what has taken place, be entitled to enforce it, in all the rigor of its terms? Not in this court, whatever he might do elsewhere. His title, the only protection of his tenant, has been defeated by incumbrances paramount, existing at the

time of the demise, and of which the tenant, when he entered into the contract, had no notice. But notice, or no notice, the title has been defeated; and as it formed the protection on the one hand, which constituted the consideration for the services to be rendered by the tenant; on the other, the destruction of the one was the extinction of both. A lease is an entire contract; and if interrupted, it lays the ground of an entire rescission. Mr. M'Master, from the time his landlord's title was destroyed, was so far released from his contract, that he is not, of necessity, bound for the stipulated rent for the time of his actual occupancy. If, upon the spur of the destruction of Mr. Holmes' estate, such arrangements had been made as to have secured the defendant in his possession for the whole remainder of the term, he might have been bound to have continued his possession, and to have paid the stipulated rents. But why? Because it would have been equitable, that when there was no disappointment, but a perfect security against disappointment on his part, he should not be at liberty to take advantage of a flaw, by which he was not injured. But where all the muniments, under which he could hold, were

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*swept away, and none extended to him from any quarter, for his protection, what was he to do? What could he do, but prepare to relinquish the possession? He was not to be restrained, because, after making all his preparations, at considerable expense and sacrifice, for his removal, he was, at the last moment, assured he might safely remain on the premises. Then, I hold, that under the circumstances, he was entitled to quit; and, under the same circumstances, I do not think he should be chargeable with a pro rata rent for the term he had already occupied. He should be regarded as a tenant at will and liable for use and occupation at a reasonable rate. It does not follow, that because he agreed to pay the rent mentioned in the memorandum, with a right to remain on the premises for four years, he would have agreed to pay at that rate for a shorter term, under an uncertainty when he might be compelled to quit.

For the time of his actual occupancy, I hold that he is liable for what is reasonable under all the circumstances. For so much of this time as occurred from his taking possession, until the sale by the sheriff, he was liable to Isaac E. Holmes, the owner of the land; from that time forward, till he left the premises, he was liable to Miss Holmes, who became the owner.

It has been argued, that Miss Holmes, by virtue of her purchase, became entitled to whatever remained due on the lease. I have said the lease was destroyed by her purchase —but I build nothing on that here; because that might be true as between Mr. Holmes and his tenant, and not true as between him and the purchaser of his interest in the land. But I rather think Miss Holmes cannot claim under the contract of lease, because she has no privity with it. She claims by a title paramount to the lease, under the judgment, which did not stay, when its time came, to enquire whether there was or was not a lease. After her purchase she was not bound by the lease, but might have ejected the tenant, and have said, as the bank, under whose judgment she bought, might have said, and by the sale did say, this lease was made in derogation of my rights, and is nothing to me. Then, if the lease was not binding on the bank or its purchaser, it is not easy to see what right either can have in that which they wanted to break up. If not bound by it, there would seem to be a want of mutuality in allowing them any of its benefits.

What Miss Holmes bought was the equity of redemption. The value of the property

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was depressed by the mortgage debt. *Miss Holmes cannot have the land for less, on account of the incumbrance, and yet be entitled to the aid of any other assets or property of Mr. Holmes, to aid her in discharging the incumbrance. She gave $85 for these premises, subject to the mortgage—which was as much as to say that they were worth that sum, besides the amount of the mortgage. Now, suppose, that because Mr. Holmes is still bound (as he certainly is,) to the mortgagee, for the mortgage debt, and being bound to satisfy that, he is, therefore, bound to assist Miss Holmes to take off the incumbrance; it would follow, that if the arrears of rent on this lot were equal to the mortgage debt, Miss Holmes might avail herself of them, and thus possess herself of Mr. Holmes' property, worth $8,085, for $85, and require him to pay as good as the whole price. This can hardly be the law of the case. I think Miss Holmes, by her purchase, got Mr. Holmes' title to the land, reference being had to the claim of the bank, and that nothing passed to her but the land. The arrears of rent due from the tenant at will, continued in Mr. Holmes, as a personal right.

Then, I think that his assignment passed it to her, and her assignment passed it, with her own right, as to rent, to James G. Holmes, who passed it again to C. E. Miller, trustee, by his indorsement on the draft of the 15th of June, 1843; so that, at last, the whole liability of the defendant, for use and occupation, centres in Mr. Miller, and the only use to be made of the distinction between the rents accrued before and after the sheriff's sale, is in relation to the amount for which the defendant may have been in advance with Mr. Holmes before the sale.

I think Miss Holmes' original part of the rents, (or compensation for use and occupation after her purchase,) is not liable to any deduction for advances to Mr. Holmes. It was her land that was occupied after the

sale, and not Mr. Holmes'. If any balance exists against Mr. Holmes for over advances, he is liable for that.

It is decreed, that the commissioner take the accounts according to the foregoing opinion, and let each party pay his own costs.

The complainants appealed, on the following grounds:

1. That I. E. Holmes' mortgage of the house and lot in King street, to Charles E. Miller, on 31st March, 1836, being duly recorded on 22d April, 1837, and the judgment

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of the Bank of *Charleston v. I. E. Holmes, for $32,000, being entered up on 27th November, 1839, the defendant, John M'Master, had legal notice of these incumbrances on the said house and lot, at the time he leased the said premises from I. E. Holmes, and went into possession on the 8th March, 1840.

2. That his Honor the Chancellor, inadvertently overlooked the fact stated by James G. Holmes, and admitted at the trial by defendant's counsel, that before the filing of Charles E. Miller's bill of foreclosure, an offer had been made to John M'Master to give him a receipt for the rent due, signed by any one, or all of the parties in this suit, but he refused to pay the rent, or take such receipt.

3. That his Honor the Chancellor, inadvertently overlooked the fact stated by James G. Holmes, and admitted at the time by the defendant's counsel, that when the defendant's counsel was first employed by defendant, and immediately after the sale of the premises by the sheriff, in April, 1842, James G. Holmes, acting as agent for his daughter, Miss Holmes, offered to give to the defendant, through his counsel, precisely such a paper, assuring to him the possession of the premises till the expiration of the lease, as was eventually drawn up and tendered him, and stated in the pleadings, and such as the Chancellor now pronounces would have been sufficient.

4. That John M'Master was neither disappointed in his lease, nor injured nor disturbed in his possession of the premises, nor were they occupied or used by any one after he abandoned them, till the expiration of his lease in March, 1844.

5. That John M'Master never was a tenant at will, but having come into possession of the land by lawful title, his holding over made him a tenant at sufferance, and as such, or as a tenant under a parol lease, his lease was, according to law, for a year, and he had no right to give up the premises at the end of the first quarter of the year, without paying the year's rent.

The defendant also gave notice of appeal, as follows:

The defendant appeals from the decree of his Honor, and respectfully insists that the bill ought to have been dismissed with costs.

1. Because if either of the complainants was entitled to compensation from the defendant, by reason of his possession of the premises, the remedy at law was plain and adequate, by action of assumpsit for use and occupation.

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*2. Because the case made by the bill and answer, shews that the occupation of the premises by the defendant, after the 8th March, 1842, was not beneficial to him, but injurious.

3. Because the defendant was a purchaser for valuable consideration, as well as the complainant, Rebecca T. Holmes, and if by her neglect to take a conveyance from the sheriff, until after the mortgagee had filed his bill for foreclosure, she lost her right of action at law, she can have no equity against the defendant, who in fact paid a much larger sum, to wit, $507.25, for the premises for the time he occupied it after the sheriff's sale, than she did for the equity of redemption, to wit, $85.

4. Because the complainant, Charles E. Miller, in whose favor the decree is pronounced, was a mere volunteer, who had already filed his bill against the defendant for a foreclosure, and had waived his equity for the rents and profits, if he had any, and before the decree in this case was given, had actually received full satisfaction of his debt by a sale of the mortgaged premises under a decree in his suit for foreclosure, taken at the same term at which this case was heard.

The defendant further insists, that if he is liable to account to the complainant, Rebecca T. Holmes, for the value of the premises from the day of the sheriff's sale, he ought to be credited in such account with his advances and payments to the complainant, I. E. Holmes, over and above the actual value of the premises ascertained upon the principles of the decree.

Because the said Rebecca T. Holmes, in fact, took an assignment of the rights of the said Isaac E. Holmes, to cover the period between the day of sale and the date of the sheriff's conveyance, and thus by her own act assumed his responsibilities with his rights.

H. A. DeSaussure, for the complainants.
McCready, contra.

Curia, per JOHNSTON, Ch. This court is satisfied with the decree from which the appeal is taken.

As regards the admissions spoken of in the 2d and 3d grounds taken by the plaintiff, though there was some conversation at the bar between James G. Holmes and the defendant's solicitor, I have no recollection of admissions to the effect stated. I feel very sure, if they had been brought to my view at the trial, as evidence intended to be relied

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on, they would have appeared on *my notes.

This matter, therefore, being necessarily left to the defendant's counsel, and his recollection differing from the statement, it must be discarded.

In relation to the most material of the defendant's grounds of appeal, this court is of opinion the bill was well filed. Independently of the matters of account and the uniformity of a remedy here by which multiplicity and circuity of suits is prevented, we are of opinion that the plaintiff Miller, had a right to come here upon the foot of the agreement assigned to him, and to join his assignors in the bill.

The only part of the decree which appears to require explanation, is that part which seems to regard the transfer of I. E. Holmes' title to Miss Holmes, as dating from the sheriff's sale, instead of the 10th of June, 1843, the time when the sheriff executed the deed to her. The decree must be corrected in this respect, the effect of which correction will be to allow the defendant a set off for his advances and demands, to and against I. E. Holmes, up to the date of the sheriff's deed.

With this explanation, it is ordered that the appeal be dismissed and the decree affirmed.

The whole court concurred.

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*THE EXECUTORS OF JOHN STONEY v. J. L. AND S. JOSEPH & CO., J. C. LEVY, et al.

(Charleston. March, 1845.)

[*Principal and Agent* ⟸90.]

Where an agent, in possession of bills belonging to his principal, is entitled to hold them as against his principal under a lien for balances due him, he is not entitled to enforce them against the acceptor to a greater extent than his principal could have enforced them.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 240–244; Dec. Dig. ⟸ 90.]

[*Bills and Notes* ⟸93, 453.]

A., a merchant, residing in New York, exchanged his own notes for three bills of exchange drawn on B. a merchant, residing in Charleston, which were afterwards accepted by B. The notes were sold by the purchaser at a small discount, but A. having proved insolvent before they become due only paid on them a small sum not amounting to one third of the principal. *Held*, that A. was entitled to recover from B. the acceptor in Charleston, the full amount of the bills.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 108, 1317; Dec. Dig. ⟸ 93, 453.]

[*Bills and Notes* ⟸353.]

[A person taking a bill of exchange as agent for the payee for its collection takes it subject to all the equities to which it was subject in the hands of his principal, whatever the state of accounts between them.]

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 900; Dec. Dig. ⟸353.]

Before Johnson, Ch., at Charleston, February, 1844.

In March, 1837, S. N. Bishop, of New York, drew three several bills of exchange, amounting together to the sum of $41,620, on the complainant's testator, residing in this place, in favor of Dudley & Stuyvesant, merchants, also of New York, for their accommodation, and to enable them to raise money there.

Dudley & Stuyvesant indorsed these bills, and exchanged them with the defendants, the Josephs & Co., also of New York, for their promissory notes of the same amount, and sold them in New York. The Josephs & Co. forwarded the bills to defendant J. C. Levy, their agent here, for collection. They were presented by him to Stoney, complainants's testator, who accepted them, unconditionally. At the time these bills were drawn, and first negotiated, the houses of the Josephs & Co. and Dudley & Stuyvesant, were both in very embarrassed circumstances, and the whole object was to enable Dudley & Stuyvesant to raise money to meet pressing demands. They sold the notes obtained from the Josephs & Co. for about $33,000. Not long after, both of these houses utterly failed and made assignments of their effects, for the benefit of creditors.

The Josephs & Co. state in their answer and tender proof, that they have paid on account of these notes about $12,000. What has become of the rest is not known. In 1837, Stoney filed a bill in this court to restrain the negotiation of the bills, and to have them delivered up, on the ground, that they were drawn without consideration. That bill abated by his death, in 1838. This bill is filed by his executors for the same

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purposes, *and further to enjoin the defendants from prosecuting any action at law against them for the recovery of the amount of the bills.

In the mean time, Levy had also failed, and made an assignment of his effects, of which the bills in question constituted a part, to the defendant Robert B. Gilchrist, for the benefit of his creditors. Levy claimed to be entitled to retain these bills as his own, on account of a general balance due him from Josephs & Co., for money advanced, and liability incurred for them, and the claim is admitted by them.

As the grounds of relief prayed for, it is stated in the bill, that at the time the bills of exchange were indorsed by Dudley & Stuyvesant, and delivered to the Josephs & Co. it was well understood between them that "the notes which were given for the consideration should be fully met, paid, and satisfied, at such time or times as the same should become due, and that no manner of obligation or responsibility, should be placed on the said Dudley & Stuyvesant, or any person or persons representing them, to provide for,

or be accountable or responsible to the subsequent holders of the said bills, for the payment thereof." That Stoney accepted the bills for the accommodation of Dudley & Stuyvesant, without any other motive or obligation than to aid them in their mercantile engagements; and the complainants insist that the Josephs & Co. "were bound to have paid, as the full consideration of the said bills of exchange, the notes given by them to Dudley & Stuyvesant, or by the full payment and satisfaction of the said notes when they were in the hands of Dudley & Stuyvesant, to have released them from all responsibility, and all obligation to provide for the payment of the same, or else to have delivered to Dudley & Stuyvesant, or the said John Stoney, the said bills of exchange," &c. But failed to do either, and shortly after were involved in utter insolvency. And the bill charges that the defendant Levy paid nothing to the Josephs & Co. for the bills, and that he knew, or had reason to believe, that they obtained the bills from Dudley & Stuyvesant, on the terms and consideration herein before set forth, and that they were forwarded to him by the Josephs & Co. to collect or raise money on them, for and on their account. Such, in substance, are the allegations and charges in the bill.

The Josephs & Co. admit in their answer, that they received from Dudley & Stuyvesant the bills of exchange mentioned in complainants's bill of complaint, and that they gave them, in exchange, their (Josephs & Co's.) own

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notes, (several in number,) *amounting in the whole, with interest and exchange charged, to the sum of the bills, and that it was understood that they were to pay the notes when they became due; but deny that there was any special agreement to restrain the negotiation of the bills which they received. They admit that the defendant Levy was their agent here, and that they forwarded the bills to him for collection, and that they were compelled to stop payment, and they state that at the time of their failure they were indebted to Levy in the sum of $205,219.93, upon a balance of account for purchases made, money advanced and responsibility incurred for them, and they insist that Levy had a legal and equitable right to retain the bills, as creditor in possession. They deny that they ever communicated to Levy the circumstances under which the bills were indorsed to them, or the consideration paid. They admit their own insolvency, and the insolvency of Dudley & Stuyvesant. They state that they have paid three of the notes given by them to Dudley & Stuyvesant, in exchange for the bills, and that Dudley & Stuyvesant, as they were informed and believe, had negotiated and put the others into circulation. They are ignorant whether they have been paid or not; and they state, that upon a settlement of accounts between them and Dudley & Stuyvesant, in which they were charged with the amounts of all their liabilities to them, and with all the paper which they were bound to pay, or for which Dudley & Stuyvesant were liable, a balance of $80,067.77 was found against Dudley & Stuyvesant. They insist that this would be a good set off against any demands which Dudley & Stuyvesant might have against them on account of their liability to them on the notes given in exchange for the bills.

The defendant Levy admits in his answer, that he was the agent of the Josephs & Co., and that they remitted to him, in the ordinary course of their business, the bills of exchange mentioned in the bill of complaint, indorsed by them, and that they were accepted by Stoney, on the 15th March, 1837, and he states, that at the time the Josephs & Co. failed they were indebted to him in the sum of $205,219.13, for monies advanced, purchases made, and liabilities incurred for them. He denies, unequivocally, all knowledge of the circumstances under which the bills were exchanged by Dudley & Stuyvesant, for the notes of the Josephs & Co., or of any special agreement in relation thereto, or the consideration on which the ex-

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change was made, and *he insists that he has a right to retain the bills on account of the balance due him by the Josephs & Co.

I have been thus particular in referring to the pleadings, because it was attempted in the argument to deduce from the circumstances in evidence, that the Josephs & Co. practiced usury in the contract, by which they obtained the bills from Dudley & Stuyvesant in exchange for their notes, and hence it was concluded that the bills were wholly void. Of this defence, it would be sufficient to remark, that the fact of usury is not put in issue by the pleadings, nor is there any other than the general allegation of fraud, unless the failure of the Josephs & Co. to perform the special agreement set out in the bill, can be so regarded. It may be as well, however, to state the circumstances under which this charge was made, that the complainants may avail themselves of them, if there is any thing in them.

The evidence is, that at the time this exchange took place, the Josephs & Co. were in very straitened circumstances, and their credit was so much suspected, that their paper could not be negotiated at a less discount than three, or three and a half per cent. per month on its face. What the estimate of the credit of Bishop, who drew the bills, was does not distinctly appear, but all the circumstances go to shew, that the credit of Dudley & Stuyvesant was very doubtful, and known to the Josephs & Co., and the probability is, that the principal value of the bills consisted in the confidence that Stoney, who was supposed to be abundantly solvent, would accept them, which he might, or might

not do, as according to the statements in the bill of complaint he had no interest in the matter, but accepted them for the accommodation of, and to assist Dudley & Stuyvesant in their business. The Josephs & Co. say, in their answer, that the principal sums of the notes which they gave in exchange for the bills, amounted to $39,747.93, and that this sum, and the interest charged, and the difference in exchange, amounted to the principal sum of all the bills of exchange, and I suppose that to be correct. If this be true, there was, as between Dudley & Stuyvesant and the Josephs & Co. an exchange of credit, on terms of perfect equality, and I do not see how usury could be predicated on that. The ground principally relied on is, that the bills were worth more in the market than the notes, but I do not see any thing in the evidence to warrant that inference. Stoney, on whom the bills were drawn, the only person concerned who was supposed to be sol-

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vent, had not, and might not, *as before remarked, have accepted them, and without that, it is not improbable that the notes would have been worth more. As it is, Dudley and Stuyvesant realized about $33,000, by the sale of the notes, and whether the bills ever will be worth that amount is yet to be ascertained. If not, in the absence of all proof that there was any intention to evade the statute against usury, it may turn out that Dudley & Stuyvesant have profited by the exchange. So much for the usury.

I recur now to the case made by the pleadings, and it may be remarked at once, that there is no evidence to support the special agreement set out in the bill, that the Josephs & Co. undertook to pay their notes at maturity, or to cancel and deliver the bills to Dudley & Stuyvesant. The complainants's case rests, therefore, entirely on the allegation that the bills were made without consideration, or rather that the consideration has wholly failed, and that is met, on the part of Levy, by the allegation that he is the purchaser or holder, for valuable consideration, without notice. This is assumed as a necessary deduction from the facts, that at the time the Josephs & Co. failed, they were indebted to Levy in a much greater sum, and he was in possession of the bills, and the cases of the Bank of the State of South Carolina, and the Bank of Charleston, against the Josephs & Co. decided in the Law Court of Appeals, at February Term, 1840, establish clearly that, as between the Josephs & Co. and their creditors, Levy had the right to retain these identical bills, as creditor in possession; but that does not conclude the present question. The rule of the Law merchant, which protects the holder of a bill for valuable consideration without notice, against the equities between the drawer, the indorser, and the acceptor, was designed to facilitate commerce by protecting those who had parted with their money to obtain bills of exchange and other mercantile securities, by means of which a great portion of the commerce of the world is carried on, against the frauds that might otherwise be practiced upon them; but Levy's case is not embraced by the principle. He paid no money for the bills; they were sent to him by the Josephs & Co., to collect on their account. Levy, in his answer, says that he was employed by the Josephs & Co. in the business of purchasing foreign and domestic exchange, and in collecting bills of exchange and promissory notes remitted to him by them, and that these bills were remitted by them to him to procure the means of making such purchases. And although, as between them and himself,

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he had *the right to retain the proceeds, when collected, on account of the balance due him, yet, as between Stoney and himself, he stood in the relation of a mere agent of the Josephs & Co., and is not, therefore, entitled to stand on higher ground than they would if they were the only parties. The rights of the agent cannot be greater than the principal. It would have been otherwise, if they had remitted the bills in payment of what they owed Levy, or as security for what he might afterwards advance for them. Judge Story, in his Treatise on Bills of Exchange, page 208, says that, as between the original parties, it is a good defence to an action on a bill, that it was without consideration, or that the consideration had failed, and that the same rule applies to any derivative title under them, by any person who acts merely as their agent, or has given no value for the bill. In Collins v. Martin, 1 Bo. and Pul. 648, it was held, that where the holder gave no value for the bill, he is in privity with the first holder, and will be affected by any thing which would affect the first holder. See, also, Darnell v. Williams, 2 Starkie's Rep. 166. It is otherwise, where the bills are deposited with an agent, as collateral security for advances made. For in that case, per Lord Ellenborough, in Bosanquet v. Dudman, 1 Starkie's Rep. 1, the agent holds them for value. The question of consideration must, therefore, be resolved according to the rights of Stoney, or rather the rights of Dudley & Stuyvesant, who made the contract, and who received the consideration, if there was any, and the Josephs & Co. As between them, the case may be thus stated. The Josephs & Co. gave their notes to Dudley & Stuyvesant, for $39,747.93, who sold and indorsed them for about $33,000, and put them into circulation. The Josephs & Co. have paid on account of them, $12,000, and no more, and they admit, in their answer, that they are insolvent, and unable to pay the balance. Dudley & Stuyvesant are also insolvent, and the probability is that they never will be paid by either. Their legal liabilities to the holders are precisely the

same—the Josephs & Co., as makers, and Dudley & Stuyvesant as indorsers. Dudley & Stuyvesant gave the bills in question to the Josephs & Co. in exchange for the notes, and regarding, as I have done, the Josephs & Co. as still the holders of the bills, the question is, whether Dudley & Stuyvesant would be bound to pay the bills, unless they are indemnified against their liability as indorsers of the notes. At law, I suppose they would, because the liability of the Josephs & Co. as

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makers of the notes, *to the holders, would be a sufficient consideration for the bills; but when it is seen, that it is now nearly seven years since the notes became due, and they are not paid—that the Josephs & Co. are insolvent, according to their own admission—that they have made an assignment of all their effects, without providing for the payment of the notes, and that from the whole tenor of their answer, the payment of them does not enter into their calculations—does it comport with equity and good conscience, to charge Dudley & Stuyvesant with the payment of the bills without being relieved from their legal liability as indorsers of the notes, or indemnified against it? I think not. It may be said, that Dudley & Stuyvesant raised $33,000, by the sale of the notes, and that, therefore, they ought to account for that amount. But it will be recollected, that they are liable, not only for that sum, as indorsers of the notes, but for their full amount. It will be seen that it gives no claim to the Josephs & Co. against them. I am, therefore of opinion, that the Josephs, and consequently Levy, are entitled to no more than they paid on account of the notes.

The only question which remains to be considered is, whether Stoney is entitled to the same protection that Dudley & Stuyvesant would be if they were the parties to be charged; or, to put the question hypothetically, whether the acceptor of a bill can protect himself by the equities which exist between the drawer and drawee, and especially when the acceptance is a mere accommodation to the drawer.

The cases before referred to, would seem to be decisive of this question; but I may add the authority of Ch. on Bills, 69, where it is said, amongst other things, that the want or failure of consideration may be set up as a defense, not only between the original parties, but also against a holder claiming by endorsement after the note has become due, or taking it with a knowledge of fraud, or other equitable circumstances, entitling the makers to avail themselves of the defence. The case of Rees v. Marquis of Headfort, 2 Campb. 574, is an illustration of the rule. That was an action by the indorsee against the acceptor of the bill. The drawer had received no consideration for the bill, but was tricked out of it, and Lord Ellenborough held, that this made it incumbent on the plaintiff to shew what consideration he gave for the bill, and not being able to do so, he was nonsuited.

I am, therefore, of opinion, and it is so de-

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creed, that the de*fendant, Jacob C. Levy, is only entitled to be paid the amount which the Josephs & Co. have actually paid on account of the notes which they gave in exchange for the bills, with interest on the money paid. I shall make no order for the payment of the amount here. That will be provided for in the judgment of the court in the case of Tennant, administrator, with the will annexed, of Francis Dalcour v. The executors of Stoney, [1 Rich. Eq. 222, 44 Am. Dec. 213] in which is involved the marshalling of the assets of Stoney amongst his creditors.

From this decree the defendants, Robert B. Gilchrist and Jacob C. Levy, appealed, on the grounds.

1. That the bills of exchange, referred to in the decree, and held by the defendant, Robert B. Gilchrist, in trust for creditors, are founded on a good and valuable consideration, and he is entitled to exact and receive full payment of them, from any of the parties, drawing, accepting or indorsing the said bills.

2. That the said Jacob C. Levy was, for good and valuable consideration, a bona fide holder of these bills, without notice of any equities in any manner affecting the said bills, and was entitled to exact and receive full payment of them from any of the parties to the said bills, at the time that he transferred them, in trust for his creditors, to his co-defendant, Robert B. Gilchrist; and the said Robert B. Gilchrist, who was also, at the time of the said transfer, without notice of any equity in any manner affecting the said bills, is, as such trustee, entitled to exact and receive the full payment of the said bills from the estate of the complainants's testator.

3. That no equities exist, to impair or bar the right of the defendant, Robert B. Gilchrist, from recovering the full amount of these bills, and the decree should have sustained and enforced that right.

Petigru and King, for the appellants, cited 1 McM. 431; 3 Wend. 62, 65; 7 Johns. Ch. 79; Bail. Eq. 505-7; 10 Wend. 113; 15 Peters, 377; 1 Stark. R. 1.

Hunt and Magrath, contra, cited 2 Ves. sr. 415; 2 Vern. 122; Ch. on Bills, (ed. 1836) 119; 1 Russ. 296; 3 Bro. Ch. R. 477; 2 Swanst. 189; 3 Atk. 755; 1 Story Equity, 197; 2 Ves. 155; Ch. on Bills, 81, 87, 91, 336; 1 Esp. N. P. 261; 2 Stark. 304; 2 D. & R. 256; 8 Taunt. 144; 9 B. & C. 208; 8 Cowen, 669; 24 Wend. 231; 15 Johns. R. 44; 2 Johns. Cases, 60; 13 Johns. R. 40; 16 Ib. 367; 5 Johns. Ch. 134;

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1 Ib. 536; 7 *Wend. 256; 10 Wheat. 367; 1 Bing. N. C. 151; Story Confl. Laws, 201-2; 8 Paige Ch. 550.

Curia, per JOHNSTON, Ch. The defendants do not insist, as they might by pleading have done, upon the conclusiveness of the judgment obtained at law upon the bills accepted by Mr. Stoney; which is very proper on their part, the judgment having been taken subject to the equitable relief sought in this cause.

We are, therefore, to enquire whether Levy, (now represented by his assignee) is entitled to the bills as against the estate of Mr. Stoney, the acceptor.

It appears that Levy acquired possession of them, as the agent of Josephs & Co., and not as purchaser in the regular course of trade; and although, as agent, he is entitled to hold them as against Josephs & Co. under a lien for balances due him by his principals, which is all that is decided in the Bank v. Levy, 1 McM. 431, that does not entitle him to enforce them against the acceptor to a greater extent than is warranted by the rights of his principals.

Coming to their possession in the manner mentioned, the familiar law is, that he holds them subject to all the equitable defences which could have been urged against Josephs & Co. had they still been theirs.

The true question, therefore, in the case is, whether the bill now filed could have been sustained against Josephs & Co. and we think it could not.

The circumstances of the case negative the idea of either usury or fraud in the acquisition of the bills by Josephs & Co.

As to usury, the Chancellor has shewn that this was not a case of loan, but of an exchange of paper; and he has also shewn the bona fides or equality of the exchange made, by remarks which it is unnecessary to repeat. It may be proper to add, however, that the evidence shews that the exchange was even more advantageous to Dudley & Stuyvesant than the Chancellor apprehended, for it appears that they sold the Josephs's notes for $37,000, instead of $33,000, as he supposed.

The ground upon which the Chancellor restricts the rights of Josephs & Co. under the bills is, that they have, in fact, paid no more for them than the amount which they paid on their notes to those to whom Dudley & Stuyvesant passed them away.

Our opinion is, that this is a mistaken view of the matter. They gave, as the considera-

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tion of the bills, their own notes, *the marketable value of which was at least $37,000, and which realized that amount to those from whom they bought the bills; and which, in the estimation of the Chancellor himself, was the full value of the bills when they bought them.

But without resorting to any other consideration—supposing the exchange to have been bona fide—it is immaterial whether they have ever paid a dollar on the notes. They made themselves liable to pay, and if they have not paid, the loss is not to Mr. Stoney, but to the holder of the notes. A binding promise is a sufficient consideration in the purchase of bills, as well as in the purchase of any other commodity; and if these parties have not discharged the obligation they incurred, they are, nevertheless, still liable to it.

It is ordered that the bill be dismissed.

The whole court concurred.

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1 Rich. Eq. 361

FERRIS PELL and Wife et al. v. EXECUTORS OF H. S. BALL et al.

(Charleston, March, 1845.)

[*Motions* ⇐59.]

The distinction between judicial and administrative orders considered.

[Ed. Note.—For other cases, see Motions, Cent. Dig. §§ 73–81; Dec. Dig. ⇐59.]

[*Judgment* ⇐650.]

A decree of the circuit court declaring that the court had no power to sell a party's land, against his consent, for partition, held to be an administrative order, and subject to the control of the circuit court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1162; Dec. Dig. ⇐650.]

[*Motions* ⇐59.]

The circuit court has the power to modify or rescind an administrative order, and it makes no difference by what judge the court is represented—whether the judge who made the former order or another.

[Ed. Note.—Cited in Meetze v. Padgett, 1 S. C. 128.

For other cases, see Motions, Cent. Dig. §§ 73–81; Dec. Dig. ⇐59.]

[*Partition* ⇐77.]

The jurisdiction of the Court of Chancery to sell lands for the purpose of partition, against the consent of a party, is not confined to the case of intestates' estates.

[Ed. Note.—Cited in Gates v. Irick, 2 Rich. 598; Baker v. Baker, 1 Rich. Eq. 394; Van Lew v. Parr, 2 Rich. Eq. 345; Steedman v. Weeks, 2 Strob. Eq. 147, 49 Am. Dec. 660; Gibson v. Marshall, 5 Rich. Eq. 261; Chalmers v. Jones, 23 S. C. 469; Holley v. Glover, 36 S. C. 419, 420, 15 S. E. 605, 16 L. R. A. 776, 31 Am. St. Rep. 883.

For other cases, see Partition, Cent. Dig. § 217; Dec. Dig. ⇐77.]

[*Appeal and Error* ⇐437.]

An appeal, it seems, does not suspend a decree.

[Ed. Note.—Cited in Guilleaume v. Miller, 14 Rich. 127.

For other cases, see Appeal and Error, Cent. Dig. § 2193; Dec. Dig. ⇐437.]

[This case is also cited in Stern v. Epstin, 14 Rich. Eq. 7, as an example of court of equity's custom comprising with act of 1791 in making partition.]

In pursuance of the decree of Chancellor Dunkin, made in this cause on the 17th July, 1843, (see Speers Eq. 520,) a writ of partition was issued by the complainants on the 24th January, 1844, to divide the land and

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negroes of Hugh Swinton Ball, *deceased. On the 26th January, 1814, three of the commissioners made a return to the said writ of partition as follows:

"We, William A. Carson, Robert W. Roper and John Harleston, three of the commissioners named in the annexed writ, do certify, that in obedience to the directions therein contained, we did this day go upon the land therein described, having been duly sworn faithfully to discharge our duty, (and notice having been given to Mrs. Amelia Ball, as administratrix of Elias O. Ball, deceased, and as guardian ad litem of Elias Nonus Ball, to Ferris Pell, to Albert Sumner, and to Augustus Taveau, to attend, if they would be present,) and in the presence of Olney Harleston, who appeared in behalf of Mrs. Amelia Ball, of Thomas Waring, who appeared as guardian and on behalf of Elias Nonus Ball, of Ferris Pell, who appeared on behalf of Albert Sumner and Catharine Sumner his wife and of Mary Ann Pell the wife of said Ferris Pell, and of Augustus Taveau, who appeared on behalf of his wife Martha Caroline Taveau,—we did examine the same, and are of opinion that the said plantations, Mepshew, Pimlico and Kecklico, cannot be fairly and equally divided, and that an actual partition thereof would be injurious to one or more of the parties interested: whereupon we appraised the said property, and found the true value thereof to be forty-five thousand eight hundred and ninety dollars. And we further certify, that we are of opinion that it will be most for the benefit of all parties interested, that the said plantations be sold together as a whole, at public auction, in pursuance of the Act of Assembly, for partition between the heirs."

"And inasmuch as it is not the desire of the parties to keep the negroes without the land, we recommend that the negroes belonging to said plantations be sold, for the purpose of distribution."

On the 29th January, 1844, the appeal, from a part of Chancellor Dunkin's decree, was heard, and dismissed, and the cause referred back to the circuit court. (See appeal decree, Speers Eq. 532.)

On the 7th February, 1844, the cause was heard in the circuit court, before Chancellor Johnson, when his honor pronounced the following decree:

This case coming on to be heard upon the return of the commissioners in partition, and under the decree made by the Court of Appeals at the late sitting of the court, referring the case back to this court to make such

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order as may be necessary *for a partition of the estate of the testator, Hugh Swinton Ball, by sale, or otherwise, and to make such further order as may be necessary for the settlement of the estate; after hearing Mr. Petigru on the part of complainants, and Mr. DeSaussure and Mr. Memminger on the part of Mr. and Mrs. Taveau, in favor of a sale, and Mr. Mazyck on the part of Mrs. Amelia Ball, as administratrix of Elias O. Ball, and as guardian ad litem of Elias Nonus Ball, against it; and it appearing that in case of a sale of the real estate, all parties concur in desiring that the negroes and personal estate be also sold: upon considering the certificate of the commissioners in partition, that a division cannot be made of the plantations without materially impairing their value; and that the testator himself is shewn to have been of the same opinion, by his will, whereby, in case of having one child, he has devised the whole estate to that child, but in case of his leaving more than one child, he has directed the whole of the said plantations, as well as his negroes, to be sold when the eldest child should come of age, or sooner, in the discretion of his executors, and the money divided among his children: It is ordered and decreed, that the testator's plantations, Pimlico, Mepshew, and Kecklico, be sold by Mr. Gray, one of the Masters of this court, in one lot, and that the negro slaves belonging to the said plantations, or employed thereon, be also sold by the said Master, in lots according to families. That in case of necessity, the whole, or a sufficient part of the entire proceeds, of said plantations and negroes, be invested for the purpose of raising by the interest or dividends thereof, a sufficient sum for the payment of the testator's debts, if any, and subject thereto; that one-half of the purchase money of the real estate and of the negroes be invested, under the trusts of the testator's will, to the use of Amelia Ball, administratrix of Elias O. Ball, until Elias Nonus Ball shall come of age; and afterwards to the use of the said Elias Nonus Ball, subject to the limitations contained in the testator's will. That the other moiety of the proceeds of the negro slaves, and all the rest and residue of the personal estate, be applied to pay the legacy of Emma Elizabeth Ball, and provide for the annuity of Martha Caroline Taveau, in proportion to their several amounts: and that the other moiety of the proceeds of the real estate be divided into two equal shares, and one share paid and allotted to Mrs. Taveau, and the other share allotted to Mrs. Pell and Mrs. Sumner, to be equally divided between them.

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*That the terms of sale be, for the land, one-fourth cash, one-fourth in one and two years, the residue in seven years, on bond and mortgage of the property, the interest payable annually. For the negroes, one-third cash, one-sixth in one year, and the residue in five years, secured by bond and mortgage of the property and personal security, the interest payable annually.—Mr. Taveau agreeing to take the bonds for the lands, payable in one and two years, and Mr. Waring the

bonds payable in seven and five years. And it is further ordered, that Thomas Waring, surviving executor of the said Hugh Swinton Ball, do sell and convert into money the residue of the personal estate of the testator, and apply the same to the payment of the legacies, as above mentioned; and that Mr. Gray, one of the Masters of this court, do take an account of the debts of the testator, if any remain unpaid, and of the sums which have come to the hands of the executors, or either of them, or which may come to the hands of the surviving executor, in the execution of this order; and of the sum to be invested for the annuity of Mrs. Taveau; and of the amounts to be paid to the complainants; and the mode in which the share of Mrs. Pell should be secured; and make his report to this court, and have leave to state any special matter.

From this decree Mrs. Amelia Ball and her son Elias Nonus Ball appealed, on the following grounds:

1st. That the court ought not to dispose of lands and negroes, the natural capital of the State, unless with the consent of the owner.

2nd. That there is no great difficulty in dividing planting lands, and especially none in dividing negroes—and this appellant is ready to receive her share: and if a future sale is desirable, she can have it done without any connection with the other parties to the suit.

3d. Because there is nothing in the case, either in the return of the writ of partition, or otherwise, to render it necessary or proper that the property of herself or her child should be converted into bonds, instead of remaining in lands and negroes.

4th. Because the former decree secures the specific property to appellant and her son, directing the same to be set off to them.

On the 22d February, 1844, the following notice was served on the Master in Equity:

"The Master in Equity, James W. Gray, Esquire, will please take notice, that as the

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decree in this case has been duly appeal*ed from on behalf of Mrs. Amelia Ball and her son, Elias Nonus Ball, as regards the sale of their share of the real and personal estate directed to be sold by the decree, he will suspend all operations under it until the decision of the Appeal Court.

Benj. F. Hunt,

Solicitor of Mrs. Amelia Ball and Elias N. Ball, her son."

Subsequently the following additional grounds of appeal from Chancellor Johnson's decree were filed:

Because the writ of partition issued and returned, was not in conformity with the former decrees in this case.

Because the right of appeal is secured by the Constitution, and cannot be curtailed or impaired.

Because the sale of an Infant's real estate against his consent and that of his guardian, is a violation of the 2nd and 6th sections of the 9th article of the Constitution of this State.

Because the decree of Chancellor Dunkin, of 17th of July, 1843, not having been appealed from, was the law of the case, and the Appeal Court could not set it aside.

On the 1st March, 1844, the solicitor of Mrs. Ball and her son, moved the court, Chancellor Johnston presiding, for leave to enter the following order:

"On motion of B. F. Hunt, ordered, that a writ of partition issue, pursuant to the decree of the 17th July, 1843, to divide between the heirs at law of Hugh Swinton Ball, deceased, and Elias Nonus Ball, the plantation on Cooper river, described in the pleadings, so as to set off one moiety thereof to the said Elias Nonus Ball, to be held subject to the limitations and provisions of the will of the testator, and to divide the other moiety, so as to set off one half thereof to Mrs. Taveau, and the other half, in equal proportions, to Mrs. Pell and Mrs. Sumner; and if the commissioners in partition shall be of opinion that the moiety cannot be fairly divided among the heirs at law of the said H. S. Ball, without manifest injury to the parties therein interested, then the said commissioners shall make a special return in relation to the said moiety, according to the form and terms prescribed by the provisions of the Act of the Assembly of 1791; and that James Ferguson and Dr. W. Moultrie be appointed commissioners on the part of E. N. Ball, and that ———— be appointed commissioners on the part of the heirs of H. S. Ball. It is further ordered, that the executor, under the direction of the commissioners, deliver to the

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administratrix of E. O. *Ball, for herself and Elias Nonus Ball, one moiety of the negroes, according to the decrees heretofore made."

The court refused the motion, and Mrs. Ball and her son appealed, on the ground that the order moved for was the proper order, according to the decree of Chancellor Dunkin, and the appeal decree, and should have been granted accordingly.

On the 2 March, 1844, on the report of one of the masters, and the petition of some of the parties interested, Chancellor Johnston filed the following decree:

Mr. Gray, one of the Masters of this court, reports, that in obedience to the decree pronounced by Chancellor Johnson, in this cause, on 7th of February of the present year, he had advertised the sale of the land and negroes, directed to be sold by the said decree—but that he had been served with notice signed by Mr. Hunt, as solicitor for Mrs. Amelia Ball and Elias Nonus Ball, informing him that the said decree had been duly appealed from by these parties, "as regards the sale of their share of the real and personal estate directed to be sold by the decree," and requiring him "to suspend all operations un-

der it, until the decision of the Appeal Court."

Accompanying this report, is a petition of Mr. and Mrs. Pell, and Mr. and Mrs. Sumner, alleging that the master "had advertised the property for sale, and all arrangements for a sale were made, in consequence of which the property is so situated, that a great loss would accrue from postponing the sale;" that they are advised that the appeal taken does not suspend the execution of the order, and praying "that Mr. Gray may be ordered to proceed with the sale." Upon the authority of Riggs v. Murray, (3 Johns. Ch. 160,) and the cases therein quoted, I take it to be pretty clear that an appeal does not suspend the execution of a decree—that until reversed, it operates as a full authority to the officers acting under it; and that, in fact, a special order is necessary to suspend it, which will only be granted by the court in the exercise of a sound discretion, with reference to circumstances. No application for a suspension having been made in this case, unless the notice to the master be regarded in that light, I have no ground for interfering, and must leave the decree to its full operation. I cannot consider the notice to the officer, in the light of an application to the court. It is simply the veto of the parties, carrying no authority; for it cannot be admitted for a moment, that the administrative officers are

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to be *directed in the course of their proceedings by any other rule than the judgments under which they act; and much less, that the will of a discontented party is to usurp, or to be substituted in the place of, a solemn adjudication. If I could regard the notice served in this case as an application to the court to suspend the decree, it furnishes me with no circumstances upon which my discretion is to be exercised. It is a mere annunciation of the ground that an appeal supersedes the decree; and upon that I am compelled to differ with the counsel.

At the same time, I must decline to give the order prayed for in the petition. The master has already all the authority I could give him—and if an appeal forms his obstacle to proceeding under it, an appeal from my order would be an equal obstacle.

Although an appeal has not the effect to supersede the decree appealed from, the opposite parties do, generally, from considerations of prudence, suspend the proceedings under the judgment drawn in question. For although it be settled that an appeal has not the effect of a supersedeas, per se, yet as the right of appeal is an unquestionable right, they who proceed after one is taken, proceed under the risk of having their acts undone and set aside. But whether they will, or will not, desist, must depend on their discretion alone. They have an unquestionable right to act under the authority they have; the other party has as undoubted a right to proceed to set that authority aside. This is the view taken by Chancellor Kent; and it appears to be the only one which can reconcile his assertion of the right to execute a decree, while it remains unreversed, with the position taken by him, that this is no disparagement of the right of appeal.

It has been argued in this case, that the decree appealed from is not the subject of appeal, being, as it is contended, merely a decision in execution of a previous decree of the Court of Appeals. Whether this is good ground for appeal, is a question for the Appeal Court, and not for this. It may be, that upon an application for an order to suspend proceedings, this court might more readily grant such an order, where, from a consideration of the points involved, it might be impressed with the conviction that the decision was doubtful. But in no other view that I can take, is it competent for the Circuit Court to enquire into the judgment drawn in question.

If I could look into this matter, I should be at a loss to decide whether the decree of

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the 7th February is founded upon *a correct construction of the decree of the Court of Appeals. I was confined to my bed by severe indisposition, when the latter decree was made. The other members of that court, if this application had been made to any one of them, as I wished it should have been, would have been more able, from the opportunities possessed by them, to have stated what was in the mind of the court, than I am. I can judge only by the record; and looking to this, I must say that a repeated perusal of the appeal decree, in connexion with that of Chancellor Dunkin, upon which it was made, has very much shaken the impression I took up at first, from the general terms employed by the Appeal Court.

From so much of the decree of Chancellor Dunkin as decided, upon general grounds of law, that one moiety of the property specially devised, could not be sold for partition; and that the special grounds taken were not sufficient to authorize it—and awarding a writ of partition, with special directions to the same effect—there was no appeal by any one of the parties. Elias Nonus Ball did not appeal, because his view was sustained, and the opposite party confined their appeal to three special and different grounds of objection. The decree was affirmed generally. The case was sent back, to make the orders necessary to be passed under this decree, and others which had been previously pronounced. The writ of partition awarded by Chancellor Dunkin was to be returnable to the Circuit Court, to be executed under his decree, as I would suppose, that decree having been affirmed. It is true the Court of Appeals, in remanding the cause, directs the Circuit Court "to make such orders as may be necessary and proper for effecting parti-

tion of the real estates, conformably to the decrees of the court, heretofore made, by sale or otherwise, as may be necessary." It had already been decided that a sale of the whole was unnecessary and improper—that one-half should not be sold, but allotted by actual division; and that as to the other half which descended, the writ should go under the Act of 1791. The question then, is, whether the court, by delegating authority to the Circuit Court to effect partition "by sale or otherwise," intended to modify the decree which they affirmed generally, and that upon a point not appealed from, or whether the authority to sell was not intended to be restricted to that moiety which descended, and which, by the terms of the Act of 1791,

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might be partitioned by sale, or other*wise, according to the return of the commissioners. I think this a very questionable point.

I must leave this matter with a mere expression of the opinion heretofore announced, that the appeal taken does not suspend the operation of the decree of the 7th of February last.

From this decree Mrs. Ball and her son appealed, on the following grounds:

1. That the Chancellor's own reasoning is conclusive that the decree directing the sale of the infant's property was illegal, and against a positive decree of the court.

2. Because the right of appeal is a constitutional right, and cannot be impaired, and a decree appealed from is no decree on which execution can issue, as the right of appeal being a perfect right, carries with it the means necessary to render it effectual; and the sale and delivery of property to strangers is inconsistent with the right of appeal.

3. Because the universal practice under the constitution sanctions the forbearance to execute any decree, until affirmed, when duly appealed from.

4. Because a Court of Equity cannot deprive a citizen of his freehold, without trial by jury, especially where no title is set up in any other party before the court.

On the 5th March, 1844, on the application of Mr. and Mrs. Taveau to suspend the order of Chancellor Johnson, of the 7th Febr'y, 1844, Chancellor Harper filed the following opinion:

"It is ordered and decreed, that the testator's plantations, Pimlico, Mepshew, and Kecklico, be sold by Mr. Gray, one of the masters of this court, in one lot, and that the negro slaves belonging to the said plantations, or employed thereon, be also sold by the said master, in lots, according to families; that in case of necessity, the whole, or a sufficient part, of the entire proceeds of said plantations and negroes, be invested, for the purpose of raising, by the interest or dividends thereon, a sufficient sum for the payment of the testator's debts, if any, and subject thereto; that one-half of the purchase money of the real estate, and of the negroes, be invested, under the trusts of the testator's will, to the use of Amelia Ball, administratrix of Elias O. Ball, until Elias Nonus Ball shall come of age, and afterwards to the use of the said Elias Nonus Ball, subject to the limitations contained in the testator's will. That the other moiety of the proceeds of the negro slaves, and all the rest and residue

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of the personal es*tate, be applied to pay the legacy of Emma E. Ball, and provide for the annuity of Martha Caroline Taveau, in proportion to their several amounts; and that the other moiety of the proceeds of the real estate be divided into two equal shares, and one share paid and allotted to Mrs. Taveau, and the other share allotted to Mrs. Pell and Mrs. Sumner, to be equally divided between them.

That the terms of sale be, for the land one-fourth cash, one-fourth in one and two years, the residue in seven years, on bond and mortgage of the property, the interest payable annually; for the negroes, one-third cash, one-sixth in one year, and the residue in five years, secured by bond and mortgage of the property and personal security, the interest payable annually; Mr. Taveau agreeing to take the bonds for the land, payable in one and two years, and Mr. Waring the bonds payable in five and seven years.

And it is further ordered, that Thomas Waring, surviving executor of the said Hugh Swinton Ball, do sell and convert into money the residue of the personal estate of the testator, and apply the same to the payment of the legacies, as above mentioned; and that Mr. Gray, one of the masters of this court, do take an account of the debts of the testator, if any remain unpaid, and of the sums which have come to the hands of the executors, or either of them, or which may come to the hands of the surviving executor in the execution of this order; and of the sum to be invested for the annuity of Mrs. Taveau; and of the amount to be paid to the complainants; and the mode in which the share of Mrs. Pell should be secured; and make his report to this court, and have leave to state any special matter."

Mr. Gray advertised the property for sale, but on the 21st February Mr. Hunt gave the following notice of appeal:

"I am authorized and instructed by Mrs. Amelia Ball, on behalf of herself and her child, Elias Nonus Ball, to appeal from the decree for the sale of the lands and negroes, to which she and her son are entitled under the will of H. S. Ball, and on the following grounds:

1. That the court ought not to dispose of land and negroes, the natural capital of the State, unless with the consent of the owner.

2. That there is no real difficulty in dividing planting lands, and especially none in di-

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viding negroes; and this appellant is *ready to receive her share—and if a future sale is desirable, she can have it done without any connexion with the other parties to the suit.

3. Because there is nothing in the case, either in the return of the writ of partition, or otherwise, to render it necessary or proper that the property of herself or her child should be converted into bonds, instead of remaining in lands and negroes.

4. Because the former decree secures the specific property to appellant and her son, directing the same to be set off to them."

In consequence of this appeal, Mr. Gray submitted a report to Chancellor Johnston, and asked his directions, whether the appeal was a Supersedeas. His Honor delivered an opinion, declaring that the appeal does not suspend the order.

The Master, in these circumstances, has proceeded to make arrangements for the sale.

This is an application, on the part of Mr. and Mrs. Taveau, to suspend the sale, on the ground that the sale will be injured by the pending appeal.

I am of opinion that the Master is right in going on with the order of court. The appeal is no Supersedeas, as Chancellor Johnston has already shewn.

Neither is the order of Chancellor Johnson the subject of appeal. The Court of Appeals referred the matter to his discretion, and his order is but the execution of what the Court of Appeals has directed. There is no ground of irreparable mischief disclosed by the affidavit, and it would be of evil example to countenance the opinion that a mere notice of appeal could suspend an order sanctioned by the Court of Appeals.

From this order Mrs. Ball and her son appealed, on the following grounds:

Because Chancellor Johnson's order was not in conformity with, and in the execution of, any decree of the Appeal Court, but a new and substantive circuit decree.

Because the right of appeal being secured by the Constitution, cannot be impeded or rendered ineffectual by any court or officers of court.

In pursuance of the order of Chancellor Johnson of the 7th February, the land and negroes were sold, and on the 3d July, 1844, the report of Mr. Gray on the sales came before the court on exceptions taken in behalf of Mrs. A. Ball and her son. One of the exceptions was as follows:

They except to the sale both of the lands and negroes, stock and provisions, as being a specific legacy.

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*This exception was overruled, and the report of the Master was confirmed.

Mrs. Ball and her son appealed, on the grounds:

1. Because the exception should have been sustained.

2. Because the sale, pending an appeal on the order of sale, was illegal and unauthorized.

The cause now came on to be heard before this court.

[For subsequent opinion, see 1 Rich. Eq. 419.]

Hunt, for Elias Nonus Ball. The points made by the minor child are:

1st. That the prior decrees having settled and adjudged that he took one moiety of the lands and one moiety of the negroes as devisee, he was entitled to have the same set off to him specifically; and being tenant in common with the heirs at law, who take the remaining moiety, he is entitled to a partition of the land and negroes into moieties, according to the well established laws of this court.

2nd. That as to the moiety thus to be set off to the heirs at law, they can divide the same under the Act of 1791, where a specific provision is made, not extending to estates other than those specified in the Act.

3d. That so the decree of Chancellor Dunkin had settled, directly, on the very question being heard on report of testimony, and this decree was not appealed from, and so became the law of the case.

4th. That no writ of partition had been issued, and no return made in conformity to the said circuit decree, at the time the case, on other points, was heard before the appeal court, and the language of the appeal court being referred to the only matters before it, is clear, and not to be tortured into any other meaning than that the case was remanded to execute the decree of Chancellor Dunkin in regard to the partition.

5th. That the circuit decree of Chancellor Johnson was a clear and direct reversal of the decree of Chancellor Dunkin on the point decreed, to wit, that the fee simple estate of a minor cannot be sold for partition, but that sale for the purposes of partition, is a new provision, confined to cases under the Act of 1791; and more especially in this case it was decreed that no sale was necessary, even if legal.

6th. That the decree of Judge Johnson being duly appealed from, was superseded, and the sale pending the appeal was illegal and void, there being at that time no subsisting and operative decree.

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*On the first point, he said it was clear that when once a court arrives at a conclusion, it is out of order to look behind the judgment in order to weaken its legal effect. All judgments when obtained are of equal obligation; he therefore assumed that Elias Nonus Ball was seized in fee by devise of one moiety of the lands to be partitioned; and that the other moiety was distributable under the Act of 1791; and hence he concluded that the land was divisible into moi-

eties; and he contended that this court has no power to decree a sale for partition of land held in fee by devise or purchase, against the consent of the owner. A man cannot be compelled to change his investment and give up his fee simple against his will. It is only when he takes as distributee under the Act of 1791, that he is bound to submit to the mode of partition therein prescribed; which Act has never been held to affect any other estates in common. It is said that the practice has been to compel a sale for partition, and that long practice is equal to law, and especially that since the Act of —91, the equity of that Act has been extended to other than estates derived under that statute. In the first place, he denied the existence of the practice, never having heard of such a decree for at least a quarter of a century, and he believed no such practice does exist, but that the general acquiescence of parties in sales has led superficial observers to mistake the general consent of owners to sell for partition, for a general rule to compel them to sell against their consent.

It seldom happens that men will insist on a specific partition of land, as most people are glad, in the abundance of land, to get the proceeds of sale, and purchase for themselves. Certain it is that no adjudicated case can be found in which this court has ever compelled one to sell his estate held in common for the mere end of making partition, neither has any Judge ever stated that as an admitted principle. It is not sound logic to contend that the mere absence of a decision is evidence of universal acquiescence, for it is equally evidence of universal belief that there was no ground to call for an adjudication. If it is plain law that one cannot compel a man to sell his lands to make partition, then we should not expect any one to make a case and call that law in question; and so is the fact,—there is no such case. Let us then see what is the settled law in England, and the settled practice by which this court is bound, and then what is the law of South Carolina, and, as equity is bound to follow the law, what this court has authority to decide and rule. At

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*common law joint tenants could not be compelled to make partition. It was the stat. 31 H. 8, C. 1, that first made provision in case of joint tenants for a writ de partitione facienda, and this was extended by 32 H. 8, to lesser estates than those of inheritance. On these statutes there was a regular judgment, first, quod partitio fiat, &c., and on the return of the inquisition a second judgment, quod partitio firma, &c. in perpetuum teneatur. But in equity partition goes upon the conveyance to be executed, and as a general rule, if the parties are not competent to execute conveyances, partition could not be made, 1 Madd. Rep. 214. This species of partition is matter of right, 1 Ves. and B. 554; Amb. 589. Where the estate consists of several parcels, each need not be divided, but if one gets a parcel of greater value, then compensation is made, either by a sum of money or rent for owelty of partition, to those who have parts of least value. But if there is but one house it must be divided, however inconvenient, 8 Ves. 143; so one mill, an advowson, and the like, 1 Dick. 69; 2 Dick. 652; 11 Ves. 143; 1 Ves. 51. In all these cases, however great the inconvenience, a partition must be made. If an advowson, every other presentment; if a mill, alternate tolls; see Amb. 589, 191; 1 Ves. and B. 554; 1 P. W. 446, 518; Co. Lit. 169, b. note. The statutes in 2 Stat. 474, are adopted, and 8 and 9 W. 3. C. 31, and 3 and 4 Anne, C. 18, define the mode and manner of partition.

In 1748, 3 Stat. 708, we find the first law of this State on the subject. Let us examine this Act. It provides for a partition of land held in coparcenary, joint tenancy and tenancy in common, and directs an equal partition, either in entire tracts or in parcels, as they shall be of opinion will be most beneficial to the several parties, &c. "and the return was to remain," of record. This was a proceeding in the common pleas, and is still the law.

Having already shewn that the Court of Chancery had no power to make a compulsory sale, he would now shew what the law is.

The case Crompton and Wife v. Ulmer, 2 N. and McCord, 429, settled two points; first, that the Act of 1791, ordering a sale for partition, is confined to cases of intestacy; second, that under the Act of 1748, that court could not order a sale as a means of making partition; and this ought to be conclusive. The Act which so inauspiciously revived the power of an Equity Court to decide finally

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when it chooses, without an appeal, in *order to slur over the obvious irregularity and danger of such a power, expressly provides that in all questions of law, as distinguished from equity, the Court of Chancery, shall follow the decisions of the court of law. Here is the law, and how strong it is to prevail against the spirit of innovation which is incident to all chancery jurisdiction, is seen by the fact that here is a clear explicit decision of the court of law, deciding in terms that the statute of 1791 does not apply to any but cases of intestacy, and that under the Act of 1748, a sale cannot be ordered, and yet the ground is taken that this case is within the "equity of the statute." That is, the law is to be laughed to scorn, that the court may do as it pleases and evade the law.

The words of the decision are, "The Act of 1791 most clearly and conclusively relates to the disribution of the estates of intestates." The Judge recites the Act, and says, "here, then, is the strongest and most explicit language which can be used, to shew that

the Act relates to the distribution of the estates of intestates, and this is confirmed by every subsequent clause." "This power, so given in this Act, can have relation to no other partition or distribution of property than that which arises under the Act." Now, in this case, until the estate be divided into moieties, the Act of '91 does not begin to operate, for E. N. Ball takes by devise.

It is easy to account for the Act of 1791, for it placed personal and real estates on the same footing, and distributed them as if there was no difference between them, but left other real estate to the law as it stood. But it is pretended that "distributive share," used in the Act of —91, by an equitable construction may mean the share of "a tenant in common." So weak and shallow a pretence needs hardly be exposed: "distributive," is applicable only to shares to be distributed. But it is an abuse of terms to say the title of a tenant in common is to a distributive share. He is entitled to partition, not distribution. The perversion of this clear term shews what is meant by extending, "the equity of the statute." Now, the court of law applies the true meaning, "because the words, distributive share, apply in legal understanding to that portion of an intestate's estate to which one would be entitled, and not a bequest or devise, and in this view of the Act my brethren unanimously concur." Here, then, the court of law unanimously concur in the opinion that "distributive share," is a term which so far from extending the equity of the statute, actually restricts and confines

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distributive shares to *the Act of 1791. What are we to come to, when the very words which the court of law unanimously decide are restrictive, and confine the proceeding to the specific case of distributive estates under the Act, are, by the licentious interpretation of a Court of Equity, to be made an excuse for "extending the equity of the statute," beyond what the Legislature have intended by its clear enactments!

It amounts to bold, naked usurpation, thus to decide contrary to the rule laid down by the courts of law, and thus violate the very letter as well as spirit of the Act creating a Court of Appeals in Equity. Let us pursue this question, what is the law? and see if equity has followed the law.

The next case at law is found in the same book, p. 593, Spann v. Blocker. Here, although there was a default made, and a long period had elapsed, yet the court set aside an order by which the return of the commissioners recommending a sale to make partition was made the judgment of the court; and this, too, on the express ground that, as there was no allegation that the joint tenancy arose under the Act of 1791 for distributing the estates of intestates, the court had no power to order a sale, but only to make actual partition.

In this case Justices Colcock, Nott, Richardson and Huger concurred, and it was the constitutional decision and exposition of the law, that law which equity is bound to follow, and yet we are told that universal practice is the other way. He believed the assertion wholly destitute of foundation, and that no lawyer living can cite a case in which any court has ordered a sale of lands of inheritance, other than under the Act of —91, for making partition, against the consent of the tenant in common.

That no such order has ever, before this case, been submitted, is clear. The case of Dinckle and Timrod, in 1784, see 1 Dess. 109, is relied on, but that was a case of consent and family arrangement. But what can be said to the case of House v. Falconer, 4 Dess. 86, decided in 1810, where "the infants had six months after coming of age to shew cause against the decree," even under the Act of —91? The equity of the statute, however, is claimed, to convey to the Court of Equity power not possessed by the court of law. This is but a form of words to cover a claim on the part of that court to make that law which they think ought to be law, but which the Legislative have not yet had the wisdom to enact. Does the equity of the statute also extend to the courts of law, or are they bound

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by the Act as it is written? *If so, then the Court of Equity has a power unknown to the law court, by which it can dispose of a man's estate in a different way from a court of law, and unless two of the Chancellors desire it, the law court has no power to sit in appeal on such cases. By the constitution, the right of appeal is secured, and this cutting off appeals from equity, subjects suitors in that court to rules of decision unknown to the law. This is the very evil predicted from two Supreme Courts, guided by different rules of decision, in one State. At law, a man's inheritance is sacred, it cannot be sold against his will. In equity, the equity of the statute rides over the rules of law, and he can be made to sell his land, purely to enable another to make a more advantageous sale of his land. Who urges the sale?—not the tenant in fee by devise, but the distributees.

The cases in which the equity of the statute has been extended to cases not within its letter, apply as well at law as in equity. Thus a law affecting executors is construed to apply to administrators, because they are also personal representatives. But here the law court has expressly denied the application of the Act of 1791, to other than intestates' estates, and the "equity of the statute," contended for, consists of a new clause to be introduced by the Court of Equity, against the express enactment that the Equity Appeal Court shall follow the rule of law, otherwise the ultimate decision would not have been entrusted to them. If the court had left the parties after the decree to seek

partition at law, no one pretends that the minor's estate could be sold. It is then, not the equity of the statute, but the far reaching power of an unlimited jurisdiction, called the Court of Equity, that is appealed to. This is not a case of construction, a case for two opinions; the law is settled; and he relied on the allegiance of the Judges to execute the law; and if the hasty ill considered orders that have been made, create difficulty, the open violation of the law will do more, it will shake the confidence of the public in the tribunal he addressed. He did not mean, of course, any imputation. There has been an error committed, expediency has ridden over right. This he averred, but all men are liable to error; "aliquando dormitat bonus Homerus."

But now, on solemn argument, it is time to be awake to the danger of innovating on the rights of property for mere convenience; and least of all, under a pretence of extending the equity of a statute beyond what the law extends it—for that is the true meaning of the term—it does not mean stretching a

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*statute by the energies of a Court of Equity. Statutes are construed strictly or liberally, according to the subject matter, and remedial statutes are to embrace cases within the mischief. All that is admitted, but this construction is to be given by the courts of law. There is no extended equity of construction given to the Chancellor; if so, and there is no appeal from the equity side of the Appeal Court, then there is to be one rule at law, and another in equity. He concluded, then, on this point, that by the law of the State a man may not be deprived of his freehold by a compulsory sale for partition; and so the decree for a sale in invitum is unconstitutional, and against the law of the land.

He would now proceed to consider the next point. The decree of Chancellor Dunkin is direct and conclusive on this question, which was directly in issue before him; from this decree there was no appeal, and therefore it was not competent for the court of appeals to reverse the circuit decree. Was there a decree? If not, the school-master is wanted—language has become incapable of conveying ideas. But let us see what Chancellor Dunkin has said, which has been mistaken for a decree. A reference was made to the master, Mr. Gray, who, after taking testimony, reported that it was expedient to sell the real estate of H. S. Ball, to make partition among his devisee E. N. Ball, and the heirs at law; and this report came up for confirmation, and the Chancellor said: "Both the complainants and the heirs at law unite in the desire, that the portion of the estate not effectually disposed of, should be forthwith brought to sale." Then the Chancellor adds, "It would present a much more embarrassing question, if the sale of this portion necessarily required a sale of the remaining moiety, which, it is seen, is devised in fee to E. N. Ball;" and thus the point as to his fee simple came up; and the Judge more than hints, that if such was the fact, none of the estate would be sold, for he adds, "strong arguments might, with justice, be urged against thus breaking the entire plan of the testator. But no such necessity has been exhibited to the court." Here, then, is a clear decision on the point, thus followed out. "The testimony reported by the master, has been carefully considered." The Judge then decides, that on the evidence, a sale is not necessary to a partition; and proceeds to the legal question, whether, "for the mere purpose of partition, this court has authority, in the case presented, to direct a sale of the entire premises, against the desire of one of the parties." Here the legal position is

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stated, and the Chancellor lays *down, that in England no such sale has been ordered, and concludes, "neither this court or the Court of Common Pleas have any authority to direct a sale of the entire premises for the purposes of partition, but as derived from the provisions of the Act of 1791;" and he recognized the decisions at law, that sales are confined to cases of intestacy, quoting the cases of Crompton and Ulmer, and Spann and Blocker. Is not this a decree, that equity cannot direct a sale for partition, except under the Act of 1791? If not, what does all this mean?

The court then adverts to the well known case, in which the court changes a minor's estate for his own advantage, and properly remarks on the distinction. It is not in invitum, but solely for the benefit of the infant. Having thus settled the law, that the court had no power to direct a sale for partition, the Judge says "it is ordered and decreed, that a writ of partition issue, to divide between the heirs at law of Hugh Swinton Ball deceased, and Elias Nonus Ball, the plantations on Cooper river described in the pleadings, so as to set off one moiety thereof to Elias Nonus Ball." Is this a decree, or mere reasoning? Is it not a decree, that the infant's estate should not be sold against his consent, at the instance of a tenant in common? The decree provides, as will be seen, for the subdivision of the moiety of the heirs at law, by partition or sale under the Act of 1791. No one can say he does not understand this decree, or that it is capable of two meanings. This, then, was the decree; it was not appealed from; and by the Act of 1808, a circuit decree, not appealed from, is final. The case was heard on appeal on other points, not affecting E. N. Ball, so he was not heard before that court; and yet it seems that all this time a plan was going on to defeat Chancellor Dunkin's decree, and compel the minor to sell. A writ of partition was issued, and the commissioners of the heirs at law made, not

a partition, but a report that the land could not be divided, that "an actual partition would be injurious to one or more of the parties interested," carefully avoiding to say that it would be injurious to the minor. This return, it seems, was submitted to some of the Appeal Judges, when the minor was not before that court, and in remanding the cause, it was referred back to make partition, "conformably to the decrees of the court heretofore made, by sale or otherwise, as may be found necessary." If this was intended to reverse the decree of Chancellor Dunkin, at least the minor ought to have been heard; but no fair man, on a careful

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perusal, can doubt that the words *"by sale or otherwise," had reference solely to the moiety of the heirs at law. When Chancellor Johnson was called on to sell the minor's share, no new evidence was produced—no return, under the Act of 1791, stating the reasons—and yet he reversed Chancellor Dunkin's order, and overruled his law, that the court had no power to sell for partition, and decreed a sale in invitum. If this can be done, no man is secure in his estate; a Court of Equity is the law, and until they speak, no man knows his own. Without a trial by Jury, against a decree not appealed from, a fee simple is taken from one man and conveyed to a purchaser, by the officer of this court. No country in Christendom, no Turkish Aga, has ever before exercised such a power. But this violation of the decree is all to be slurred over, and when the Chancellor was, as he thought, making a decree on full consideration of the law, he was only making an administrative order, that is, a mere discretionary order, which any other Judge might at a future day reverse. He thought he had settled the right of the minor to hold his land, and it was a favor even to let the heirs at law withdraw their moiety; thus, in fact, making a new will in part; and now the will of the testator is revoked by the Appeal Court of Equity. But if it was even an administrative order, it ought not to have been set aside without a change of circumstances. The volunteer and studiedly ambiguous return, where no return was authorized, is no excuse.

The case came up before Chancellor Dunkin on the motion of the heirs at law, to sell the infant's moiety together with theirs. The right of E. N. Ball to a moiety, had been already adjudged and decreed, and the only question, as to him, was whether his share could be sold against his will. This truth must not be kept out of view. The question was directly presented, and directly decreed. It affected the right to hold the fee without a sale. There was nothing administrative in the matter. The right was challenged, and it was decreed upon, and there was no appeal. The facts cannot be truly stated, and the conclusion avoided—that it was a decree on the merits, sustaining the minor's right to have his moiety in specie, and not the mere money from a sale. He had found, he said, decrees interlocutory and final, but no authority for the assertion, that a decree that land is not liable to be sold against the will of the owner, is not a decree at all, but an administrative order, liable to be superseded and varied. It is an attempt, by the use of a term, to get rid of a substantive decree.

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What, he presumed, is *meant by an administrative order, is an interlocutory decree, not affecting the rights of the parties, but only necessary to expedite or facilitate the progress of the case.

To call a decree, founded on two solemn decisions of the law court of appeals, a mere administrative order, is to pervert the plain meaning of terms. A decree founded on the constitutional right of a freeholder to retain his real estate, is not a mere decree on the mode and manner, but on the substance. The case must be met directly, and not evaded. The decree was against the parties calling for a sale of the whole premises. It sustained the right of the devisee to his moiety in specie, and the court refused the application for an order to sell. An administrative order, is one addressed to the discretion of the court, for the better forwarding the cause. This was a motion resisted on legal objections to the power of the court. The objections were sustained. The testator devised lands and negroes. The court has no power to set aside the will and make it a legacy of so much money as the land and negroes will bring at auction. The devisee is already in possession by force of the devise. This was an effort to dispossess him and compel a sale. The decree, then, was on the very merits; whether one in, by devise, can be compelled to go out, and yield to a purchaser. The quantity of interest had been already decided. If left at law, the devisee could not have been put out. The direct issue before the Chancellor related solely to the manner of executing the former decree, and he decreed he had no power but to partition, and not to sell. Now, having proved that there is a decree on the very subject, let us look to the subsequent proceedings. Chancellor Johnson, in direct opposition to the decree of Chancellor Dunkin, decided that this court had the power to direct a sale, and did so, in invitum; from this decree there was an appeal, and then, for the first time in all his practice, he heard that the appeal did not suspend the decree, and that the sale must go on. Indeed, Chancellor Harper says that the directing the sale was not the subject of appeal, because it was discretionary to divide or sell. If so, why was not Chancellor Dunkin's order to divide, and not sell, equally final? But these doctrines, that an order to sell a man's estate against his will, is not the subject of appeal,

and that an appeal does not suspend all action on the circuit decree, are startling doctrines, and if sustained, render the court indeed a fearful engine. It would seem that the constitutional right of appeal is confined

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to the law courts, *and the court of equity is here again beyond all control or limit. To give the court of equity final jurisdiction, even when all the Chancellors concur, is at least of questionable constitutionality, it being considered necessary to secure the right of appeal by a constitutional provision, and "the Judges," include certainly the law Judges. But that a circuit decree can be acted on while appealed from, or that any order affecting the sale of a freehold, can be placed at the discretion of a single Chancellor without appeal, will not go forth without exciting the special wonder of the profession and the people. The Act of 1808, 7 Stat. 304, creating a circuit chancery, provided that "the orders and decrees of the said judges, in all cases wherein appeals shall not be made to the court of appeals hereinafter established, shall have the same force and effect with decrees sanctioned by the courts of appeal." Of course, if appealed from, they are not final. The appeal court is to hear appeals "from any order or decree of any Judge presiding at the circuit." Who then shall say, that an order, selling a man's freehold, is not the subject of appeal? But the 7th sec. of the Act gives the Judges power to make rules, and the 25th rule is that "no execution or attachment for the enforcement of a decree shall issue, until thirty days after the rising of the court during which such decree was pronounced, and if there be an appeal, then such execution or attachment shall not issue until thirty days after the adjournment of the court of appeals at which the cause shall be determined." This is conclusive, and if a payment of money cannot be enforced, much less can a sale, by which one is turned off his land and compelled to give possession to another. If negroes are sold, they may be scattered all over the West before the appeal is heard. If this clear violation, both of the law and the rule of court, must go unchecked by the magic word "administrative order," such mischievous orders should be suppressed. But here, again, there is no room for two opinions; the court is only to execute the law, and he called on them to do so.

Here is the law of South Carolina, that an appeal does suspend a circuit decree. But it is supposed the English law, and the New York, is not so; if so, that is not to supersede our own law. But on examination it will be found, that even in England the rule has fluctuated, and depends upon the will of the house of Lords. O'Connel's case is an instance of the effect of executing a sentence, and then deciding it was illegal. It brings

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*the law into contempt. The case of Green and Winter, 1 Johns. Ch. 77, so far from supporting the views of either Chancellor Johnson or Harper, happens to be an authority just the other way. A decree for the payment of a large sum of money was appealed from, and a petition was made, that pending the appeal, either the money might be deposited, or security given. If the appeal did not suspend the execution, whence the necessity of such a motion? It was conservative, and depended on the circumstances, and was like an application for a ne exeat or bail pending suit, to secure the performance of the decree in the last resort; see also City Bank v. Bangs, 4 Paige, 285; Halsey v. Van Arminge, 4 Paige, 279; Gregory v. Dodge, 3 Paige, 90; Messonier v. Rouseman, 3 Johns. Ch. 66; Barrow v. Rhinelander, Id. 123; Riggs v. Murray, Id. 183; Price v. Nesbit, 1 Hill Ch. 453; see the rule in England, Guainin v. Lethbridge, 14 Ves. 586; also 9 Ves. 316, Wardens of St. Paul's v. Morris. There is no ground, then, of reason or law to authorize the refusal of the Judge to direct the master to hold his hand; and in this case, had no sale been made, no one doubts, none would be now directed against an infant. What excuse was there for selling his negroes, but that his land was taken away, and what for taking his land but to give to strangers the advantage of selling their land better? And shall the hot haste in which this sale was pushed, be now an excuse to bend the law and talk of dangers to purchasers? Every purchaser was warned, and bought in spite of notice. In Turkey, it would create an outbreak, thus to make the violation of one's rights itself an excuse for denying justice to the injured party.

It remains to be seen whether this court will vindicate the law, and restore Elias Nonus Ball to his rights, or suffer him to be the victim of influences, which operated in the hurry of the circuit to defeat a calm investigation of his claims.

Petigru and Memminger, contra, cited 3 Johns. Ch. 160; 1 M. & K. 61; 1 McC. Ch. 351; 1 Eq. R. 109; 11 Ves. 157, note; 3 Burr. 1895; 4 Bro. Ch. 277; Bacon Abr. Error, M, 3; 6 Peters, 8; 3 Cranch, 300; 10 Peters, 449; Bacon Abr. Supersedeas, G; 10 Mass. R. 105; 9 Ves. 316; 15 Ves. 182; 16 Ves. 214; 18 Ves. 452; 17 Ves. 380; 2 Molloy, 345; 1 J. & W. 48; 2 Hill Ch. 156.

Bailey, in reply. The first question that requires solution in the case, is whether an

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appeal is a supersedeas, and he was a *little astonished to hear so much argument upon a point almost self evident. It is the first time that the question has ever been raised in our courts, the general belief of the bar inclining to the affirmative of the position.

It has been asked in the course of the argument, what is the use of an appeal if it does not suspend the operation of the judgment of the court?—and as his colleague had correctly remarked, to say that the appeal does not suspend the court's judgment, would be to allow that judgment to be executed, which might result in the most fatal consequences. Suppose the case of a party condemned to death and the judgment appealed from,—could the execution be ordered notwithstanding the appeal? The case in 3 Johns. Ch. 160, decides that an appeal is a supersedeas; if it was not, wherefore the special order? He cited 16 Ves. 213; 7 Stat. 304, sec. 3; 1 Hill Ch. 453. The Court of Equity has no jurisdiction to order a sale of lands except in cases of descent. The Act of 1791 only gives the court jurisdiction in such cases, and there is no case, either in the English authorities or in our own, which authorizes this court to order a sale of a devised freehold in invitum. The case in 1 Des. 109, is no authority, for it does not appear whether the parties did or did not consent. He cited Bac. Abr. Statute J. But the question is concluded by the decree of Chancellor Dunkin; Bail. Eq. 98, 279; Dud. Eq. 28.

Curia, per HARPER, Ch. I believe that the grounds on which I refused to suspend the sale on the application of Taveau and wife, were assumed somewhat hastily and unadvisedly.

Chancellor Dunkin's decretal order of July, 1843, certainly directs one moiety of the land and slaves to be allotted to Elias Nonus Ball, specifically, and not otherwise, the other moiety to be divided between the parties entitled, and if the commissioners find it disadvantageous to divide specifically, then as to that moiety to recommend a different method, as provided by the Act of Assembly. This I think the obvious import of the decretal order alone, unconnected with the opinion which precedes it. Though the decretal order is alone the proper decree, yet, if there be any thing doubtful in its terms, it may be well construed with reference to the opinion, and we should, as far as practicable, give it a construction in conformity to the opinion. Thus considered, there can be no doubt with respect to the order in question. The Chancellor, upon full consideration, decides explicitly that he has no power to order a sale of the infant's portion of the estate, and that the same must be allotted to

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*him specifically, and by metes and bounds; and if this order be regarded as an adjudication, I am of opinion that it is conclusive upon the parties, and was not reversed or modified by the judgment of the Court of Appeals.

I do not question but that it is within the competency of the court to make such modifications of a decree as the justice and merits of the cause may require, on its own motion, though the particular matter may not have been the subject of appeal. When a decree is said to be affirmed, this may well mean that it is affirmed with respect to the matters appealed from, and is not inconsistent with the modification of the decree in other particulars. But I do not think this has been done in the present instance. The order of the appeal court directing the cause to be remanded, for the purpose of making the necessary orders to effect partition by sale or otherwise, conformably to the decrees heretofore made, must refer to this decree, if it be a decree, and the discretion allowed must respect the moiety with regard to which the Chancellor had admitted a discretion.

I am of opinion, however, that the decretal order, so far as it respected the manner of partition, was not a judicial, but an administrative order, subject to the control of the court, and that it was modified and controlled by the subsequent order of Chancellor Johnson.

The distinction between these sorts of orders is too familiar to need much illustration.

To render an order judicial, it must be one which affects the merits of the cause. Nothing is more common than that during the progress of a cause, property should be sold for its preservation, or some motive of convenience, thus changing the form of the property, without deciding on the respective rights of the parties in relation to it. It is not doubted, but that in such a case, if any change of circumstances should occur between the making of such an order and its execution, to render the sale unadvisable, it might be rescinded. So in the case of orders for the sale of infants' property, there are many such instances. It has been determined that the order confirming the master's report of sales, or of money paid by him, is not a judicial, but a ministerial order, and you may allege against it if the report be not true.

To determine whether the party is entitled to a partition, and in what proportion, is

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matter for judicial enquiry. In what *manner he should be put in possession of his interest, is matter for administrative discretion.

Some difficulty arises, and there may be an appearance of refining in the views taken, from the circumstance that the order directing the writ, also decides the merits. If the decree of Chancellor Dunkin had simply declared and adjudged Elias Nonus Ball to be entitled to a moiety of the estate, and to have a present right of partition, and this had been affirmed on appeal, and the cause remanded for the necessary order, its administrative character might have been more readily perceived. What were the matters in issue before Chancellor Dunkin? Undoubtedly to what portion of the estate the infant was entitled, and whether he was entitled to immediate partition. In what manner, or in

what form, his portion of the estate should be allotted to him, was not in issue; and can that be regarded as a judicial decision which relates to a matter not in issue, though the Chancellor may have expressed a legal opinion in relation to it? It was a direction for carrying the decree into effect. To remove and appoint trustees as exigencies may require, is a function of this court. The laws on this subject have varied in this State, and elsewhere. Suppose, on application for the purpose, a judge to decide, on consideration of the law, that he has no power to appoint or remove a particular trustee, and to become afterwards convinced of his error, and that he has such authority, may he not then, on sufficient shewing, grant the order he has before refused?—yet this he could not do, if the former order on the subject were an adjudication.

If by some arrangement of the parties, and in pursuance of an order to that effect, a writ of partition were issued requiring the commissioners to make partition among all the parties, specifically, by metes and bounds, this, in effect, would mean no more than the writ in this case, and in the common case, directing them to make partition: yet can any one doubt the power of the court to make a different order, upon the return of the commissioners that they could not make such return without injury to the parties?

Might not the parties vary their arrangement? During the present sitting, an order of Chancellor DeSaussure has been before us, in a case where there were two plantations belonging to an estate, directing one plantation to be allotted to one distributee and the other to the other. If the commissioners had returned that one was entirely

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unsuitable for the purposes of a *plantation, and that the other could be conveniently divided into two, might not the former order have been modified?

I have spoken of the power of the court to modify or rescind an administrative order. It is hardly necessary to say that it makes no difference by what Judge the court is represented, whether the Judge who made the former order, or another. There may be greater delicacy in one case, but the authority is the same. It is, as I have said, only on a change of circumstances that the court will entertain a motion to modify or rescind a former order. This is because it will not be harassed by a perpetual reconsideration of the same matter on the same grounds,—but if a Judge should capriciously, and without any change of circumstances, so modify or rescind, the last or rescinding order must prevail and continue valid till itself reversed.

Then the question arises with respect to the power of the court to sell for the purpose of partition, in any other case than that of intestates' estates. Undoubtedly our Courts of Chancery have assumed jurisdiction in various instances, not warranted by the rules and practice of the high Court of Chancery of South Britain, to which, by the Act of Assembly of 1721, they are directed to conform. Yet, where such jurisdiction has been long exercised—where, on the faith of decisions again and again repeated, and on the authority of law regarded as being so firmly settled as not to be questioned—titles have accrued, and money has been paid or invested; thus involving, perhaps, the titles of a large portion of the property of the country, we should be guilty of far bolder and more mischievous usurpation, to resort to what we might conceive to be the true and primitive practice, than the Judges who introduced the practice which we find established. It is not questioned, that by the rules and practice of the English Court of Chancery, it has no power to direct the sale of lands for the purpose of partition; and according to many of the cases cited in argument, much hardship and injustice have been suffered, from the want of such authority. The case of Dinckle v. Timrod, 1 Dess. 109, is an authority that the court exercised the jurisdiction to make such sales, long before our Act of 1791, authorizing them in the case of intestates' estates; and before the Act, the court certainly had equal jurisdiction in every other case of joint tenancy, or tenancy in common, as in that of intestates' estates. It exercised, also, jurisdiction in making partition of slaves, for

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which, of course, it could de*rive no authority from the English law. It is not questioned, but that the jurisdiction has been exercised familiarly and habitually, for the greater portion of a century, and I believe there is no lawyer at the bar, or Judge on the bench, who cannot verify the prevalence of the practice, so far as his recollection extends.

It is argued, however, that we can draw no conclusion from this established practice, as the jurisdiction appears to have been exercised by consent; at all events, we find no case in which the objection to its exercise has been made and overruled. It is one thing, that for a long time no case has arisen, or been prosecuted under a law; and from such a negative shewing, we might not be authorized to pronounce the law obsolete or repealed. It is another thing, that the law should be regarded as so firmly settled, and familiarly known, that no one has thought of calling it in question, though cases may have again and again arisen, in which the parties must have been invited to make the objection, if they had supposed they could do so successfully. The selling of mortgaged land for the purpose of satisfying the mortgage, is utterly unknown to the practice of Westminster Hall. Yet this has obtained in our courts, time out of mind; and I believe no case can be found, in which the authority of the court to make such sales has been questioned, or an objection to its exercise suggested. I

should as soon think of calling in question the court's authority in one case as in the other. But the argument is entirely misconceived, with respect to the jurisdiction having been exercised by consent, and the practice having obtained sub silentio and without objection. When joint tenants, or tenants in common, are all of full age, they need no aid of the court to enable them to make partition, or to sell. If all consented, they might divide or convey as they pleased. It is only in the case of some of the parties refusing to consent, that they would find it necessary to resort to the court. When some of the parties are infants, it would be the duty of the court, if such sale were not authorized, to make the objection for them, if it were not otherwise taken in their behalf.

There are some other views which it is hardly necessary to take. The court may have extended the equity of the statute of 1791, in relation to intestates' estates, to all other cases of joint tenancy, and tenancy in common, according to a well known practice of the English courts, as being "within the mischief or cause of the making of the Act."

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Co. Lit. 24, b. It would be *entirely analogous to the construction in Eyston v. Studd, Plowd. 467, where the stat. 9 Ed. 3, c. 3, relating to executors, was extended to administrators; or where a feoffment to defraud the lord was declared void, this was extended to all other conveyances, grant, fine, lease and release, &c.

Whether we at this day, if the question were a new one, would give such extended construction to the statute, or not, we are not at liberty to disregard the construction of our predecessors, if they have given it.

It might be further remarked, also, that the words of the Act of 1791 are not necessarily confined to the case of intestates' estates. The words are that "it shall and may be lawful for any person who may be entitled to a distributive share of any estate, real or personal, to have the writ of partition." Now, the words "distributive share" are commonly understood to relate to intestates' estates, and in an Act providing for the distribution of intestates' estates, this meaning might seem still more appropriate. Yet they are very capable of a different construction. Every tenant in common may very well be said to be entitled to a distributive share of the common property; and if courts heretofore have made this construction, I should not be prepared to pronounce it an erroneous one.

The order of Chancellor Johnson is affirmed.

JOHNSON and JOHNSTON, CC., concurred.

COLUMBIA, MAY, 1845.

CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
" WM. HARPER.
" JOB JOHNSTON,
" B. F. DUNKIN,

1 Rich. Eq. *390

*A. D. JOHNSON and Others v. W. E. LEWIS, Executor.

(Columbia. May, 1845.)

[*Courts* ⟸102.]

Where the court of appeals, consisting of three Chancellors, one of whom dissented, reversed a decree, on a question of fact, of the Chancellor who was absent, *Held*, that a petition for a re-hearing, which relied on the grounds that the decision was, in effect, by an equally divided court, and that the court of appeals erred in their conclusion from the facts, would not lie.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 352; Dec. Dig. ⟸102.]

[*Equity* ⟸392.]

A petition for a re-hearing will not be allowed for supposed error in the conclusion of the court, drawn from doubtful or equivocal evidence.

[Ed. Note.—Cited in Brown v. Smith, 3 Rich. Eq. 541; Ex parte Dunovant, 16 S. C. 302.

For other cases, see Equity, Cent. Dig. § 844; Dec. Dig. ⟸392.]

[*Courts* ⟸102.]

[The chancellors present at the hearing and decision of a cause constitute the "court," and an absent chancellor's opinion will not be taken into consideration for the purpose of showing a division in the court.]

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 351; Dec. Dig. ⟸102.]

[This case is also cited in ex parte Knox, 17 S. C. 212, as an example of jurisdiction of courts of equity on petition for rehearing.]

Petition for a re-hearing, addressed to the Court of Appeals.

Curia, per JOHNSON, Ch. This cause was heard, and a decree pronounced on it, in the circuit court of Fairfield district, in July, 1840. From that decree the complainants appealed to this court, on various grounds of law and of fact, and upon the hearing here, at May Term, 1841, the court, consisting of three Chancellors, (Harper, Ch. who presided in the circuit court, being absent,) one of whom dissented, made an order reversing the decree of the circuit court on certain important matters of fact, and this is a petition, submitted on the part of the defendant, praying for a re-hearing, and that an issue at law may be directed to try and determine the questions of fact.

The grounds relied on in the petition are,

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*1. That the cause was decided by two Chancellors, in opposition to the opinion of one of the court, and of the absent Chancellor, who presided on the circuit, and was, in effect, decided by a court equally divided.

2. That the Court erred in their conclusion from the facts.

The court of appeals, as organized by law, is composed of the four Chancellors, a majority of whom constitute a quorum, and the decisions of that majority must, of necessity, be as conclusive and obligatory as if all the members were present and concurring; and from a like necessity, the decisions of the majority of that majority must be equally binding. The minds of men, however nearly they may approximate in their physical organization, do not run in the same channel, even in the pursuit of truth. They sometimes arrive at the same conclusion by different processes of reasoning, or at different conclusions by the same process. This always has been, is now, and ever will be, the case in enquiries depending on the speculative sciences, and that it is so in our own department, is demonstrated by every day's experience; and no practical results can be obtained if all must concur. The common sense of mankind has pointed out the majority, where numbers are concerned, (notwithstanding some wild speculations to the contrary) as the most safe and worthy of confidence. The judgment of a majority of a court, however constituted, must, therefore, be decisive of the matters in controversy. Chancellor Harper, whose opinion is relied on as shewing a division of the court, was not a part of the court on the hearing of the appeal, and, however highly we all appreciate his opinions, they were not authority in the determination of the particular case—nor do we

know that they would not have been wholly changed by the argument on the appeal.

Application for re-hearing causes, are addressed entirely to the discretion of the court, and they are habitually allowed where there is error apparent on the proceedings, or important evidence has been newly discovered,—but it would be unsafe to allow them for a supposed error in the conclusion drawn from doubtful or equivocal evidence.

The same reasons for granting or refusing them, must always remain, and constitute grounds for renewing the application to every term. Now, that the facts relied on here are of that character, follows from the history of the case. They cannot but be doubtful, at least, when it is seen that two out of the three Chancellors who presided on the appeal,

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deduced from them a con*clusion opposed to the views on which the petition is founded. The decisions of a court, as to matters of fact, are entitled to the same respect as the verdicts of juries are at law, where the general rule is, not to grant a new trial when there is evidence on both sides; and in reversing the decree of the circuit court, the majority of the appeal court must have been influenced by a strong conviction that it was not sustained by the evidence. The facts, therefore, cannot, at most, be otherwise than doubtful. Petition dismissed.

The whole court concurred.

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1 Rich. Eq. 392

LYDIA JANE BAKER, by Her Guardian, v. WILLIAM H. BAKER and Others.

(Columbia, May, 1845.)

[*Judicial Sales* ⟸3.]

The Court of Equity has the power to sell the absolute fee in lands, on the application of the person having a defeasible fee, against the will of the contingent devisee. Per Johnson, Ch.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 6; Dec. Dig. ⟸3.]

[*Infants* ⟸37.]

An application for such a sale opposed by the contingent devisee and refused by the court.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 83; Dec. Dig. ⟸37.]

Before Johnson, Ch., at Lancaster, June, 1843.

The decree of his Honor the Chancellor is as follows:

The following clause is contained in the last will of the defendant's testator, the late William Baker, viz: "I give and bequeath to my beloved wife Rhoda Baker, the lands whereon I now live, during her widowhood, for her support and maintenance—also the following negroes, viz: Jack, Sall, Mary and George, with their future increase, during her widowhood; and at the marriage of my said wife, I will and bequeath the said land and negroes, with their future increase, to my natural daughter, Lydia Jane Baker; and in case of the death of my daughter, Lydia Jane Baker, before the above contingency happening, or if my daughter should die leaving no children at the time of her

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*death, in that case all the aforementioned property, lands, negroes and increase, I give to my son William H. Baker of Alabama, to him and his heirs and assigns forever." "But if my little infant daughter," (the complainant,) "should be alive at the intermarriage of my wife with any person, in that case all the lands and negroes, with their future increase, at the end of the widowhood of my wife, I give to my infant daughter, and at her death to her children; and in case of her dying and leaving no children at the time of her death, then, and in that case only, I give that property to my son William H. Baker."

The testator died in 1837, and his widow intermarried with Henry Gardner, the guardian of the complainant, in 1839, when of course the interests of the complainant became vested, and it is stated in the bill that Gardner, the guardian, has rented out the plantation since that time, from year to year, for her benefit, but that almost the whole tract has been cut down and cultivated, leaving but scanty materials for repairs of buildings and fencing. That the plantation is much worn and exhausted, and the buildings and fences are greatly out of repair, and that under this system, the plantation, in the course of the long minority of complainant which is to ensue, will be entirely worn out and exhausted—and the prayer is, that the lands may be sold under the order of the court, and the proceeds vested in other property, subject to the uses of the will, or paid to the guardian of the complainant.

The defendant William H. Baker still resides in Alabama, and has not put in his answer, nor has he qualified as executor. He was, I suppose, made a party by publication, and for any thing that appears, is in fact ignorant of these proceedings. The defendant Blackman admits in his answer the facts stated in the bill in regard to the condition of the plantation, and concurs in the opinion that it would, under the circumstances, be to the interest of all concerned, that the land should be sold and the proceeds vested in other property, or put to interest, subject to the uses expressed in the will. The commissioner to whom the subject was referred, on the evidence of disinterested witnesses, found the facts stated in the bill and admitted in the answer to be true, and recommends a sale, and I shall accordingly order a sale.

It was argued at the hearing, that the limitation over to William H. Baker was void, and that the complainant took an absolute property in the estate devised, but on exami-

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nation of the authori*ties, I am satisfied that

the limitation over is good, dependent on the event of Lydia Jane Baker dying without leaving issue at the time of her death; but if I had thought otherwise, I should have made no order on the subject, as William H. Baker is not in reality before the court, and I propose still to leave it open, until it shall be necessary to make a final disposition of the funds arising from the sales.

It is ordered and decreed, that the plantation mentioned in the pleadings be sold by the commissioner, at such time as he, with the consent of the complainant, shall appoint, on the terms recommended by him, that is to say, on a credit of one, two and three years, in equal instalments, the interest to be paid annually on the whole sum, at the end of every year. The purchaser to give bond and personal security, and a mortgage of the premises, to secure the payment of the purchase money. The accruing interests when received, to be paid to complainant for the use of his ward, and the principal sum to remain subject to the further order of the court.

The defendant, W. H. Baker, appealed.

Clinton, for the appellant.
Wright, contra.

Curia, per JOHNSON, Ch. The decree of the Circuit Court proceeds on the principle, that the court have the power to order the sale of the entire fee simple of the lands in question, against the will of the defendant Baker, and in reviewing the matter, I am satisfied that it can be sustained. There are numerous cases in which the court do exercise the power of disposing of the interest of the parties in real estate without their consent, as in the common case of the partition of intestates' estates provided for by the Act of 1791, and according to Pell v. Ball, (ante, p. 361,) decided at the last sitting of the court in Charleston, where real estates were devised to several and partition was sought for by one; and so in all cases where several have a common interest which cannot be severed in specie so as to make the several parts useful to all, as in the case of a house with a single room of which half a dozen persons are tenants in common, where the only practicable mode of making severance is by reducing it to money. In this and like cases the exercise of the power is forced on the court by necessity, as that is the only

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means by which equal *justice can be done between the parties. But here no such necessity exists; the interests of the parties are several and distinct. The will gives the fee to the complainant, defeasible on the contingency of her dying without leaving issue at the time of her death, and in that event the absolute fee is limited over to the defendant Baker in remainder, and their estates, if the remainder over vests in Baker, are as distinct and independent of each other both as to the title and the enjoyment, as if there had been several estates devised to each of them. The contingent estate of Baker opposes no obstacle to the complainant's perfect enjoyment of all interest which the testator intended to confer on her, or to her power of disposition over it, and the sale of Baker's contingent interest is in no way necessary to its full fruition. It may be that the estate would sell for a better price if it had not thus been incumbered with this limitation, but it will be worth just as much in the hands of the purchaser as it is in the hands of the complainant, and as well might one, who desired to sell his own estate, insist that his neighbor, who owns an adjoining estate, should be compelled to sell that also, because they would bring a better price if both were sold together, or a remainderman that the interest of the tenant for life should be sold because he would prefer to have the remainder in the form of money.

It is therefore ordered and decreed, that the decree of the Circuit Court be reversed, and that the case be referred back to the Circuit Court, to give the complainant an opportunity of taking such further order as she may think fit, consistently with this opinion.

The whole court concurred.

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1 Rich. Eq. *396

*ELI CLARK et al. v. JOHN MOSELY.

(Columbia, May, 1845.)

[*Wills* ⇐506.]

Testator devised all his 'landed property' to his wife for life, and at her death to be equally divided between his daughter Martha's 'lawfully begotten heirs' by H. her husband, and his daughter Rebecca. Martha survived the tenant for life. *Held*, that the term heirs must be construed in its technical sense, and that, Martha being alive at the death of the tenant for life, and her children consequently not being then her heirs, the limitation over of one moiety to her heirs failed, and that that moiety was distributable as intestate property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1098; Dec. Dig. ⇐506.]

[*Wills* ⇐457.]

In construing wills, technical words are to be taken in their technical sense, unless from the context they appear to have been used in a different sense; and the mere failure of the will to effect an intention conjectured from extrinsic circumstances, will not justify the court in departing from a technical construction.

[Ed. Note.—Cited in Duncan v. Harper, 4 S. C. 83.

For other cases, see Wills, Cent. Dig. § 975; Dec. Dig. ⇐457.]

Before Johnston, Ch., at Edgefield, June, 1844.

The decree of his Honor the Chancellor is as follows:

Alexander Stewart departed this life, the 25th of October, 1824, leaving a widow, Ann Stewart, and two daughters, Martha, the wife of Henry Barnes, and Rebecca, the wife

of the defendant, Mosely. The former of these daughters, Mrs. Barnes, had, at his death, several children. He left a will, duly executed, but without date, containing the following provisions: First, I lend to my wife, Ann Stewart, during her natural life, the following property, to wit: all my landed property, together with all the advantages arising therefrom; my fishing places on Savannah river, known as the Cow Shoals, and all my stock of cows, hogs, sheep, and horses, together with all my household and kitchen furniture, and negroes, to wit: Charles, Tom, Pat, Kate, and Sam, together with the future issue of the females.

Second, I lend to my daughter, Martha M. Barnes, the following property, to wit: one bed, &c., and the following negroes, during her natural life, and after her decease to be divided between her lawful heirs by Henry W. Barnes, now her husband, to wit: Nancy, Sarah, and Harriet, together with the future increase of the females; and the disposal of the negroes to her lawful heirs by Henry W. Barnes, shall be at her own disposal. Thirdly, I lend to my daughter, Rebecca A. Stewart, (afterwards Mrs. Mosely,) the following property during her natural life, to wit: Margaret, Eliza, and Edward, together with the future increase of the females, &c. &c.

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*Now, my desire is, that if Rebecca A. Stewart should die without a lawfully begotten living heir, then, and in that case, all the property that I have loaned her, shall be equally divided between the lawful heirs of Martha M. Barnes, begotten by Henry W. Barnes, now the husband of Martha M. Barnes. Now, my desire is, that all the property that I have loaned to my wife, Ann Stewart, shall, at her death, be equally divided between Martha M. Barnes's lawfully begotten heirs, by Henry W. Barnes, now her lawful husband, and Rebecca A. Stewart.

Now, if Rebecca A. Stewart should die without a lawful heir, then, and in that case, all the property that comes by her mother to her, shall be equally divided between the lawful heirs of Martha M. Barnes by Henry W. Barnes, now her lawful husband.

From the pleadings it appears that Mrs. Mosely, formerly Rebecca A. Stewart, died the 18th of November, 1825, survived by her husband, the defendant, and by an only child, now the wife of Eli Clark; that Ann Stewart, the widow of the testator, died in September 1831; and that Henry W. Barnes, the husband of testator's daughter, Martha, died in September, 1840, survived by his wife, and leaving five children by her, to wit: John S., Samuel M., James A., Henry W., and Robert G. Barnes, but the pleadings do not inform us how many of these were born prior to the execution of the will, or to the death of the testator, or prior to the death of the testator's widow.

The bill, which is brought by Mrs. Barnes and her children, and by Clark and his wife, is for a division of certain lands, of which the testator died seized, and for an account of the rents and profits which have been received by the defendant; as, also, for waste committed by him. There are several points raised in the answer, which it is unnecessary to notice, there being only one point submitted to me; and that I shall proceed to explain. It appears from the pleadings, that of the lands of which the testator died seized, some were acquired before, and others after, the execution of his will. The parties are not exactly agreed as to which of the different tracts, owned by him, fall within the one category or the other; and, besides, the defendant sets up an agreement with the testator, and a resulting trust, as to one of them. But be these matters as they may, these issues have not been submitted to me, and I am not to decide upon them. Nor am I to decide upon the rents and profits, or waste, all of which are contested.

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*The point submitted to me is this: As to such lands, whichever they may be, as were acquired by the testator before the execution of his will, the plaintiffs insist that they passed by the will, and upon the determination of the widow's life estate, became divisable as follows: one-half to the children of Mrs. Barnes, by her husband Henry W. Barnes, in equal shares; the other half to Mrs. Clark, as the only child of Mrs. Mosely, and to the defendant, Mrs. Clark taking two-thirds and the defendant one-third. The defendant, objecting to this, "submits, that such of the plaintiffs as are children of Henry and Martha Barnes have no proper standing in this cause, and cannot take, under the terms and description in the will of Alexander Stewart, as Martha M. Barnes' lawfully begotten heirs by Henry W. Barnes her lawful husband, inasmuch as the said Martha M. Barnes, being yet living, has no heirs: and the said plaintiffs were not even heirs of Henry W. Barnes, at the happening of the contingency, the death of Ann Stewart, upon which the heirs were to take: and, consequently, that the moiety, thus ineffectually given to the heirs of Martha M. Barnes, is not devised by the will of Alexander Stewart, (except as to the life estate of Ann Stewart therein,) and descended, upon the death of Ann Stewart, in like manner as the real estate acquired by said Alexander after the execution of his will, to his heirs at law, namely, Martha Barnes, and Rebecca Mosely, the deceased wife of the defendant. If, however, the children of Martha Barnes shall be construed to take as heirs of their living mother, then, the respondent submits, that those of them, only, who were in existence at the death of the testator, or, at most, those of them who were in existence at the death of Ann Stewart, are entitled to take."

This point includes three questions:

1. Whether any of the children of Mrs. Barnes can take under the designation of her heirs, she being still alive?

2. If heirs are construed to mean children, whether any who were not born at the death of the testator can take?

3. Whether, upon the same leading construction, the right is not restricted to such children as were born before the death of Ann Stewart?

Only the first of these questions was argued: and that without reference to authorities. The word heirs has a technical meaning, which forbids its being applied to the children of a living person, unless, from the

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context of the instrument in *which it is used, it seems to have been used in the latter sense. Prima facie, words must be understood according to their legal import; and when they have an obvious meaning, they are not to be rejected, (nor, by parity of reasoning, warped from their technical signification, when they are technical words,) upon a mere suspicion that he who used them did not know what they meant; 5. Ves. 401; 8. Ves. 306. But when, from the context, it is apparent that they have been employed in an arbitrary manner, to signify something contrary to their ordinary or legal signification, courts of justice, whose office it is to carry out the real intention of parties, are bound to give effect to them in the sense in which they have been used. In this will, if we restrict ourselves to the particular section in which the testator limits over the property he had given his wife, we shall be bound by the rules of law to declare that the remainder is given to Miss Stewart, and to special heirs of Mrs. Barnes.

If this had been a deed, and the gift had been direct, and intended for immediate enjoyment, there would have been ground for the construction that children were meant. But in a paper which itself could have no present operation, and where the bounty is expressly postponed and made to depend upon a contingency that might not occur for many years, there is no necessity for putting a forced construction upon the words used; and without a strong necessity it cannot be done. The rule is pretty clear (as laid down by Wigram, in his excellent little work lately republished in this country) that when words in their primary sense can operate, they shall operate in that sense; and it is only where they cannot so operate, but are capable of a secondary construction, that extrinsic circumstances are let in for the purpose of giving efficacy to them according to the secondary meaning. But this doctrine does not prevent us from looking into the other parts of the will, for the purpose of seeing whether the testator used the word heirs as synonymous with children; and I do not perceive that he has done so. In the bequest to Mrs. Barnes, he has created a limitation over to her heirs, but that is expressly after her death, when the term aptly applies; and as to the disposal to these, which she is authorised to make, it is evidently nothing but a power of appointment among them, which she is enabled to execute notwithstanding her coverture. So again, when the heirs of Rebecca A. Stewart are spoken of, they are mentioned as persons to exist at her death. I do not doubt that if these children had, by

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the *death of their mother, become her heirs, (meaning with us her distributees,) at any time before the death of the life tenant, they would have been entitled; the doctrine, as I apprehend it, being that he who answers the description at the time of distribution shall take. He who is to take at the death of the testator, must come up to the description then; but he whose enjoyment is postponed to a distant period, shall enjoy, if he be in esse to enjoy. 1 Ball & B. 459, et seq. 462, 483. I am of opinion, then, that the will in respect of the lands referred to, had no operation beyond the life estate of testator's widow. If the parties have agreed upon the other points, they are at liberty to prepare and present a decretal order; otherwise the case will stand for further hearing on these points.

Having been put to unnecessary trouble in stating this case, I will venture to order, that in such cases, in future, when points are to be argued upon a case stated, the counsel shall furnish the court with a statement, in writing, setting forth the facts and the questions.

The plaintiffs, John S., Samuel M., James A., Henry W., and Robert G. Barnes, children of Martha M. and Henry W. Barnes, appealed, on the following ground:

Because, under the will of the testator, they became entitled, upon the death of the widow, to one-half of the property lent to her for life.

Griffin, for the appellant.

Wardlaw, contra.

Curia, per JOHNSTON, Ch. It is not thought necessary to quote cases establishing the general proposition, that if property be given to the heir of a person living at the time of the gift, or when it comes to take effect, the gift must fail. Brett v. Rigden, Plowd. 341.

A few authorities, indiscriminately collected, will shew the strength of the rule, that technical words are to be taken in their technical sense, unless he who employs them appears, from the context, to have used them in a different sense: and that the mere failure of the instrument to effect an intention conjectured from extrinsic circumstances, will not justify the court in departing from a technical construction.

Prima facie, words must be understood in

their legal sense; unless by the context, or express words, plainly appearing, intended otherwise. 5 Ves. 401.

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*It is a rule of construction, not to make any intendment contrary to the plain and usual sense of the words, unless from other parts of the will plainly appearing not intended to have that extensive operation. 7 Ves. 368.

Words used by a testator shall be interpreted according to their legal effect and operation, unless it clearly appears that he intended to use them in a different sense. Wilson v. Tigler, 2 B. & B. 204.

In the construction of a will, it shall be presumed that the testator was acquainted with the rules of law. Langham v. Sanford, 2 Meriv. 22.

The court never alters nor adds to a will, without necessity. 7 Ves. 128.

Words having an obvious (or ascertained) meaning, not to be rejected (or warped) upon a suspicion that the testator did not know what they meant. 8 Ves. 306.

The mere improbability that a testator could have meant what he has expressed, neither authorizes the rejection of his words, nor renders the devise void for uncertainty. Chambers v. Brilsford, 2 Mer. 25.

Though the testator may not have contemplated the event which has happened, that will not affect the construction. 7 Ves. 369.

If the meaning of a will (or of the words in it) be ascertained, any reasoning from supposed cases will not induce the court to make a different construction; but can only lead to a conclusion that the testator did not foresee all the consequences. 15 Ves. 103.

In Attorney General v. Grote, 3 Meriv. 316, (*a*) Sir W. Grant said: "To authorize a departure from the words of a will, (or from the accepted meaning of the words,) it is not enough to doubt whether they were used in the sense which they properly bear. The court must be quite satisfied that they were used in a different sense; and ought to be able, distinctly, to say what the sense is in which they were meant to be used." And Lord Eldon laid it down that "individual belief ought not to govern the construction; it must be judicial persuasion."

I think whoever will allow due weight to these authorities, will hesitate to adopt any construction based merely upon the reasonable intention of the testator, to be conjec-

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tured from the *circumstances of his family at the time, directly at variance with the legal meaning of the words used by himself to express his intention, and unsupported by any contrary meaning annexed to the same words in the context of his will. To take such liberties with his words, is not to interpret his will, but to make it; and will throw the rules of law, and the rights of men under them, into an intolerable uncertainty.

As no part of the context of this will has been or can be pointed out in which the testator has not used the word "heir" in its technical sense, upon what ground are we to infer that it was otherwise used in the clause in question? Are we to infer it from the fact, that in the events which have happened, it could not take effect? The authorities referred to explicitly lay it down, that such a ground is quite insufficient.

If you reject the word "heir," you must be able to say, with distinctness, what other word the testator meant to employ. Now what word will you substitute, which, in other events, might not as seriously have disappointed the supposed intention of the testator? Did he mean "children," or "issue?" If the former, then, in certain well known events, some of the children might have been excluded, as if born after the testator's death, or after the death of the life tenant; and if some of the children had died leaving issue, the issue would not have taken. If he meant issue, then, according to Campbell v. Wiggins, (Rice Eq. 10,) children and their descendants, taking as purchasers, would have taken together and per capita, and thus have received shares very different from those intended.

Two cases have been relied on, to pervert the meaning of the testator's word "heirs" from its technical meaning. But in my opinion, the question presented here could not have occurred in one of them; and the other is an authority for a construction directly contrary to that contended for. The first of them is Loveday v. Hopkins, Amb. 273. Testator devised as follows: "I give to my sister Loveday's heirs £600." "I give to my sister Brady's children, equally, £1000." At the making of the will, Mrs. Loveday had two children—the plaintiff and a daughter named Martha. Martha afterwards died in testator's life time, leaving three children. Mrs. Loveday survived the testator, and was alive at the hearing of the cause. The plaintiff, one of the children, filed his bill against the executrix for the whole £600. The children of Martha were made defendants.

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*The executrix, who was residuary legatee, by her answer, and at the bar, disclaimed all right to the £600. Question: whether the testator intended to include the children of Mrs. Loveday, and their descendants, in the word "heirs;" and whether the children of Martha, the deceased daughter of Mrs. Loveday, were entitled, as such, to a moiety of the £600, which (it was assumed) would have been their mother's share, if she had survived the testator.

(*a*) Cited in Wigram on Wills, p. 30, pl. 45, and p. 200, App. No. 2.

Sir Thomas Clark, M. R. was clearly of opinion that the testator intended to give the £600 to the children of Mrs. Loveday, the same as in the subsequent clause to Mrs. Brady's children, and had not their descendants in view—and decreed the whole £600 to the plaintiff.

Now, it is evident from the brief report by Ambler, that the only person who could have raised the question whether "heirs" meant "children" in this case, was the executrix and residuary legatee, and she disclaimed. Upon this disclaimer, the only ground upon which either the plaintiff or Martha's children could contest the right as among themselves, was the assumption that "heirs" in this clause meant "children;" and that construction was taken for granted by both parties. It was conceded, that if Martha had survived the testator, as well as the plaintiff, she, as well as he, would, as children of Mrs. Loveday, have been entitled to a share of the £600, notwithstanding their mother was still living. This construction being assumed, the only question in the case was whether the term "children" extended to "grand-children," the descendants of children. And the import of the decision was that it did not: and this is all that was decided in the case.

The other case is Wilson v. Vansittart, Amb. 562. Testator made his will in India, in his own hand writing, and after several legacies, gave the residue of his estate, consisting of personalty, to his brother John, (the plaintiff) and to his heirs male, equally to be divided among them, share and share alike.

Three questions: 1. Whether the father shall take the whole, rejecting the words equally to be divided? 2. Whether the father and sons shall take at the same time, as tenants in common? 3. Whether the father shall take for life, and after his death the residue shall go to all his sons equally?

Lords Commissioners Smith and Bathurst were clearly of opinion that, according to the

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true construction, the father shall take *the whole for life, and then to go to the sons equally, and decreed accordingly.

Now, the plain import of this decision was, that by construction of the will, the gift to the sons was after their father's death, when they were heirs and answered to the description. They were not allowed to take with their father, as tenants in common, because during his life they were not "heirs;" wherefore they were postponed until they could come up to that description.

This case seems, to me, to support the principle of the decree in the present case. It is ordered that the decree be affirmed, and the appeal dismissed.

HARPER and DUNKIN, CC., concurred.

1 Rich. Eq. 404

ISAAC D. WHITWORTH v. HARDY STUCKEY and Another.

(Columbia. May, 1845.)

[*Wills* ⟸605.]

Testator devised lands to his son, 'for and during his natural life, and at his death, to the lawful issue of his body; and if he should die without lawful issue, living at the time of his death, then,' over. *Held*, that the limitation 'to the lawful issue of his body' served only to enlarge the estate of the son to a fee conditional at common law, and did not create a remainder to the issue, as purchasers.

[Ed. Note.—Cited in Hull v. Hull, 2 Strob. Eq. 190; Buist v. Dawes, 4 Strob. Eq. 49, 50; Hay v. Hay, 3 Rich. Eq. 396; Buist v. Dawes, 4 Rich. Eq. 124, 503; Corbett v. Laurens, 5 Rich. Eq. 323; Graham v. Moore, 13 S. C. 119; McIntyre v. McIntyre, 16 S. C. 293, 295, 296; Bethea v. Bethea, 48 S. C. 441, 443, 444, 26 S. E. 716; Simms v. Buist, 52 S. C. 557, 560, 562, 30 S. E. 400; Mattison v. Mattison, 65 S. C. 354, 43 S. E. 874; Kennedy v. Colclough, 67 S. C. 122, 45 S. E. 139; Duckett v. Butler, 67 S. C. 135, 45 S. E. 137; Holman v. Wesner, 67 S. C. 308, 45 S. E. 206; Boyles v. Wagner, 91 S. C. 185, 74 S. E. 380; Surles v. McLaurin, 94 S. C. 309, 77 S. E. 944; Adams v. Verner, 102 S. C. 16, 86 S. E. 214.

For other cases, see Wills, Cent. Dig. § 1365; Dec. Dig. ⟸605.]

[*Vendor and Purchaser* ⟸114.]

While a purchaser of land remains in quiet possession thereof, he cannot sustain a bill for a rescission, or abatement of price, on the ground of an outstanding title, unless on the score of fraud. He must rely on his covenant of warranty. Per Harper, Ch.

[Ed. Note.—Cited in Van Lew v. Parr, 2 Rich. Eq. 336, 338, 341; Maner v. Washington, 3 Strob. Eq. 181; Mitchell v. Pinckney, 13 S. C. 213; Childs v. Alexander, 22 S. C. 185; Lessly v. Bowie, 27 S. C. 196, 200, 3 S. E. 199; Moss v. Jefferies, 32 S. C. 199, 10 S. E. 939; Munro v. Long, 35 S. C. 359, 14 S. E. 824, 28 Am. St. Rep. 851; Baum v. Raley, 53 S. C. 39, 30 S. E. 713; Nathans v. Steinmeyer, 57 S. C. 393, 35 S. E. 733; Computing Scales Co. v. Long, 66 S. C. 382, 44 S. E. 963, 65 L. R. A. 294; Coleman v. Whittle, 79 S. C. 216, 60 S. E. 523, 128 Am. St. Rep. 841; Brown v. Thompson, 81 S. C. 382, 62 S. E. 440; Godfrey v. E. P. Burton Lumber Co., 88 S. C. 138, 70 S. E. 396.

For other cases, see Vendor and Purchaser, Cent. Dig. § 204; Dec. Dig. ⟸114.]

[This case is also cited and explained in Hay v. Hay, 3 Rich. Eq. 384, and in Duckett v. Butler, 67 S. C. 130, 45 S. E. 137, and distinguished therefrom.]

Before Harper, Ch., at Sumter, June, 1843.

This was a bill for the rescission of a contract for the sale of land.

A considerable portion of the land in question once belonged to John Baxter Fraser, who by his will devised the same to his

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*four sons. All the sons were alive and had issue living. The title which the complainant purchased was derived through one or more of the sons.

The bill alleged that at the time the complainant made the purchase from the defendant Stuckey, "he had no knowledge whatever of any interest in remainder, or any estate

whatever of third persons in any part of the premises; that he fully believed, and was so induced to believe by said Stuckey, and he agreed to pay a price accordingly, that said Stuckey owned, and was able to convey, as he undertook to do, an absolute fee simple title, and one free from all incumbrance."

The bill further charged that the said Stuckey, during the negociation of the trade, and at the time he made the conveyance of the land to the complainant, knew the incumbrance arising from the will of John Baxter Fraser, upon a very considerable portion of said land, as to quantity, and a still greater, as to value, and studiously and deliberately concealed such important information. That the complainant had been deprived of an advantageous sale of the premises, by reason of the incumbrance hanging over the title to the best portion of them. The prayer was either for a rescission of the contract, accompanied by such account as would place the parties in statu quo, or for a decree to compel defendant to perfect the title, if he could, and for general relief.

The decree of his Honor the Chancellor is as follows:—

The object of the bill was to obtain the rescission of a contract for the sale of land conveyed by the defendant, Hardy Stuckey, on the alleged ground of defect of title to a portion of the premises conveyed. It appears that the complainant is in the undisputed possession of the whole of the land conveyed.

I had occasion to consider this subject, in the case of Gillam v. Briggs, [Rich. Eq. Cas. 432,] decided by me at Newberry, which decision, I believe, was appealed from, but the appeal abandoned, and came to the conclusion that while a purchaser remains in quiet possession of the land, he cannot sustain a bill for a rescission or abatement of price, on the ground of an outstanding title. The grounds of the decision, (which I think is sufficiently supported by authority) are, that though there may be an apparent outstanding title, yet it does not appear that it will ever be prosecuted. There may be insuperable difficulties in the way of prosecuting it with effect. The purchaser may, perhaps, maintain his title by the lapse of time

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before it will be disputed, or if, at any *time, he shall be evicted, he will have his remedy on his covenant of warranty. On a bill for the specific performance of an executory contract for the sale of land, the purchaser who has accepted and retains possession, is bound to accept such title as the vendor is able to make. The alleged defect of title depends on the construction of the will of John Baxter Fraser, deceased, giving the land in question to his sons. The question is, whether a valid remainder is created by the will to the issue of his sons.

The testator first gives slaves to his sons respectively, "for and during his natural life, and at his death to the lawful issue of his body, and if he should die without lawful issue living at the time of his death, then," &c. He then gives the land to his three sons, for their natural lives, "and then subject in all respects to the like limitations as is provided in the preceding clauses," &c.

At the hearing I inclined to the opinion that the limitation to the issue served only to enlarge the estate of the parents to a fee simple conditional, under the rule in Shelley's case, (1 Coke. 93.) and did not create a remainder to the issue, as purchasers. But some reflection has made me more doubtful on this subject, and I prefer to rest the decision on the ground just taken.

There was understood, also, to be a contest upon evidence, whether any, or how much, of the complainant's purchase was affected by the will of John Baxter Fraser, but upon the expression of my opinion as to the first point, the evidence was not gone into.

It is ordered and decreed that the bill be dismissed.

The complainant appealed, on the following grounds.

1. That though the complainant be in possession of the land, undisturbed as yet, it is error to hold, as is done in the decree, that he must be evicted, or disturbed in his possession, before he can be entitled in this jurisdiction to a rescission of the contract, or to other relief.

2. That the allegations made by the bill disclose such a case of fraud, in contemplation of equity, as entitles complainant to relief.

3. That the case made by the bill in this cause entitled the complainant to the relief he prayed for, and the Chancellor erred in ordering the bill to be dismissed.

Preston and Withers, for the appellant, on

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the question *whether the complainant was entitled to relief in this court, supposing the title to be defective, cited 1 Bail. 217, 250, 259; 1 Hill, 326; Cheves, 115; 1 Sp. 125; Coop. Ch. Ca. 307; 3 Swanst. 165; 2 Ib. 287, 305; 2 Esp. R. 639; 1 Ib. 184; Peake R. 192; 1 Camp. 113, 401; Sug. on Vend. 347. On the question whether the limitation to the issue was good, they cited Fearne, 473, 117; 1 P. W. 563; 3 Ib. 258; 2 Atk. 646, 293; 1 P. W. 663; 4 T. R. 294; Lord Ray. 1440; 3 Atk. 298; Bail. Eq. 546.

W. F. DeSaussure, contra, cited, on the first question, 14 Ves. 125; 17 Ib. 273; 12 Ves. 375, 27; 15 Ib. 594; 19 Ib. 563; 1 Cox. 258; 10 Price, 117; 3 Swanst. 168; 1 J. and W. 173; 1 Mad. R. 310; 3 Russ. 171; 4 Des. 126; 2 McC. 186; 1 Johns. Ch. R. 213; 2 Ib. 519. On the second question he cited 2 P. W. 472; Cases Temp. Talb. 3; 3 Bro. P. C. 180, 273; 5 T. R. 323; 2 Wils. 322; 2 B. and P. 324; 4 East, 313; 2 Vern. 324; Amb. 358; Eden, 119; Fearne, 126, 136, 158; 2 Stra. 789; 2 Bro. P. C. 120; Doug. 342;

4 Burr. 2579; 1 McC. Ch. 60; Bail. Eq. 48, 535, 542.

Curia, per HARPER, Ch. In the circuit decree I have referred to the case of Gillam v. Briggs, [Rich. Eq. Cas. 432.] decided by myself at Newberry. I find that there were two cases of Gillam v. Briggs and Briggs v. Gillam, in which opinions were expressed on the same or an analogous subject. In the former of these cases, I considered chiefly the question whether a party going into the possession of land, under an executory contract to purchase, with a knowledge of the vendor's title, and without any stipulation for the maturing or perfecting the title before the execution of the contract, or the payment of the money, will be bound to accept such title as the vendor is able to make. The authorities seemed to me very full and satisfactory, admitting little question; nor, so far as I know, was the conclusion questioned. But if this be the law, then, much more strongly, when a party has gone into possession under a conveyance executed, with a similar knowledge of the title, he cannot sustain a bill for the purpose of rescinding it. The party defending is always in a better position in this court than the party prosecuting. Such an absurdity in the law can hardly be supposed, as that a party should be compelled, by the court, to execute a contract, when he might sustain his bill to rescind it, if it were already executed.

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*In the second of the cases referred to, I considered another question, which was regarded as of much more doubtful character. Whether a party who goes into possession under such contract to purchase, without knowledge of the title, and who afterwards coming to the knowledge, still continues in possession for a considerable time, using the property as his own, will not also be compelled to accept such title as the vendor is able to make. I decided that he was bound to accept such title, chiefly on the authority of the cases of the Margravine of Anspach v. Noel, 1 Madd. Rep. 313, and Fleetwood v. Green, 15 Ves. 594. But I do not perceive that this has any application to the present case.

The bill in the second of the cases, was for the rescission of the contract to purchase, and involved the question which is now before us. In the opinion it is said: "I have treated the case hitherto as if Gillam were now seeking a specific performance, and I think he would be entitled to it. But the case is certainly stronger against Briggs coming for a rescission on his part. I do not find that a contract of sale has ever been relieved against, on the ground of an outstanding title, while the vendee continues in possession, unless on the score of fraud. Contracts have been rescinded on the ground of mistake, but not on the ground of mistake in relation to an outstanding title, when there has been no eviction of the purchaser. Such is the case of Abbott v. Allen, 2 Johns. Ch. 519, in which Chancellor Kent refused to relieve against the payment of the purchase money, though an outstanding title was very satisfactorily shewn. That was the case of conveyance executed, but the reasoning will apply to one like the present. The Chancellor says, 'can this court proceed to try the validity of the outstanding claim in the absence of the party in whom it is supposed to reside, or must he be brought into court against his will, to assert or renounce a title which he never asserted, and perhaps never thought of? I apprehend there is no such practice or doctrine in this court; and that a previous eviction or trial at law is, as a general rule, indispensable.' 'The purchaser's resort in such cases must be upon his covenants of seisin or of warranty, should he be afterwards evicted.' See the cases there cited, and Bumpus v. Platner, 1 Johns. Ch. 213. With this agrees Westbrook v. McMillan, 1 Hill, 317, [26 Am. Dec. 187.] That was a law case, but it was the adoption of an equity doctrine."

I beg leave to throw out some other considerations. Nothing would tend more to the

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promotion of fraud and litigation than *the establishment of a contrary rule. In the frequent fluctuations of the commercial prosperity of the country—fluctuations to which our country seems more liable than any other—there is a corresponding fluctuation in the value of property. He who purchases land at a high price, will be tempted, when there follows a great fall of value, to discover and bring forward some claim which may have the effect of ridding him of his bargain. But this is a betrayal of his vendor's title, and against good faith. The case has occurred of a vendee who, upon such a fall of property, has been at great expense of time, labor and money, in seeking information from individuals and searching public offices, in order to ferret out a paramount title, which there was not the remotest probability would ever be prosecuted, which did not appear to be known to the person in whom it was vested, and which there was hardly a probability that he would prosecute successfully even if he knew it. This was scarcely less than fraud; yet according to the doctrine contended for, relief ought to have been granted in such a case, for there was clearly an outstanding title in some one.

The present bill contemplates that the court shall determine on the outstanding title by a reference, without bringing the parties alleged to have title, before the court. Yet, in general, the party having title is the only party competent to litigate it. This court has no authority to try titles, even if the proper parties were before it. Absurd consequences would follow, if the court should determine the validity of an outstanding

claim, and the alleged claimant should never after prosecute it, or should prosecute it unsuccessfully. Then, as said by Chancellor Kent, what right have you to bring into court a party who has never pretended or asserted any claim, in order to compel him now to assert it, or to renounce it forever? As I have observed, it is in bad faith towards the vendor, to stir up a claimant against his title.

It was strongly urged that relief ought to be granted in this court, because it will not be afforded in any other. The law courts, it is said, will not grant an abatement of price in such case, in a suit for the purchase money. I have no doubt that the decisions of the law courts were perfectly correct; but, with proper deference, I think the dicta of some of the judges—that relief will be afforded in equity—are founded on a mistaken view. Relief is to be afforded in no court, because there is no grievance. When the grievance is suffered, relief will be afforded.

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*It is within the very letter and meaning of the vendee's contract, that he shall not be entitled to any such relief. The vendor warrants the title to him—and this warranty alone it is which gives him a claim to any relief. What does this warranty mean? It means, that if the vendee's title should at any time be assailed by a proceeding at law, he will defend it, or make good the loss if he should fail to defend it successfully. It is hardly necessary to refer to Coke, or Blackstone, or Bacon, or Comyn, to shew that this is the true meaning of the word. It is said to be great hardship that he should be obliged to wait with this doubt hanging over his title, or should be unable to sell. It may be his misfortune, but if it be according to the terms of his contract, he has no right to complain.

I have said that any contract may be rescinded on the score of fraud; and such is the case of Edwards v. McLeary, Coop. Cases in Ch. 318, confirmed on appeal, 2 Swanst. 287. Fraud is said to be charged in this case. I have no doubt that if the vendor knew of an outstanding title and concealed it from the vendee, this would amount to a fraud. But if the vendee knew of the defect, there could, of course, be no fraud. The wrong and hardship would be inflicted on the vendor, if relief could be granted in such a case—the vendee having taken the title with his eyes open; having, in effect, stipulated to take the risk of being evicted and then to rely on his covenant of warranty, and then calling in a claimant to defeat his title. But there are, perhaps, cases in which the vendee will be presumed to know the title. The general rule is, that if a purchaser cannot make out a title, without coming to a knowledge of the defect, he will be presumed to know. It is not usual among us to furnish abstracts of title; but it is usual to examine the vendor's title deeds, or to require information of his claim of title. It may not be necessary to conclude any thing on this subject. The case would, perhaps, be remanded for the purpose of hearing evidence on the subject of fraud, but that we are with the defendant on the limitation in the will of John Baxter Fraser. I may remark, however, that the complainant could not have examined the title of the defendant Stuckey, without coming to a knowledge of the will of John Baxter Fraser. The conveyance to him refers to the title of Thomas Fraser, one of the sons who took under the will of John Baxter Fraser. The word fraud is not used in the bill. It charges that defendant "knew the incumbrance arising

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from the will of John Baxter Fraser, *and studiously and deliberately concealed such important information." He also charges that when he purchased he knew of no incumbrance or defect of title. This seems somewhat evasive. He does not state that he did not know of the existence and terms of John Baxter Fraser's will; and if he knew of this, it is immaterial that he put a wrong construction upon it. Or if defendant represented to him, in the strongest manner, that his title was good, only expressing his own opinion or conviction on the construction of the will, this would be no fraud. If, indeed, he had represented to him that he had taken the opinion of counsel, and the representation were false, this might amount to fraud. But, as I have said, it is not necessary to conclude any thing on this part of the case. Then, with respect to the limitation in the will of John Baxter Fraser. There is no question but that if there had been no more in the will than a gift to a son "for and during the term of his natural life, and at his death to the lawful issue of his body," this would have given an estate tail or fee conditional, under the rule in Shelly's case. The question is upon the effect of the limitation over, "if he should die without leaving issue of his body living at the time of his death." Does this, according to the established rule of law, sufficiently indicate the testator's intention, that the first taker should be restricted to a life estate, and the issue take as purchasers? If the limitation over had been simply on the event of not leaving issue, there is no doubt that this, as applied to real estate, or at all events after an estate tail, would be held to imply an indefinite failure of issue. The case of Barnfield v. Wetton, 2 B. & P. 324, seems to be one in which such a limitation, after a devise in fee, was held to be a good executory devise. So it was held by our own court, in the case of Mazyck v. Vanderhorst, Bail. Eq. 48, and such is the familiar doctrine of the English Courts. But this seems to be equivalent to leaving issue living at the time of the death. So it is always construed when applied to personal estate.

The case of Pearson v. Wright, Amb. 358,

Eden 119, quoted on the part of the defendant, is rather against him. It seems to be assumed in the case, that if such had been the terms of the limitation, they would have had the effect of restricting the first taker to a life estate. But the case is decided on other words in the will, plainly importing an indefinite failure of issue, and the former words were held not to apply to the limitation over. There is, therefore, no decision

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on the effect of these *words so applied. The case of Sparrow v. Shaw, 3 Bro. Parl. Ca. 120, seems to be sufficiently in point. The case was first heard on appeal from the great sessions in the court of King's Bench, and was twice argued in that court. (Reported as Shaw v. Weigh, Stra. 798.) The material words of the will in that case were—to the testator's sisters during their natural lives, "and if either of my said sisters happen to die, leaving issue or issues of her or their bodies, lawfully begotten" &c., then in trust for such issue; "and if it shall happen that both my said sisters shall die without issue, as aforesaid," which must mean issue living at the time of the death, then over. On the first argument in the King's Bench, the court expressed the opinion that the sisters took an estate tail. On the second argument, however, the court changed its opinion, and on some particular circumstance of the will, determined that the sisters were restricted to a life estate, and reversed the judgment of the court of Great Sessions. On the final appeal to the House of Lords, however, the judgment of the King's Bench was reversed, and the sisters held to be entitled to an estate tail. The case of Richards v. Lady Bergavenny, 2 Vern. 324, seems equivalent to this. That was a devise to Lady B. for life, and to such heir of her body as should be living at the time of her death, and in default of such, that is, of an heir of her body, living at the time of her death—over. This was held an estate tail.

The words heirs of the body and issue are generally equivalent in a will, though the former are regarded as the stronger and more technical words. The word heir of the body, in the singular number, has been thought a more appropriate word of purchase than heirs of the body. There can be no doubt that under the words of the will, the heir would have taken by purchase, if they had been applied to personal estate.

These cases are certainly strengthened by that of Doe ex dem. Gilman v. Elvey, 4 East, 313. In that case, the testator devised to his "son, Henry Gilman, and to the issue of his body lawfully begotten, his, her, or their heirs, equally to be divided, if more than one; and if my said son, Henry Gilman, shall have no lawful issue of his body living at the time of his decease, then," &c. Lord Ellenborough, all the other Judges concurring, expressed the opinion that the issue took as tenants in common, that is, by purchase, on the effect of the words, "equally to be divided between them," and the limitation to "his, her or their heirs;" but he does not resort to the limitation over,

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in *the event of the son's not leaving issue living at the time of his death, to confirm his conclusion.

The case of Forth v. Chapman, 1 P. Wms. 663, was the first in which a distinction was made as to the same words, when applied to real or personal estate. In that case, both real and personal estate were given indefinitely, with a limitation over in the event of dying without leaving issue. As applied to the personal estate, the words were held to mean "issue living at the death of the first taker," because such is the proper and natural meaning of the words leaving no issue; and it is only on the ground that such is the meaning of the words, that the limitation over is supported, and the indefinite bequest gave the absolute property in the personalty. But with respect to the real estate, there being no words of inheritance or perpetuity, the first taker could only have had an estate for life, and the remainder, in the event of the tenant for life's dying without leaving issue, would have been undisposed of, unless the words had been construed to import an indefinite failure of issue, so as to enlarge his estate to an estate tail by implication. This is called a reason of necessity. But the very same necessity would have existed, and in the same degree, if the terms of the limitation over had been carried out more explicitly—leaving issue living at the time of his death. Following this case, the same meaning has been attributed to the words in every instance of their being applied to real estate—or perhaps, as I have said, after an estate tail—and such is the established law.

The decree is affirmed.

JOHNSTON and DUNKIN, CC., concurred.

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1 Rich. Eq. *414

*MARTIN CAUGHMAN and JOHN MEETZ v. HENRY J. DRAFTS et al.

(Columbia. May, 1845.)

[*Usury* ⟸27, 93, 102.]

Complainants confessed a judgment at law to the defendant, and afterwards, at different times, gave him their notes, as compensation, over and above the legal interest, for indulgences on the execution. On these notes the complainants made sundry payments. *Held*, that the notes were usurious, and that the complainants were entitled to have the payments made on them credited on the judgments, and the notes delivered up and canceled. *Held*, further, that the Court of Equity had jurisdiction of the matter.

[Ed. Note.—Cited in Cornwell v. Holly, 5 Rich. 52; Harp v. Chandler, 1 Strob. 466.

For other cases, see Usury, Cent. Dig. §§ 71, 194, 244; Dec. Dig. ⟸27, 93, 102.]

Before Dunkin, Ch., at Lexington, June, 1843.

The decree of his Honor the Chancellor is as follows:

On the 18th March 1840, Henry J. Caughman, with the complainants as sureties, gave their joint and several note to the defendant, Henry J. Drafts, for two thousand six hundred dollars, payable on the 1st of November following. On the 31st December, 1840, they confessed judgment on the said note.

On the same day, H. J. Caughman gave his note to the defendant, for one hundred and fifty five dollars, 16 cents, being a compensation, over and above the legal interest, for a stay of execution for one year, or until 1st January, 1842.

On the 7th February, 1842, the complainants also signed the last mentioned note, and they, with H. J. Caughman, gave to the defendant another note for one hundred and sixty-three dollars, being a compensation, over and above legal interest, for indulgence on the execution for another year.

On the second of January, 1843, Martin Caughman, one of the complainants, paid the defendant two hundred and twenty-five dollars, gave a new note signed by himself and the other complainant, for one hundred and thirty-six dollars, and took up the former two notes, already described.

On the 10th February, 1843, the complainants gave the defendant another note for two hundred and fourteen dollars and twenty-eight cents, in consideration of another year's indulgence, which was over and above the legal interest on the judgment so delayed. On this last note, several payments have been made, and the defendant is using coercive measures to recover the balance.

The allegations of the bill are that the payments made by the complainants on the judgment of December, 1840, added to the usurious payments, have fully satisfied that

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judgment, and the *prayer of the bill is, among other things, that the judgment may be satisfied, and the two notes be delivered up to be cancelled.

It may be as well first to dispose of the amended bill. The answer of John Black, as well as the evidence, prove, beyond reasonable doubt, that the complainants must have acted under some misconception in this matter. The allegations are entirely unsustained—and the bill as to John Black and John Fox, must be dismissed.

Nor does the evidence sustain the allegation, that the consideration of the judgment was infected with usury. The complainants have made a witness of the defendant Drafts, by the character of the bill, and the answer repels the charge. Besides, the case of Fowler v. Henry, 2 Bail. 54, is conclusive, that unless the confession of judgment was part of the original agreement, (which is not suggested.) the party is estopped from charging usury.

But all the subsequent transactions seem to the court plainly obnoxious to this objection. It was said there was no loan of money, as the judgment was already confessed. But as is said by Mr. Ord, p. 29, "the forbearance is nothing more than lending the money for a further time." The court looks at the transaction "as equivalent to a loan"—see Manners v. Postan, 3 Bos. and P. 343; Wade v. Wilson, 1 East, 195.

Then it was urged that the payments by the complainants were voluntary. But to this the answer is given by Sir Joseph Jekyll, in Bosanquet v. Dashwood, (cases Temp. Talb. 37.) It was there insisted that the party "had acknowledged the accounts, and voluntarily paid." But the master of the rolls decreed that the defendants should account, and that if more than what was due, with legal interest, had been received, it should be refunded. Lord W. Talbot, affirming the decree, said "this court would never see a creditor running away with an exorbitant interest beyond what the law allows, although the money has been paid. The court would relieve against what was unjust and oppressive, though the party may have submitted for a time to the terms imposed upon him. The payment of the money will not alter the case in a Court of Equity, for it ought not to have been paid. The debtor was oppressed, and his necessities obliged him to submit to these terms. Nor can it be said in any case of oppression, that the party oppressed was particeps criminis, since it was this very hardship which he labored under, and which was imposed upon him by anoth-

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er, *that constituted the crime." "Must he keep," concludes the Chancellor, "what he has no right to, merely because he has got it in his hands." See Palmer v. Lord, 6 J. C. R. 103; Dey v. Dunham, 2 J. C. R. 182.

The Court is of opinion that the complainants are entitled to have an account of what has been paid on the notes, and to have the same applied, as far as may be necessary, towards satisfaction of the judgment of Dec. 1840.

It is ordered and decreed that the commissioner take an account of the amount due on the judgment in favor of the defendant, crediting the complainants with all payments made thereon, as well as with the payments on account of the notes described in the pleadings, and that he report the result. It is further ordered that the notes of the 2d January, and 10th February, 1843, be delivered up to be cancelled.

Finally, it is ordered, that as to John Black and John Fox, executor W. S. Miller, the bill be dismissed at the cost of the complainants, and that they also pay the costs of their own amended bill—and all other costs to be paid by the defendant Henry J. Drafts.

The defendant appealed, on the following grounds, viz:

1. Because money paid by a debtor for forbearance, on an existing bona fide debt, cannot be recovered back, even if such payment exceed the rate of 7 per cent. per annum.

2. Because the judgment mentioned in the pleadings, is free from the infection of usury, and ought not to be invalidated or credited with the amount of any payments made by the complainants, in order to procure indulgence thereon, which were not intended when made to be applied thereto.

3. Because the several payments made by complainants to the defendant Drafts, on the notes described in the pleadings, were not made on said judgment, nor were they intended, either by the complainants or Drafts, when made, to be applied thereto, and the complainants have no right now to have the amount of such payments applied to the credit of said judgment.

4. Because the application of the amount paid on said notes to said judgment, would be equivalent to a recovery thereof in a separate suit, to which it is submitted the complainants have no right, in this or any other court.

5. Because, if the complainants are entitled to relief, they have a plain and adequate remedy at law.

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Curia, per JOHNSON, Ch. This court concurs in the decree of the Circuit Court. There are, however, two questions mainly relied on here, which deserve further notice. They are, (1) whether the complainants are entitled to set off the usurious interest against the judgment at law; and if so, (2) whether this court has jurisdiction of the matter.

In Clark v. Hunter, 2 Speers, 86, (and it would be unprofitable to trace further back for authority,) it was solemnly ruled that, in an action at law on a promissory note, the defendant might set off against the principal debt, usurious interest paid on it. In that case it is said, arguendo, that the borrower having voluntarily paid the usury, he could not, since the Act of 1831, maintain an action to recover it back; and it is insisted that this is in effect a bill to recover back money so paid. But I am not altogether prepared to assent to such a construction of the Act, nor can I perceive how it can be reconciled to the right of the party to set it off in an action at law to recover back the principal sum. If it may be set off, it would seem to follow that an action at law would lie to recover it back. If the right exists there must be an adequate remedy. It cannot be set off here, because the judgment at law was obtained before the usury was paid,—apart from that consideration, the object of this bill is to obtain precisely what was allowed in the case referred to—not to recover back money paid, but to set off, against the judgment at law, money paid to the defendant, which he ought to have applied towards its satisfaction.

No notice is taken of the objection to the jurisdiction of the court in the circuit decree, and I suppose it was not insisted on there, and although it is raised in the answer, I question much the propriety of considering it here, as the jurisdiction of this court is strictly appellate: nor do I think that the Chancellor on circuit is bound to look critically into the pleadings to ferret out something that the counsel did not think worthy of being brought to notice. There is, however, no difficulty about the matter. The argument in support of the objection is, that if the complainants have a right to set off the money paid on account of excessive usury, they may recover it in an action at law, and having a remedy there they cannot come into this court. The defendant has a judgment against the complainants, which, but for the interposition of this court, he might enforce at any moment, and thus compel them to pay again a debt which they have already paid;

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and if they are driven to law to recover *it back, they may be despoiled before the relief comes. It has occurred to me that the complainants might have substantially obtained the relief they now seek, in the law court, on a rule to shew cause why satisfaction should not be entered on the judgment; but that is an equitable proceeding, and although exercised there, is, I suppose, not incompatible with its exercise here. The bill, however, prays that the unpaid usurious notes may be delivered up and cancelled, and that is itself a distinct ground of equity jurisdiction never exercised by the law court.

The appeal is therefore dismissed, and the decree of the Circuit Court affirmed.

HARPER and JOHNSTON, CC., concurred.

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IN THE COURT OF ERRORS.

PRESENT.

HON. DAVID JOHNSON,
" WILLIAM HARPER,
" JOB JOHNSTON,
" B. F. DUNKIN,
" J. S. RICHARDSON,(a)
" J. B. O'NEALL,
" J. J. EVANS,
" A. P. BUTLER,
" D. L. WARDLAW,
" EDWARD FROST.

1 Rich. Eq. *419

*FERRIS PELL and Wife et al. v. EXECUTORS OF H. S. BALL et al.

(Columbia. May, 1845.)

[*Appeal and Error* ⇐33, 359.]

A case cannot be placed on the docket of the Court of Errors, as involving a constitutional question, without the order of the Court of Appeals which heard the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 110, 1938; Dec. Dig. ⇐ 33, 359.]

[*Appeal and Error* ⇐358; *Courts* ⇐244.]

An appeal does not lie to the Court of Errors, on any question, at the option of a party, either from a circuit decision, or a decision of either of the Courts of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1932; Dec. Dig. ⇐358; Courts, Cent. Dig. § 738; Dec. Dig. ⇐244.]

Rules prescribed for the Court of Errors.

[Ed. Note.—Cited in City Council v. Ahrens, 4 Strob. 258.]

On the first day of this term of the Court of Appeals, the Court of Errors was convened, to hear several causes which had been ordered to that tribunal; and on that day, the clerk of the court, at the instance of the counsel of Mrs. Amelia Ball and Elias Nonus Ball, placed this case on the docket of the Court of Errors, and this was a motion to strike the case from the docket. For the questions raised by the appeal, and the disposition which had been made of the case, see the case as reported, ante, p. *361.

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*Petigru, for the motion.

Hunt, contra, first presented a petition from Mrs. Ball and her son, the prayer of which was, "that their cause may be docketed and called for hearing, at such time as the court may prescribe," and then said,

Under the Act of 1836, is this a case the court is bound to hear?

The words of the Act are, "that upon all constitutional questions, arising out of the constitution of this State or of the United States, an appeal shall lie to the whole of the judges assembled to hear such appeals." This is a distinct substantive clause. Then arises the question, whether the Court of Appeals, or the party against whom the decree is made, is to decide whether the question arises out of the constitution. The analogy of the provision in relation to the United States' Supreme Court may illustrate this point. Where a law, or the constitution, of the United States is drawn in question, the party against whom the decision is made, is entitled to a writ of Error to the Supreme Court. If the State Court, by deciding that the case does not arise under a law or the constitution of the United States, can arrest a writ of error, it is clear that they decide the very question reserved to the Supreme Court. To say that the party has no claim under the constitution, is to decide that it is not a constitutional question, and so that there is no appeal, and thus render the right of appeal a nullity. Here the appellant alleges, that by the constitution the Court of Equity has no jurisdiction to sell a fee simple, not claimed under the Act of 1791 for purposes of partition. The court of Appeals has ordered or sanctioned such a sale, and the party against whom the decree is made, appeals, and submits that question to the Court of Errors. Here, then, is a clear right. But it is objected that the appeal should be direct from the circuit. If so, then it is clear the appellant must decide in

(a) During part of the term.

the first instance, if it is a constitutional question, and this answers that objection; for if the Appeal Court are to decide that point, the case must go before them. But the law did not contemplate the appeal to the Court of Errors except in the last resort—for non constat, but the parties may be satisfied with the decree of the Court of Appeals, and no further appeal may be necessary. It follows, that the party who makes the question, has a right of appeal, not because it is clear that it is a constitutional question, but because it is a debateable point, to be resolved by the Court of Errors.

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*The next point is, in what manner is this appeal to be prosecuted? The answer is, in the absence of any rule, in a prompt and reasonable manner.

In this case, the decision was made at the late extra session of the Court of Appeals in Charleston. On the very first day a Court of Errors was formed, the case was put on their paper of causes, and notice given to the other side. Can a right be forfeited under such circumstances? The eighth clause of the Act requires the Judges to make rules for the practice of the Court of Errors. No such rules have been promulgated. In their absence has not due diligence been used?

Curia, per HARPER, Ch. This case was placed on the docket of the Court of Errors, as involving a constitutional question, by the counsel of the party, without any order of the Court of Appeals which heard the cause, and this is a motion to strike it from the docket.

We are of opinion that the motion to strike the case from the docket, must be granted. The fifth section of the Act of Assembly of 1836, 7 Stat. 340, provides "that all appeals from the courts of law shall be heard and determined in a Court of Appeals, consisting of the law judges; and that all appeals in equity shall be heard and determined in a Court of Appeals, consisting of the Chancellors."

Nothing can be more explicit than this, that every appeal, whether involving a constitutional question or not, must be taken to the separate Courts of Appeals; thus constituting them generally, and as I shall shew with respect to suitors, courts in the last resort. It follows, that if cases are brought into the Court of Errors, they must come from one of those courts.

Then, the seventh section of the Act provides, "that upon all constitutional questions, arising out of the constitution of this State or of the United States, an appeal shall lie to the whole of the Judges, assembled to hear such appeals. That an appeal shall also lie to the whole of the Judges upon all questions upon which either of the Courts of Appeal shall be divided, or when any two of the Judges of the court shall require that a cause be further heard by all the Judges."

I admit that when an appeal is given, it is generally understood as of course to imply that it shall be at the option of the party against whom judgment is pronounced. But it is absolutely impossible to give this mean-

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ing to the word, in two of the *instances in which it is used in the clause in question. Upon every equal division, it is made the duty of the court to carry the cause into the Court of Errors, whether parties desire it or not. The reference to the Court of Errors, on the demand of two of the Judges, has, of course, nothing to do with the wishes of the parties, and does not admit their interference. Where an appeal is given in the ordinary sense, it is understood, of course, that the judgment by which he is aggrieved shall be rendered before the party's right of appeal can exist. But the case of an equal division necessarily implies that there shall be no judgment; and I am satisfied that the power given to two Judges of demanding a Court of Errors, can only be exercised before judgment rendered.

If the right of appeal were the right of the suitor, he could only exercise it after judgment against him; but the Appeal Courts have familiarly, and without doubt or question, ordered cases to the Court of Errors, if upon the opening of them any constitutional question appeared to be involved.

Then, it is a well known rule for the construction of legal instruments, as laid down in Henry and Talbird v. Archer, Bail. Eq. 535, where the English cases are referred to, that where the same word is used several times in the same instrument, it is to be understood in the same sense, unless there is something to indicate clearly that it was intended to be used in a different sense. It adds to the force of the rule, that the word is repeated in the same sentence, and in close juxta-position. But this would seem equally applicable to an Act of the Legislature. It is no less a rule of reason than of law, and must necessarily be resorted to by one who would ascertain the true meaning of words.

Then, what was the spirit and purpose of the Act? According to Lord Coke's rule, what was the mischief, and what remedy is provided? In the case of an equal division, the natural dissatisfaction of the party whose cause is thus decided, may have entered into the motive of the Act; but undoubtedly, the principal object was to prevent the detriment which the public would sustain from the law's remaining uncertain.

The right of two Judges to demand a Court of Errors, indicates the court to be merely a consultative one, like the English Court of Exchequer Chamber, which any of the superior courts may assemble, and whose judgments are authoritative, though the suitor has no right of appeal to it. Then, what was

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the *evil in the case of constitutional questions? Certainly it was not that the suitor had not a double appeal, or it would have been allowed in all cases, whether constitutional questions were involved or not. The suitor is as much aggrieved by an erroneous decision, depriving him of property or any other right, if the question be one of law merely, as if it were of law affected by the constitution. Constitutional questions were regarded by the Legislature as of great importance, and the decision of them as affecting not only the party, but the public.

It concerns the public that the constitution should be maintained inviolate; and the Legislature has therefore made it the duty of the court to submit all such questions to all the Judges of the State. It is said that the courts whose errors are intended to be corrected, are thus made the Judges in the last resort of the propriety of their own decisions. But every court in the last resort, must, of necessity, be the judges of the correctness of their own decisions, as of their own jurisdiction; and, as I have shewn, the separate Appeal Courts are the general courts of last resort. Is there any hardship in this? Before the establishment of the Court of Errors, was it a grievance that suitors had not a double appeal? Is it a hardship now, that a double appeal is not allowed in every case? Certainly, it is a benefit to the losing party, that it should be the duty, or in the power of the court, to submit his cause to an ulterior tribunal.

The eighth section of the Act provides "that it shall be the duty of the judges to make all proper rules and regulations for the practice of the said Court of Errors, and for the mode of bringing causes before them." The present question is of the mode of bringing causes before the Court of Errors, and the clause indicates the authority of the court over the matter. It is a rule, which the court has adopted and acted upon, though it has not been made public, that the method of assembling the Court of Errors shall be by a note addressed by the presiding officer of one of the appeal courts to the presiding officer of the other. There is no time fixed by law for the meeting of the Court of Errors; but this depends entirely on the action of the two courts. Yet if the suitor may appeal at his option, he must of necessity have the right of requiring the court to assemble to hear his appeal. Or is it only when the court is formed, and there is a docket of causes, which the court has ordered there, that he has a right to come in and add his

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cause to the docket? *It is a possible case that for years neither court should order a cause to the Court of Errors.

It is argued, that to decide that no constitutional question is involved, is to decide the constitutional question, and the Act of Congress of 1789, (1 Story Laws U. S. 61,) giving an appeal to the Supreme Court of the United States from the State courts, in the last resort, is referred to. The Act provides "that where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties, or laws, of the United States, and the decision is in favour of such their validity," [U. S. Comp St. 1913, § 1214,] an appeal shall lie. To decide in favour of the validity of a law which is charged to be contrary to the constitution, is certainly to decide that there is no constitutional question involved in the case. The constitution does not touch the question.

But the Act gives the right of appeal in that very case,—where the court shall decide that there is no constitutional question involved,—and there is nothing in the Act to shew, as in our Act, that the word is used in any other than the ordinary sense,—at the will of the party. Indeed it could not be otherwise, for Congress had no power to legislate for the State courts so as to make it their duty to transmit causes to the Supreme Court for the purpose of being reviewed. And with respect to the apprehended difficulties of appealing to the Supreme Court of the United States, it is plain, that if some action be not taken by the court itself, the decision of one of the Courts of Appeals is the decision of a court in the last resort, and the appeal lies of course.

It certainly enters into our consideration, that the construction contended for would render the administration of justice, under our present system, utterly impracticable. It is already very onerous. From the establishment of the system, it was foreseen, from the natural disposition of men to divide the responsibility of deciding difficult and important questions, that there would be too great a tendency on the part of the two courts, to throw business into the Court of Errors. The result has been found to correspond. But if it were left to the option of the parties, in every case, to have an ulterior appeal, it is plain that it would be impossible to get on. On the construction contended for, this would

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be, in effect, the result. There is *hardly a case in which some pretext of raising a constitutional question might not be found. Nay! without any pretext at all, the suitor, if the matter depended only on his will, might docket his cause as containing a constitutional question, and the falsehood of the pretext could not be detected till the cause should be opened for hearing in the Court of Errors. This would be often resorted to for purposes of delay, and when the docket of the court shall have accumulated, the delay would be interminable. Is it not safer to leave it to the court, whose duty it will be to

send the cause to the whole of the judges, not only in cases in which a constitutional question is clearly involved, but in those in which a question can fairly be made?

There must be a discretion which is not precisely defined. If there is any danger of abuse in this, it is that the discretion will be too liberally exercised; and there is no hardship on the suitor, who has already exercised all the right of appeal which the constitution intended him to have.

The point was in fact determined in the case of Pedrieau v. Hunt, Riley's Eq. 92. It is said, "If any constitutional question were really involved in the case, it would be necessary to reserve it for the Court of Errors. But however desirous we might be to have the judgment of the ultimate tribunal on an interesting public question, yet we should not be justified in making an inofficious question, which is not in fact involved in the cause."

Upon the opening of a cause in one of the Courts of Appeals, the counsel concerned may move or suggest an order for sending the case to the Court of Errors, as plainly involving a constitutional question, but if the suggestion be adopted, the order will be regarded as made on the court's own motion. If the order be refused, then, on the hearing on the merits, counsel will be fully heard on any constitutional question which may appear to them to be involved in the cause, and consequently on the propriety of sending the case to the Court of Errors; and they will not be entitled to be heard a second time, if the point should be decided against them. If any constitutional question be not made at the principal hearing, parties ought not to be permitted to make it by an original application at any time after the judgment is rendered. This would be a new and inexhaustible source of litigation and delay. Our views on the subject of the Act of 1836, result in the following propositions, which may be regarded as rules.

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*In no case whatever will an appeal lie directly from any circuit court of law or equity to all the judges assembled as a Court of Errors.

No cause shall be placed on the docket of the Court of Errors, unless by the order of the appeal court in which the cause was heard or opened.

No application will be entertained by either court, by petition or otherwise, nor will argument be heard on any motion for sending a cause to the Court of Errors, after judgment rendered.

In every case, the court requiring the assembling of a Court of Errors, shall, so far as practicable, unless all questions and matters involved in the cause be referred to the said court, specify the particular questions and points of law on which it may desire the judgment of that court.

The motion is granted.

JOHNSON, JOHNSTON and DUNKIN, C.C., and O'NEALL, EVANS, BUTLER, WARDLAW and FROST, JJ., concurred.

RICHARDSON, J., absent at the hearing.

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1 Rich. Eq. 426

JEANNETTE WALLACE and Others v. ROBERT McCOLLOUGH.

(Columbia. May, 1845.)

[*Frauds, Statute of* ⊂⊃102.]

If a person, intending to convey lands, request a witness, who is present, to sign his name to the deed for him, which the witness does in his presence; quære? is the deed sufficiently executed under the statute of frauds to convey the lands?

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 191; Dec. Dig. ⊂⊃102.]

[*Deeds* ⊂⊃51; *Husband and Wife* ⊂⊃29.]

Supposing such a deed not to be sufficiently executed to convey the lands, then quære? can the person intending to convey subsequently assent so as to make the deed binding on the parties?

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 97; Dec. Dig. ⊂⊃51; Husband and Wife, Cent. Dig. § 166; Dec. Dig. ⊂⊃29.]

[*Deeds* ⊂⊃47.]

Such an execution is sufficient to pass personal property.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 104–110; Dec. Dig. ⊂⊃47.]

[*Husband and Wife* ⊂⊃31.]

The following description in the schedule to a marriage settlement, to wit, "one tract of land on Fairforest creek, containing 150 acres, more or less," *held* to include two parcels of land containing two hundred and thirty nine acres, which adjoined, or nearly adjoined, and were regarded as one tract.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 182; Dec. Dig. ⊂⊃31.]

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[*Husband and Wife* ⊂⊃124.]

*Where a married woman, whose lands had been settled to be at her disposal after the coverture, joined her husband in conveying the same to purchasers, but relinquished her inheritance only to a part; *held*, that she had a right to require her husband to hold the proceeds of the land in which she had not relinquished her inheritance, subject to the uses of the settlement; aliter as to the part in which she had relinquished her inheritance.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 89, 449–452; Dec. Dig. ⊂⊃124.]

[*Husband and Wife* ⊂⊃31.]

The schedule to a marriage settlement contained the following description, "also the following notes of hand, one given by J. P. to the said Elizabeth" (the settlor) "for $1691, with interest thereon—one given by W. for $1500, with interest thereon." The settlor owned no notes answering to the description, but owned three

notes on J. P., the principal sums of which amounted to $790, and, the interest thereon to $878.70, making, of principal and interest, $1668,70, and seven notes on W. the principal sums of which amounted to $1430,84, and the interest to $1382,59, making, of principal and interest $2813,43. *Held*, that the deed conveyed the whole amount due by J. P. and $1500 of the amount due by W.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 182; Dec. Dig. ⟸31.]

[*Evidence* ⟸461.]

Parol evidence would have been inadmissible to shew which notes, or whether all, were intended to be conveyed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2068, 2169–2133; Dec. Dig. ⟸ 461.]

[*Evidence* ⟸448.]

Where specific things are described in a will or deed, the existence and qualities of the things which, it is alleged, pass under the instrument, may be ascertained by parol; and when, in this process, two things are proved to exist, each satisfying the description, an ambiguity, previously latent, is created by parol, which parol evidence may remove.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084; Dec. Dig. ⟸ 448.]

[*Evidence* ⟸448.]

But where, of two things presented, neither tallies with the description, it is against principle, whatever anomalous cases may be found in the books, to receive evidence which of them was intended, or whether both were intended.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084; Dec. Dig. ⟸ 448.]

[*Husband and Wife* ⟸124.]

Where a husband used funds in the purchase of slaves which, by marriage settlement, had been conveyed to a trustee for the use of the husband during the coverture, and afterwards to be at the disposal of the wife, and had expressed the intention of taking the slaves out of the State, he was required to give security to refund the principal sum at the expiration of the coverture, and the decree was declared to operate as a lien on his property until he should give the security.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 450; Dec. Dig. ⟸124.]

[*Husband and Wife* ⟸124.]

The husband being entitled to the interest and profits of the funds during the coverture, *held*, that the court could not attach a trust upon the slaves, which he had purchased with the funds, further than to declare a lien on them for the amount of the principal.

[Ed. Note.—Cited in Buist v. Williams, 88 S. C. 280, 70 S. E. 817.

For other cases, see Husband and Wife, Cent. Dig. §§ 89, 449–452; Dec. Dig. ⟸124.]

[This case is also cited in Green v. Green, 56 S. C. 194, 34 S. E. 249, 46 L. R. A. 525, and distinguished therefrom.]

Before Harper, Ch., at Edgefield, June, 1844.

The decree of his Honor the Chancellor is as follows:—

On the 23d of February, 1827, the defend-

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ant, Robert McCol*lough, and his present wife Elizabeth, then Elizabeth Wallace, in contemplation of their marriage, executed, or attempted to execute, a deed, reciting the said Elizabeth to be seized and possessed of considerable real and personal property, as specified in a schedule thereto annexed, and thereby conveyed the same to William Wallace, in trust, to permit the intended husband to receive the interest and profits, during the joint lives of himself and his wife; after the death of either the whole to be at her disposal.*(a)*

(*a*) The marriage settlement, the schedule thereto, and the report of the commissioner, being frequently referred to in the decrees, and being necessary to a clear understanding of the case, are here given in full. R.

Marriage Settlement and Schedule.

South Carolina, Union District.

This indenture tripartite, made the twenty-third day of January, in the year of our Lord one thousand eight hundred and twenty-seven, between Robert McCollough of the first part, Elizabeth Wallace of the second part, and William Wallace of the third part. Whereas, a marriage contract is intended shortly to be had and solemnized between the said Robert and Elizabeth—and whereas, the said Elizabeth is seized and possessed of considerable real and personal estate, consisting of those lands, tenements, personal property and other matters and things, as by reference to the schedule hereunto attached will more fully appear; and it has been agreed that the said Robert should, after the said intended marriage, have, receive and enjoy, during the joint lives of the said Robert and Elizabeth, the interest and profit of the said lands, tenements, personal property and other matters and things in the said schedule set forth; that the same, and the profits, after the death of either of them, should be at the disposal of the said Elizabeth, notwithstanding her coverture. And whereas, it has also been agreed that in case the said Elizabeth should, after the intended marriage, happen to survive the said Robert, she would not claim any part of the real or personal estate whereof the said Robert should be seized of or possessed at any time during coverture, by virtue of the right of dower or otherwise. Now this indenture witnesseth, that in pursuance of the before recited agreement, and in consideration of the sum of ten dollars to the said Elizabeth paid by the said William Wallace, by and with the privity, consent and agreement of the said Robert, testified by his being made a party to and his sealing and delivery of these presents, hath granted, bargained and sold to the said William Wallace, his executors, administrators and assigns, all the land, tenements and other property, real and personal, agreeable to schedule hereunto annexed, to have and to hold the same unto the said William Wallace, his heirs, executors and assigns; in trust, nevertheless, and for such purposes as have been heretofore specified and set forth, the same being completely in trust as aforesaid.

In testimony whereof we have hereunto affixed our hands and seals, on the day first above written, in the presence of

Robert McCollough, [L. S.]
Elizabeth Wallace, [L. S.]
Wm. Wallace. [L. S.]

Cloe M. Sanders,
Hancock Smith,
J. McKibbin.

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*The intended wife did not sign the instrument herself, but requested a witness who was present to sign her name for her, which she did in her presence.

Among the property specified in the schedule, was a tract of land containing one hun-

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dred and fifty acres, more or less, ten *slaves,

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*A schedule of the lands, tenements, hereditaments, personal property, choses in action, belonging to Elizabeth Wallace, to be attached to a deed of trust hereunto annexed, being duly assigned by the parties being therein concerned, on the same day and year therein mentioned.

Robert McCollough, [L. S.]
Elizabeth Wallace, [L. S.]
Wm. Wallace. [L. S.]

Cloe M. Sanders,
Hancock Smith,
J. McKibbin.

One tract of land on Fairforest Creek, Union District, containing 150 acres, more or less—one negro man named Will, one negro man James, one negro man Ben, one negro man Ephraim, one negro boy named Sam, one negro boy named Alexander, one negro boy Jacob, one negro woman named Phillis, one negro woman named Minda, one negro girl Unice—also the following notes of hand, one given by John Parham to the said Elizabeth, for one thousand six hundred and ninety-one dollars, with interest thereon—one given by William Wallace for one thousand five hundred dollars, with interest thereon—one note of hand given by Martha Sanders for one hundred dollars, with interest thereon.

State of South Carolina, Union District.

James McKibbin personally appeared before me and made oath that he saw Robert McCollough, Elizabeth Wallace, by her agent Cloe Sanders, and William Wallace, sign and acknowledge the within deed of trust to William Wallace, for the uses and purposes within mentioned, and that himself, Hancock Smith and Miss Cloe M. Sanders witnessed the due execution thereof. J. McKibbin.

Sworn to and subscribed before me, this 30th January, 1827. J. Rogers, Q. U.

Recorded January 4, 1827.

Report of the Commissioner.

The matters of account in this case having been referred to the commissioner, at the last term of this court, reserving the equities of the parties, I beg leave to report, that in the schedule attached to the deed of marriage settlement, "is included" "a tract of land on Fairforest Creek, Union District, containing one hundred and fifty acres, more or less." According to the evidence of Messrs. Rice and Dogan, Mrs. McCollough, before and at the time of her marriage, owned a body of land on Fairforest Creek, Union District, containing two hundred and thirty-nine acres; this body, it seems from the re-survey and grants taken out after the marriage, in the name of Mrs. McCollough, was in two parcels, but from the proof they either adjoined, or so near it as to be regarded as one tract. These tracts were sold by defendant—the one to John Parham for $700, the other to Clough Ming for $500. It seems that these tracts were the only land owned by Mrs. McCollough. I am satisfied that these tracts were regarded as one, and is the land referred to in

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the schedule attached to the deed of *marriage settlement. The defendant therefore is chargeable with $1,200 received from the sale of said land. The defendant admits that he received a note of hand, given by John Parham to the said Elizabeth, for one thousand and six hundred and ninety-one dollars, and a note of hand given by William Wallace, for one thousand and five hundred dollars. There was also a note of hand of Martha Sanders, for one hundred dollars, respecting which there is no question.

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*The schedule annexed to the deed is not signed in the usual manner at the foot. There is first a caption—"A schedule of lands," &c., to which the signature of the parties is affixed; then follows the schedule itself. The land owned by Elizabeth Wallace was made of two tracts, adjoining each other, or nearly so, and I should concur with the commissioner, if it were necessary to decide the question, that both passed under the

the ten negroes named in the schedule attached to the deed of marriage settlement.

In the schedule is set forth a note on John Parham for $1,691, with interest. It appears from the evidence, and a receipt of O'Neil & Spencer, attorneys at law, given to Robert McCollough, that he placed in their hands three notes for collection on John Parham; one for $295, due 1st May, 1804—one for $300, due 21st Aug., 1810, and the other for $195, due 7th Feb., 1822. These notes were payable to Elizabeth Wallace. And it appeared in evidence that a suit was brought in Union District, on a new note, supposed to have been substituted in place of these notes, by Robert McCollough and Wife v. executors of John Parham. The defendant admits the receipt of the money collected in this suit, and also that he received from executors of John Parham in part payment thereof four negroes, viz: Jacob, Anderson, Lindy and her child Ephraim, at $1,200, and the balance in a horse and cash. Jacob was sold by defendant for $400. These notes amount, in principal and interest, at the date of the deed, to $1,668,70, and I am satisfied that these notes were intended to be described in the schedule.

In the schedule is mentioned a note on Wm. Wallace, for one thousand five hundred dollars. It appears that the defendant received nine small notes, all payable to Elizabeth Wallace by Wm. Wallace. The principal of these notes amount to a small sum over $1,700, but from the statements in writing, receipts and memorandums of settlements between the parties, it appears that these notes were regarded by the defendant as the property of his wife, and I am satisfied that these notes were designed to be described in the schedule. It appears that these notes amounted, in principal and interest, at the date of the deed, to $3,224.70, and the defendant admits that in part payment thereof he received from the executor of Wm. Wallace nine (9) negroes, at the price of $3000, which he has now in his possession, except four, which he sold to Harrington for $1,175. The defendant admits the receipt of the note of Martha Sanders for $100, due 16th March, 1825, and that he collected the money.

From the foregoing statement it will be seen that the defendant received on John Parham's notes, ...	$1,668 70
Defendant received on Wm. Wallace's notes, ...	3,224 70
From Martha Sanders on note, ...	112 54
From sale of land, ...	1,200 00
Amounting in the aggregate to....	$6,205 94

All which is respectively submitted, by

S. S. Tompkins, C. E. E. D.

description. There were no such notes of hand as those of Parham and Wallace described in the schedule; but several small notes of Parham and of Wallace respectively, making up in the aggregate about the amount of the respective notes of each as set forth in the schedule. The amount of these notes was afterwards included in single notes, given by the executor of Parham and of Wallace, respectively. The defendant afterwards received from the executor of Parham, in part payment of his note, four slaves, valued at $1,200, and the balance in a horse and cash. Of these negroes he has since sold one, Jacob. He received also from the executor of Wallace nine negroes, in part payment of his note. Of these defendant has sold four at the price of $1,175. The two parcels of land owned by the complainant at the time of her marriage, have since been sold, the one to John Parham, and the other to Clough Ming. Mrs. McCollough joined her husband in both conveyances, but has only renounced her inheritance in the form of the statute, on the latter. The bill is filed by the executor and executrix of William Wallace, in whom the legal title to the personal property contained in the marriage settlement is vested, and by Mrs. McCollough. They claim for the latter the negroes received from the executors of Parham and of Wallace, as being subject to the trusts of the marriage settlement.

They allege their willingness to confirm the sales of the land and negroes made by the defendant, and pray that he may be declared their debtor for the money for which they were sold, and also for the cash received on the notes mentioned, and decreed to hold the same on the trusts of the settlement. They allege, that besides having sold some of the negroes, defendant has threatened to remove, or is preparing to remove, them to the Western country, and pray that he may be required to give security for their forthcoming at the termination of his estate.

Defendant contests, on several grounds, the validity and effect of the marriage settlement and schedule. He denies that the notes of Parham and Wallace were assigned

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by the settlement, *or that his wife is entitled to the money received on them, or that he is bound to hold the negroes received in part payment of them, on the trusts of the settlement. He denies having intended or prepared to remove any of the negroes out of the State, with a view of defeating the settlement, but admits that on the occasion of his son-in-law's removal to the Western county, he may have expressed himself as if it were probable that he would send part of his force there, and after a while remove himself. He denies, however, that he ever intended to remove the negroes without the consent and approbation of his wife.

Another deed, of the 16th September, 1829, was in evidence, by which the defendant constituted his wife a sole trader. But I did not understand by the bill, or from the argument, that any distinct and substantial claim was made under that deed.

It seemed to be offered as evidence to shew that up to that time the defendant regarded the property in question as the separate estate of his wife.

The first question is as to the validity of the execution of the deed of marriage settlement by the complainant, Mrs. McCullough. I think there was not a valid execution, so far as respects the real estate. There are some cases in which a party will be bound by the signing and sealing of another, in his presence and with his consent, as where one partner signs and seals for himself and copartners in their presence, as in Ball v. Dunsterville, 4 T. R. 313; Burn v. Burn, 3 Ves. 578. It would be otherwise if they were not present. Harrison v. Jackson and others, 7 T. R. 207. But with respect to real estate, by the express provision of the statute of frauds, no estate or interest shall be assigned, granted or surrendered, unless by writing signed by the party, or his agent lawfully authorized by writing. In the following clause, respecting executory contracts in relation to lands, it only requires that the agent shall be lawfully authorized. The distinction is pointed out by Lord Redesdale, in Clinan v. Cooke, 1 Sch. and Lef. 27, when an estate is to pass by the writing, and when it is only a contract which does not pass the estate. It was argued that the defendant is estopped to deny the execution of the deed, by being a party to it. A man may certainly be estopped by his deed, as where he conveys property to which he has no title, and afterwards acquires one. But this instrument does not purport to be a conveyance of any property by the defendant. He signed and sealed it, only to signify his assent to the

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act of the intended *wife. But I do not know how his assent to a void act could render it valid. The conclusion in this case is, that there was no deed as to the real estate. A different construction would defeat the statute altogether. In every case of such execution, it might be said that the grantee was estopped; for, if not formally a party executing, one is as much estopped by his accepting as by his making of a deed. No doubt, the verbal authority to sign and seal, was sufficient as to the personal estate.

But though not conveyed by the deed, the land remained her estate and inheritance. With respect to the land to which she has renounced her right of inheritance, being converted into money, her husband's marital rights have attached upon it. As to the other parcel she has still the right of inheritance, and may assert her title after

the termination of the joint life estate. But I think, if it appears to be for her interest, she may confirm the sale, and claim the purchase money of her husband. One may adopt the act of a voluntary agent—Sarter v. Gordon, 2 Hill Eq. 121. If one who is in possession of my property sells it, delivers the possession and receives the price, certainly I may waive my remedy against the vendee, and claim the money of the vendor. He is estopped by his act to allege the want of authority. The decree of this court, confirming the sale, will be conclusive as to the title against the wife and in favor of the husband, and all claiming under him.

An objection was taken to the signing of the schedule, but there is nothing in it. In the case of autograph wills, before our Act of 1824, or of agreements under the statute of frauds, the writing of one's name in the caption or introduction, has been held a sufficient signing. But this is a regular and formal signing. It is not unusual to sign in the margin.

Besides, as observed in argument, a schedule is only required in favor of creditors. If this schedule had been written in a book, or anywhere else, being expressly referred to by the instrument, it would have become a part of it, and evidence between the parties. Per Ld. Redesdale in Clinan v. Cooke, 1 Sch. and Lef. 33; Hatcher v. Hatcher, McMul. Eq. 319.

An objection was taken to the want of recording in proper time, but it is hardly necessary to say that though not recorded, it is good between the parties.

The next question I shall consider is one of fact, whether the several notes of Parham and Wallace passed under the description of "a note" of each of these parties respectively.

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*Parol evidence is always admissible to shew to what subject matter the terms of a description apply. As laid down in the case of Pell v. Ball, decided by the Court of Appeals, if no subject can be found to which the terms of a description can apply, in their proper, strict and primary sense, evidence may be received of that to which they apply in a looser, secondary or popular sense. I know no rule upon the subject, except that the evidence must be such as to satisfy the mind that the thing in question, and no other, was intended. My mind is so satisfied, and I concur with the commissioner. The taking of the notes of the executors of Parham and Wallace, in the name of himself and wife, was equivalent to an admission that the former notes were not his absolute property by virtue of his marital rights.

A question was made whether the negroes received by the defendant from the executors of Parham and Wallace are subject to the trusts of the settlement. Of this there can be no doubt. If a trustee, (and a tenant for life is a trustee) purchase with that which can be clearly identified as the trust fund, though in his own name, a trust results of course. But I think in this case—at all events as to the negroes received from the executor of Wallace—there was a sufficient declaration of trust. The receipt for the negroes, in the handwriting of defendant, was signed by his wife alone. By receiving the negroes under that receipt, he admitted his wife's right in them.

I think the defendant must give security for the forthcoming of the negroes after his death. The rule is, that if by any acts or expressions of the tenant for life, it appears that the rights of the remainder man are endangered, the former will be compelled to give security. Lattimer v. Elgin, 4 Dess. 26. The selling of part of the trust estate is evidence enough that the residue is endangered. The defendant alleges that he has not sold any of the negroes originally included in the settlement, leaving it, I suppose, to be inferred, that he sold those subsequently acquired, under a mistaken notion of his rights, believing them to be his own. But, as I have said, having obtained possession of them by virtue of his wife's receipt, he admitted them to be hers, and I must conclude that he sold knowing them to be part of the trust estate. He admits, too, that he did express the intention of taking or carrying them out of the State. I think, as a general rule, the court will not permit trust property to be taken out of the jurisdiction without security. It is true, that he states he did not intend to do so without his wife's consent. But

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being *sub potestate viri, she could not consent, unless such power were given her by the settlement. A trustee is created for the purpose of protecting her rights, even against her own consent. If she should consent, the court would still interpose at the instance of the trustee, who might incur very serious responsibility if he should fail to interfere, and the property should afterwards be lost.

It is therefore ordered, adjudged and decreed, that the defendant give bond to the commissioner, for the forthcoming of the slaves aforesaid, as well those received from the executor of John Parham and the executor of William Wallace, as those specified in the marriage settlement aforesaid, with sufficient security in double the value of the said slaves, to be estimated by the commissioner, at the termination of his estate therein; that the sale of the tract of land conveyed by the defendant and wife to John Parham, the sale of the slave Jacob, and of the four slaves sold to Harrington, be confirmed, and that the defendant is indebted to the trust estate of his wife in the amount for which the said land and slaves were sold, and also for the money received on the notes specified in the schedule annexed to the marriage settlement, over and above the price

of the slaves received from the executors of Parham and of Wallace.

The defendant appealed, on the following grounds.

1. Because the deed of marriage settlement was not executed by the complainant Elizabeth McCullough, and the signing of her name and the sealing thereof by Cloe M. Sanders, although in her presence, was void, she, Cloe M. Sanders, having no power of attorney under seal, authorizing her to execute the deed.

2. Because Cloe M. Sanders, if she acted as the agent of, and personated, Elizabeth McCullough, was thereby rendered incompetent to attest or prove the execution of the deed.

3. Because the marriage settlement is void for uncertainty in the description of the property, inasmuch as the schedule is not signed by any one, and it does not appear when, by whom, by whose authority, or with whose consent, it was drawn out and appended to the deed.

4. There having been two tracts of land belonging to Elizabeth McCullough, answering the description in the informal schedule, and it being uncertain which was intended to be conveyed, neither can pass, and certainly not both.

5. The complainant Elizabeth McCullough having joined in the deed, and relinquished

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her inheritance of the land sold to *Parham, estops her from setting up any claim to the purchase money, as trust property covered by the marriage settlement; and if the legal title was in Wm. Wallace, the trustee, the deed to Parham was void, and that title still remains unimpaired in William Wallace the trustee, and therefore the defendant should not be held accountable for the proceeds of that sale.

6. Because there was no evidence of the existence of any such notes as the two described in the schedule, as those on John Parham for $1,691, and on Wm. Wallace, for $1,500, and if there were such notes they never came to the possession of the defendant. The other notes on Parham and Wallace, which the defendant collected, not answering the description, are not included in the schedule, and therefore the defendant cannot be held accountable for the money or property he received in payment of them.

7. Because the decree is erroneous in charging the defendant with the negroes he received from Parham and Wallace, in part payment of the notes; for, assuming that the notes were correctly described in the schedule, and that the defendant had collected them, still the defendant, by the terms of the deed, being entitled to the use of them —that is, the capital sum, during life—whatever advantageous trades he made on that capital was for his own benefit, and not for the benefit of the remainderman, Mrs. McCullough, and therefore he can be held accountable only for a like sum in cash or notes, without interest or profits.

8. Because the case made by the admission of the defendant in his answer, there not having been any evidence upon the subject of removing or endangering the property, was not such as to require or authorize security from the defendant for the forthcoming of the property, and if insisted on, will amount to a forfeiture of his estate.

The complainants also appealed, on the following grounds.

1. That the defendant should, under the circumstances, have been held accountable for the sum at which he sold the tract of land to Clough Ming.

2. Because the defendant should have been required to give bond and security for the forthcoming, at the termination of his interest therein, of the balance of the money arising from the notes embraced in the schedule, and from sales of the land and negroes which he disposed of.

Banskett, for the motion, as to the right

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of the complainants *to charge the defendant with the proceeds of the land, cited 2 Kent, 614; 9 Wend. 16; P. L. 381; Paley on Ag. 133; 4 Bing. 283; 4 Kent. 451. On the claim for the amount of the notes, he cited 3 Stark. Ev. 1021; 4 Dow Parl. Cas. 65; Wigram, pl. 34, pl. 183, pl. 131, pl. 147, pl. 161, pl. 163, pl. 189; 3 Ves. 306; 2 P. Wms. 140; 2 Bay, 541; 1 N. & M'C. 45, 431; 1 M'C. 41; 1 M'C. 258; 3 M'C. 269; Sp. Eq. 348. On the question whether the court could attach a trust on the negroes purchased with the funds, he cited Lewin on Trusts, 201.

Wardlaw, contra, contended that the deed was well executed. 1 Shep. Touch. 56–7; Cruise, chap. 2, § 74–5; 1 Liv. on Ag. 35; 2 Caine Cas. 1; 3 Ves. 578; Story on Ag. § 51; 4 T. R. 313; 7 Ib. 207; 3 Ves. 57; 9 Johns. R. 285; 4 Mass. R. 232; 4 Barn. & Ad. 647; 8 Ves. 185; 1 Camp. 518; Sug. on Vend. 71; 9 Ves. 251; Sp. Eq. 233; Prec. in Ch. 405; Chev. 271; Story on Ag. § 50. On the question as to the notes, he cited Stark on Ev. 1021, 1025; 1 T. R. 701; Phil. Ev. 533; Amb. 374; 1 M. & S. 299; Sp. Eq. 83; Wigram, pl. 70, pl. 186; 4 Barn. & Ad. 785; 5 Ib. 51; 1 P. Wms. 286; Wigram, pl. 67; 4 Johns. Ch. 607; 1 Paige Ch. 291; 2 Danna, 47; Wigram, pl. 181. Have the complainants the right to follow the funds? Story Eq. § 1210, 1260–1; Lewin on Trusts, 280, 290.

Griffin, same side, on the question whether the deed was well executed under the statute of frauds, cited 2 Bl. Com. 307; 3 Ad. & Ellis, 117; 43 Eng. Com. L. R. 658; 2 Stark. Ev. 271. On the question relating to the notes, he cited 5 Stat. 203; 1 Sim. 166; 2 Vern. 593; 6 Madd. 192; Gress. Eq. Ev. 200, 209; 4 Russ. 581; 8 Rep. 155. On the question whether the trusts of the settlement at-

tached on the property purchased by the defendant, he cited 4 Ves. 116; 2 Fonb. 118–9; 1 Story Eq. 160, 169; 1 Fonb. 35; 2 Story Eq. § 768.

Preston, in reply, cited Amb. 415; 2 Bro. C. C. 232; Story Eq. § 1210, 1211; Story Eq. 1527–8–9, 1260; 1 M'C. 258.

Curia, per JOHNSTON, Ch. In announcing the judgment of the court in this case, I am embarrassed by those difficulties which a Judge must always experience to whom is assigned the duty of exhibiting the reasons of a decision resulting from a combination of the widely differing opinions of the several members of the tribunal, none of which exactly coincide with his own. It is hardly to be expected that I shall be able to put forth the reasons of my brethren, in which I do

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not concur, in *the same clear light with which they presented themselves to their own minds; for the plain reason, that their failure to convince me, is demonstrative proof that I do not so fully apprehend them. But I shall endeavor, as faithfully as I can, to disclose the opinions entertained by my brethren, as well as those entertained by myself, on the several questions discussed by counsel; taking care to distinguish between the questions decided and those left undecided by us.

The first question is, whether the marriage settlement was sufficiently executed by Miss Wallace to vest the lands in the trustee; and this is not determined, a majority of the Judges not having been found on either side of the question.

The signature was by Miss Sanders, in the presence and by the direction of Miss Wallace.

The first section of the statute of frauds, (Rob. on Frauds, 240, book 1, chap. 4,) declares that "all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenaments or hereditaments, made or created by livery and seisin only, or by parol—and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only."

A portion of the court is of opinion, that whatever would, at common law, have amounted to a signing by the party, is a good signing by the party under the statute; that at common law, no doubt could have been entertained that a signature for the party, in his presence and by his direction, was attributable to him as his own signature; and that the statute has, in no respect, altered this rule of law. That the statute has simply required the party to sign the conveyance, but has not defined what shall amount to a signature on his part—leaving that to be determined upon common law principles. That this construction of the statute is countenanced by the cases cited by the Chancellor in his decree, where the signing of one partner in the name of the co-partnership, in the presence and with the consent of his copartners, has been held a good execution by them—and that the sanction of such a practice leads to no greater danger of the fraud and perjury intended to be avoided by the statute, than the cases which have been held to be in accordance with its provisions; such as the party's making his mark, or

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printing or stamping *his name, or subscribing by merely holding the pen while a third person writes his name.

On the other hand, an equal number of us hold, with the Chancellor, that under this section of the statute, no subscription can be attributed to the party as his own, unless he personally and physically engages in or contributes to the act. The statute requires him to sign himself, or if he signs by an agent, the agent must be authorized in writing. When another person subscribes for him, that person is his agent, whether the act be done in his presence or out of it. The only difference between an agency exercised in the presence and one executed in the absence of the principal, is in the evidence of the agent's authority. The presence and superintendence of the principal, are proof of his assent; other proof may be necessary when he is absent.

But in either case it is not the principal who acts, but the agent. If the agency be made out by proof of authority, then the law comes in and declares that the act done by him shall be attributed to and shall bind the principal. The common law which admitted parol proof of authority, would, no doubt, have declared that an act done in the presence of the latter, by his procurement, was binding on him, and, in this sense, that it was his own act. But the statute, in this section, has emphatically declared that if an agent sign, his authority shall not be made out by parol, but must in all cases be proved by writing. The act, if otherwise evidenced, shall not be the act of the principal, nor bind him. This enactment, it is therefore contended, has materially altered the common law, in this—that a subscription by agency, wherever executed, if the authority to make it depend upon parol, is not the subscription of the party, nor conclusive on him.

It is further to be remarked, Rob. on Frauds, 287, book 1, chap. 5, that this construction of the first section of the statute is countenanced by the fifth section, which requires devises of lands and tenements to be signed by the testator, "or by some other person, in his presence and by his express directions:" and by the sixth section, which declares that no will of lands shall be revoked but by will or codicil, or by burning,

cancelling, &c. by the testator himself, "or in his presence and by his directions and consent." The contrast between these two sections and the first, is remarkable and very pregnant. The difference of the phraseology manifests a difference of legislative inten-

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tion. *It shews that the legislature, in the fifth and sixth sections, carefully distinguished between a signing or cancellation by the testator personally, and by agency—although exercised in his presence and by his direction—and gave effect to them as two distinct things. The argument of counsel was, that by agent, in the first section, the legislature meant exclusively one acting apart from the principal and not in his presence; and that acts done in his presence were intended to be regarded as his own personal acts. But no better refutation of this idea can be given, than is afforded by the fifth and sixth sections, where his own acts are contrasted with acts done under his supervision and superintendence.

Another remarkable circumstance is, that while the legislature has, in the first section of the statute, required proof, in writing, of the agent's authority, in sweeping terms, applicable to all cases and circumstances: so that whenever the principal does not act in his own person, but by another, that other must hold his written power; it has, in the fifth and sixth sections, indulged the testator with an agent to act for him without written authority, provided the acts be done under his eye. Why is a written authority required under the one section and not under the others? Evidently from a consideration of the different characters of the instruments contemplated by the different enacting clauses—the one a deed, to be executed without reference to the death or infirmity of the grantor, and while he is in health and vigor, and acting with deliberation: the other a testament, executed or destroyed, most probably, in prospect of death, under physical disability, and under the pressure of circumstances admitting of no delay.

As to the cases where the signing of one partner for his copartners in their presence, has been allowed to bind them, those of us whose opinions I am now representing, conceive that they have turned on the intimate relation and identity of interest existing among the partners, which have led the courts to allow a greater efficacy to vicarious acts in partnership cases, than would be admitted in other cases where there is no community between the principal and agent. If the court were bound by those cases to depart from the requirements of the statute, it would confine itself to like cases, and not extend what is conceived to be a misconstruction, to other and dissimilar circumstances.

And as to the observation, that the allowing the authority of the agent to be made out

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by parol proof that he acted in the *presence of the principal, is no more dangerous than to allow proof that he made his mark, or set his seal or stamp, or allowed another to guide the pen which he held; we answer, that it is the function of the court to carry out the statute in its terms, and if perjury may be committed by allowing proof to be made that the party has done what the statute required him to do, for the purpose of binding him in obedience to the statute, that is a very insufficient reason for throwing ourselves open to more perjury in allowing proof of what he has not done as required by the statute, for the purpose of binding him in direct opposition to the statute. The legislature has required the party to sign the deed, and he does sign it. The statute does not require him to sign it in any particular way or unaided. He signs with a stamp, or a mark, or makes use of a help in writing, but he does sign. No other person signs for him. His signature, however performed, must be proved by parol, and perjury may be committed. No human law could guard against this—and certainly, though the party subscribed his name in autograph—although, according to any construction of the statute, this would be a full compliance with its provisions, still, if his writing were little known, perjury might be committed. How can you certainly guard against such things? But the statute requires that where an agent signs, his power must be evidenced in writing. Here an agent subscribes the deed, and has no written authority. Who is to be responsible for the perjury that may be perpetrated in the effort to substitute parol for the written power? Not the legislature, which forbids all parol, and, by consequence, all swearing in the case, but the court, which admits them.

A case has been mentioned of a person physically incapable of signing, and therefore incapable of giving a written authority to an agent to sign for him; and it has been asked, shall not such a person be allowed to sign by an agent acting in his presence? The danger of fraud and perjury intended to be avoided by the statute, threaten the whole community, and the objects of the legislature are not to be sacrificed to an anomolous case. The statute has, for the general good, required contracts of conveyance to be executed in a particular manner, and if there be persons who cannot so execute them, why, then it amounts to only this, that such persons cannot so contract. The law has said that whole classes, such as idiots, infants, &c. shall not contract; and it may, for wise purposes, say that others may be

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circumscribed in *their capacity to convey. There never was, and never can be, a law by which some persons may not be injured.

As I have stated, the Judges here who hold

the two opinions I have endeavored to set forth, are equal in number. But there are other Judges who have not been able to come to a decision of the question, either one way or the other, although rather inclining to the latter opinion. The point is not decided, and I have thrown out these observations for the purpose of drawing the attention of the profession more closely to the subject in future cases, where a decision is necessary. But some members of the court who were not prepared to hold the deed well executed by Miss Wallace, are nevertheless satisfied that, since her marriage, and in consequence of what has taken place, she is entitled to its benefits, even in regard to the land; and these, whose views I am now to express, in connexion with those who hold her signature good, form a majority of the court.

The first section of the statute was principally intended for the protection of the party conveying. If Mrs. McCollough was not bound by her conveyance, she may nevertheless assent to it. As observed by Mr. Roberts (*b*) in relation to another branch of the statute, "there may be cases, too, as it is conceived, in which the signature of one of the parties may be binding upon both; as when a bill is filed for a specific performance of an agreement, signed only by the defendant, the plaintiff acquiesces, by his application for relief, in all the terms of the instrument which are required to be performed by him." Owens v. Davies, 1 Ves. Sr. 82. Though this passage relates to contracts for the sale of lands, and not to deeds conveying them, that portion of the court to which I last referred, do not see, upon principle, why a party may not assent to be bound by a conveyance which he did not sign, as well as by an agreement to which he is not bound without his signature, and has not subscribed.

This brings us to the question, whether both tracts passed under the schedule; and the court is satisfied that a body of land consisting of subdivisions, but generally regarded as one tract, may pass as one tract. This appears to be the case here; and it seems to be no sufficient objection, that the aggregate of the two parcels exceeds the number of acres specified, as the land is conveyed "more or less."

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*Then the question arises, whether the defendant is accountable for the amount received for both the parcels of land.

In the conveyance of one of them to John Parham, (erroneously stated in the decree to have been made to Clough Ming, which error must be corrected,) Mrs. McCollough joined, and effectually relinquished her inheritance. The court is of opinion she is bound by her act, and cannot take advantage of a devastavit in which she joined. It is no answer, to say that she was a feme covert, and not bound by her act. Although generally, in this State, a feme covert is not bound by her acts, this cannot apply to conveyances by her of her inheritance. As to these, the Act of Assembly makes her competent. Besides, if it be objected that the title was not in her, but in the trustee, it is a sufficient answer that the title is still in him, and he has sustained no injury by the sale.

With respect to the other tract, we see no reason to differ from the conclusion of the Chancellor, except in this, that McCollough being, by the terms of the settlement, entitled to the income and profits of the trust property, during the joint lives of himself and wife, is not chargeable with interest for that time on the sum received by him for that tract. But he must pay that sum to the executors of the trustee, to be by them held on the trusts of the settlement, or give them bond with sureties, to be approved by the commissioner, and by the court, upon his report of the fact, for its payment at the expiration of the joint lives of himself and wife —and this decree must form a lien on his property until one or the other of these alternatives be complied with.

This brings us to the questions in relation to the notes of hand. The deed does not convey, nor does it profess an intention to convey, all the property and choses of Miss Wallace. It expressly refers to the schedule for a description of the subjects of the conveyance; and the whole court is of opinion that the deed, independently of the schedule, conveys nothing. We must look to the schedule, then, as the test of what is conveyed and assigned; and we find, among other things "also the following notes of hand, one given by John Parham to the said Elizabeth for one thousand six hundred and ninety-one dollars, with interest thereon—one given by William Wallace for one thousand five hundred dollars, with interest thereon—one note of hand, given by Martha Sanders, for one hundred dollars, with interest thereon.

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*A note on Martha Sanders, corresponding to the description, came to the hands of the defendant; and no doubt he is properly chargeable with $112.96, to which it amounted at the date of the settlement.

The difficulty is as to the notes of Parham and Wallace.

Three notes, instead of one, on Parham, were found, the principal sums of which, respectively, were $295, $195, and $300, making together $790. So that no one of them, nor the three together, correspond to the description of the schedule; and even with the addition of the interest due on them at the date of the settlement, they fell $22.30 short of the description.

Instead of one note on William Wallace for $1500, nine were produced, two of which were not on Wallace but on Mrs. Hunt. Of

(*b*) Rob. on Frauds, 124.

those on Wallace the largest was for $760, on which there was due at the date of the deed $673.30 for interest, making the whole amount of this note, at that time, $1433.30.

The principal of the whole of the notes on Wallace, at the time referred to, was $1430-84, and their interest $1382.59, making, of principal and interest, $2813.43. If we add the principal of Mrs. Hunt's notes ($141.90,) and their interest, ($107.06,) the principal will be $1572.74, and the interest $1489.65, forming an aggregate, at the date of the deed, of $3062.39.

It will be seen by this statement that neither singly, nor by any combination, and whether interest be taken into the calculation or excluded, do these notes, any more than those of Parham, coincide with the description in the schedule.

In the application of the descriptions of the schedule to these notes, the court has experienced much difficulty. The point has been argued as if it involved the question whether parol evidence was admissible to shew the intention of the instrument. But this is a misapprehension. If evidence of this sort had been presented and received, that the intention of the parties was to embrace this or that note, or all of the notes, as explanatory of the terms of the schedule, this would have raised that question, and the whole court is of opinion such evidence would have been inadmissible.

It is the familiar and necessary practice, where specific things are described in a will or deed, to ascertain by parol the existence and qualities of the things which it is insisted pass under the instrument: and if the things, as proved by the evidence to exist, correspond with the description, the instru-

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ment itself con*tains the evidence that they are the things intended. It lays hold of them by its own terms, and conveys them to their intended destination. This process involves only the evidence of the character and existence of the subject of donation, and the construction of the instrument by which it is made.

When two things are proved to exist, each satisfying the description given in the paper, an ambiguity, previously latent, is created, which of them is intended. Here, alone, is parol evidence receivable to aid the court in making a selection between them. But even here, it will be observed, though the evidence is received of necessity to give operation to the deed or will, it is to give it an operation conformable to its terms. It is not to explain the construction, and of consequence, the meaning of the terms employed in it, much less to vary them; but simply to enable the court to apply them in exact conformity to the meaning and intent of the party, to be gathered from the paper by construction.

But when, of two things presented, neither tallies with the description given, it is against principle, whatever anomolous cases may be found in the books, to receive evidence which of them was intended, or whether both were intended.

In this case no such evidence was offered or received, nor would it have been admitted. The only question is therefore one of construction of the deed.

Under the description of one note on John Parham for $1691, and one note on William Wallace for $1500, can the deed refer to the three notes of Parham and the nine notes on Wallace, for different amounts?

A large majority of the court is of opinion that as the deed refers to notes, as existing, it must to some extent operate upon the only notes found to have existed at the time.

As to the extent of its operation three opinions exist here.

1. One is, that only one note on Parham and Wallace, respectively, passed.

2. Another is, in conformity to the Chancellor's view, that all the notes passed.

3. The third is, that the conveyance must be construed as an assignment of $1691, due by Parham, and $1500 due by Wallace, by note.

A majority of the court rejected the two first of these opinions, but adopted the last.

The first of the three is the one in which

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I personally concur, *and while I shall endeavour to do justice to the reasons of the majority, I think it due to such a question, doubtful and difficult as it is on all hands acknowledged to be, to state very briefly the grounds of my own opinion.

In the first place, it seems too plain to require reasoning or authority to shew, that the assignment was of a specific chose in action, and not of so much money. If these words had occurred in a will, I apprehend there could be no diversity of opinion that they would have constituted a specific and not a pecuniary legacy, so that if no note had been found on the persons mentioned, the legacy would have failed, nor could the amount have been made up from any other source.

Then the very thing intended to be given, in the form and according to the description employed, is the only thing which can pass under the assignment; and whether the thing presented can pass, must depend upon the proper construction of the words of the assignment.

It is admitted, that where, by part of the terms employed, the thing can be ascertained, a further false description will not vitiate nor prevent the thing, already ascertained by the true description, from passing. The things here described are, one note of John Parham to Elizabeth Wallace, and one note given by William Wallace. One note on each of these parties is produced. So far the description is true, and so far the assignment

is satisfied. But neither of these notes is of the amount indicated in the schedule. Here is the false description, but if no other notes were produced, this would not vitiate or frustrate the assignment. It is only when the party claiming, instead of producing the note coming nearest the description, goes on to produce others, that any serious difficulty arises. But the additional notes are not produced to exhibit an amount corresponding to that indicated in the schedule. If they had exhibited such a coincidence, it might have been contended that the false description was in the enumeration, and not in the amount, of the notes. But the additional notes have the effect of falsifying one description already ascertained and satisfied, without conforming to another. The first note produced violated only one of the terms of the description; these now produced violate two. I shall not proceed to illustrate this point by numerous other observations which readily occur, but simply remark, that the additional choses cannot be let in under Mr. Wigram's proposition, referred to in the decree, that when the subject of disposition

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*does not correspond to the description given in a primary sense, it may be let in, if it corresponds in a secondary sense. Although a body of land, divided by an ideal line, may be considered in one sense as one tract, and in another as two, there is no sense in which one note can be considered as nine, or two notes as twelve.

The second opinion was that adopted by the Chancellor, of which the reasons are strongly set forth in the decree.

But, as I have said, neither of these opinions is that of a majority of the court.

The construction adopted by the majority is, that the assignment was intended to convey debts due by Parham and Wallace on notes, to the extent of $1691 on the former, and $1500 on the latter. That an assignment of so much money was intended; and that the notes were referred to as the means by which it was secured and to be raised. They acknowledge the difficulties of this construction; but they see enough, in the state of facts existing at the date of the deed, to satisfy them that no other construction will subserve the real intention of the parties. In support of their view they conceive that the case (c) was well cited in argument, where £1250 value of 4 per cent stocks, was satisfied out of 3 per cent. long annuities, upon proof that the testator had purchased the 3 per cents with the 4 per cents, and that the will was copied by the draftsman from a will drawn while he yet held the latter; not that the court would rely on the decision as authority that parol evidence was admissible that three per cents were meant, but for the purpose of shewing that the legacy was pecuniary, and that the reference to the stocks was merely demonstrative.

Of course the sum due by Parham at the date of the deed being only $1668.70 instead of $1691, the former sum only passed, which added to the $1500 given on Wallace, and the $112.96 on Martha Sanders, makes the assignment, on the score of the notes, amount to $3281.66.

It is the opinion of the court that the defendant is chargeable only with this amount, to be paid at the expiration of the joint lives of himself and wife.

The plain intent, according to the construction of the deed which has been adopted, was

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to place so much money in trust, *to the interest or profits of which the husband was entitled, until the expiration of the time above mentioned.

It is true, the defendant, under a different, and, as the court believes, a mistaken construction of the instrument, did execute receipts for the notes of Parham and Wallace, in the name of his wife. But such an act, under such a misconstruction, and without any consideration, should not have the effect of converting the mistake into a declaration of trust beyond the extent of the trusts of the deed.

Nor can the court attach a trust upon the negroes received in lieu of the money, to any greater extent than to declare a lien on them and the rest of his property, until the defendant shall repay the money to the executors of the trustee, or secure the payment of the same, by instruments to be approved by the commissioner, and by the court upon the same being reported.

The defendant, being entitled to the interest and profits of the fund, was entitled to borrow it from the trustee, upon proper security, and make the most profitable use of it within his power. Resolved into its elements, the transaction which took place was substantially this, that the defendant borrowed the money from the trustee, and with it bought the negroes from Wallace and Parham, and is entitled to the benefit of his bargain. His only obligation is to replace the money; but until he does this, or secures its being done, the negroes purchased must represent the fund employed.

It is ordered that the foregoing opinion stand for the decree of this court, and that the circuit decree be modified accordingly. In all other respects the circuit decree is affirmed.

JOHNSON and DUNKIN, CC., and RICHARDSON and WARDLAW, JJ., concurred.

BUTLER and FROST, JJ. We concur in the result of the opinion, except in so far as it charges the defendant with the sale of the lands.

(c) Selwood v. Mildmay, 3 Ves. Jun. 306.

O'NEALL, J. 1st. I think the deed of marriage settlement was well executed by Cloe Sanders' signing, sealing and delivering it in the name of Elizabeth Wallace, in her presence and at her request. It thus became as much her act and deed as if she had signed, sealed and delivered it herself. To such a case the statute of frauds has no application.

2d. I think the defendant is chargeable with the proceeds of the sale of neither of the

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tracts of land. The title is in the trus*tee, and after the determination of the use for life he may recover the land.

3d. I agree that the defendant should account for the amount set out in the schedule, as the sums due by Parham, Wallace and Sanders. This is the nearest approximation to what was intended which the deed permits.

4th. I am satisfied, that the aggregate of these sums should be declared to have a lien on the slaves purchased from the executors of Wallace, and from Parham, now in the possession of the defendant, and their increase, to secure its payment to the trustee, on the falling in of the life estate.

EVANS, J., concurred in the views of O'NEALL, J.

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1 Rich. Eq. 449

JOHN WATSON, Ordinary, v. SAMUEL MAYRANT.

(Columbia. May, 1845.)

[*Executors and Administrators* ⇐11.]

Testatrix, after providing for the guardianship of her children, declared as follows: "It appears to me that the opinion of the father was, that his sons should have a good education out of the property, and as much as was a necessary outfit for pursuing the profession or business" (which they might select) "and the remainder to be divided between my daughters; and it is my desire this should be carried into effect according to the judgment of my brother-in-law" S. M. *Held*, that S. M. was executor, according to the tenor of the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 29; Dec. Dig. ⇐14.]

The case of the State ex relatione Simmons v. Watson, Ordinary, 2 Speers, 97, on the above point, overruled.

[*Executors and Administrators* ⇐29.]

The Act of 1839 has not exploded the doctrine of one's being an executor according to the tenor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 177–182, 1411; Dec. Dig. ⇐29.]

[*Executors and Administrators* ⇐32.]

The ordinary cannot revoke letters testamentary without making the executor a party to the proceedings by which they were revoked.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 205; Dec. Dig. ⇐32.]

[*Executors and Administrators* ⇐111.]

[Where the ordinary, in good faith, filed a bill to obtain possession of an estate as derelict, he was allowed costs out of the estate, though the application failed.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 119; Dec. Dig. ⇐111.]

[*Mandamus* ⇐157.]

[A person, by appearing and contesting the proceedings under a mandamus, makes himself a party, and waives the objection for want of regular notice.]

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 319; Dec. Dig. ⇐157.]

[*Mandamus* ⇐60.]

[Where a person claiming the right to administer upon an estate had, without default, lost the right to appeal from an order of the ordinary appointing an executor, a mandamus from the law court was *held* to be the proper remedy.]

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 71; Dec. Dig. ⇐60.]

Before Johnson, Ch., at Sumter, June, 1844.

This case grew out of the case of the State ex relatione Simmons v. Watson, Ordinary, 2 Speers, 97.

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*After the Court of Appeals had confirmed the judgment of the circuit court in that case, the ordinary, without summoning the defendant, Samuel Mayrant, before him, or in any way making him a party to the proceedings, revoked his letters testamentary, and Mrs. Simmons having declined to take out letters of administration, he (the ordinary) filed this bill, alleging that the estate of Mrs. Caroline Mayrant was derelict under the Act of 1839, and claiming an account of the same from the defendant.

The decree of his Honor the Chancellor is as follows:—

In April, 1843, a paper writing, purporting to be the last will and testament of the late Caroline Mayrant, was admitted to probate by the complainant, the ordinary of Greenville District; and at the same time letters testamentary thereon were granted to the defendant, wherein it is recited that the defendant was the executor therein named, and the defendant thereupon took possession of the estate. Not long after, Mrs. Anne C. Simmons, the sister and next of kin of the testatrix, applied to the complainant, the ordinary, for letters of administration, with the will annexed, on the estate of the testatrix, on the ground that neither the defendant nor any one else was named executor in the said will. This application was refused, and Mrs. Simmons applied to the Court of Sessions, (it is the Court of Sessions, and not the Common Pleas, which has jurisdiction of the subject) for a writ of mandamus, to compel the complainant to grant her letters of administration; and at Spring Term, 1843, the writ of mandamus was ordered to issue. From this judgment an appeal was carried up to the Court of Appeals, and a motion was

made to reverse the order of the circuit court, on the ground, amongst others, that the defendant was nominated executor in the said will. On the hearing there, the judgment was sustained; Butler and Richardson, Justices, contra. The complainant thereupon revoked the letters testamentary granted to the defendant, and he states in his bill that Mrs. Simmons has since neglected further to prosecute her claim to the administration, and has given him notice that she will have nothing to do with the estate. He claims, that under the Act of 1839, the administration devolves on him as a derelict estate; and he prays that the defendant may account for his administration, and surrender the estate to him, etc.

The answer of the defendant again raises the question, and insists that he is named executor in the will, and that letters testamentary were rightfully granted to him. He states that he was not a party to the pro-

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ceedings wherein the writ of manda*mus was ordered and his letters testamentary revoked, and had no notice thereof; and it is further insisted, that he is not therefore concluded or bound by the judgment of the court; and upon this the whole defence rests.

I have not thought it necessary to state the facts out of which the question as to the right of administration has arisen, for they are freely and clearly stated in the opinion of the Court of Appeals referred to; and whether it be regarded as res judicata between these parties, or as authority on the point, I should feel myself bound by it. It is an opinion directly upon the question raised in these pleadings, and I will not allow myself to call it in question. The decisions of that court are the rules of this. Equitas sequitur legem. I have, however, had some doubts whether, if the fact stated in the answer be true, (and there is nothing before me to contradict it) that the defendant was not a party to the proceeding at law, the judgment of the court was admissible as evidence here; and whether, if the ordinary has revoked the letters testamentary granted to the defendant, without having summoned him to shew cause against it, the remedy was not at law; and whether this court is competent to inquire into the matter in this collateral way. I have, however, on further consideration, come to the conclusion that this court cannot entertain the question.

The presumption is, that no court would give judgment in a cause, unless the party to be affected were properly before it. Each court has its own mode of making parties to a suit, and is necessarily more competent to judge of the correctness and propriety of its proceedings, than any other; and the correction of errors in them peculiarly belongs to the court in which they originated. The law courts habitually entertain applications to set aside judgments improperly obtained there, and having that remedy the defendant cannot be heard here.

It is therefore ordered and decreed, that the defendant do deliver to the complainant all the goods, chattels and choses in action, remaining in his hands, power, or possession, which belonged to the testatrix at the time of her death; and that he do account before the commissioner of this court for his administration of her estate during the time it has been in his possession.

From this decree the defendant appealed, for the reasons and upon the grounds following, to wit:

1. That the defendant was duly and lawfully appointed executor by the terms of the will, and is entitled to the administration of the estate of the testatrix as such executor.

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*2. That the question of the appointment of the defendant as executor, was concluded by the judgment of the ordinary in his favor, from which no appeal was taken, and which, after the lapse of the period limited by law for appealing therefrom, could not be reviewed by any other tribunal; and, as the judgment of a court of competent jurisdiction, was, and is, binding on all the world.

3. That to invest the judgment of any court with the authority of res judicata, it is indispensably necessary, in the first place, that the court should have had jurisdiction of the subject matter; and the Court of Common Pleas had no jurisdiction to grant a mandamus for the administration, until the letters testamentary granted to the defendant had been revoked; nor jurisdiction to grant it at all, as the law had provided another remedy for the relatrix, which excludes the authority of the court to grant a mandamus.

4. That the proceedings on the application for a mandamus were res inter alios acta; and were the jurisdiction of the court unquestionable, yet the present defendant, not being either party or privy to them, is not bound by the judgment: and even if titles could lawfully be divested by a side-wind, yet the present defendant cannot be made a party to the mandamus by inference, inasmuch as the judgment of the court of law proceeds expressly on the ground that he was not a party; it being conceded, that if he had been "an opposite party," the remedy was by appeal, and there was no jurisdiction to grant a mandamus.

5. That the revocation, by the ordinary, of the letters testamentary granted to the defendant, was a mere nullity, that officer having no jurisdiction to order such revocation, especially without making the defendant a party in court by process for that purpose.

6. That for the reasons aforesaid, the defendant is the rightful executor of the will of the testatrix, so ascertained to be by the proper and competent tribunal, and as such has vested in him the lawful title of the estate of the testatrix; and that the decree of

his Honor, the Chancellor, ought to have recognized his title, and dismissed complainant's bill.

7. That in other respects, and for various other reasons, the decree of his Honor, declaring the estate of the testatrix derelict, is contrary to law, and to equity, and good conscience, and tends to the manifest injury of those interested therein.

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*Bailey, for the motion, cited 1 Har. & Barb. Dig. 485; 1 Bail. 200; 30 Law Lib. 105; 1 Bail. 242; 2 Ib. 252; 4 Cranch, 241; 2 Sel. N. P. 1093; 2 Leigh, 165; 8 Pick. 17; 3 Brev. R. 520; 8 Cranch, 9; 1 Wms. Ex'ors. 348, 157; Bail. Eq. 334, 324.

Perry, contra, cited 1 Wms. Ex'ors, 390; Richards Wills, 316; 3 Eng. Ecc. R. 35; Ib. 200.

Hunt, in reply.

Curia, per JOHNSON, Ch. This cause was argued in the equity Court of Appeals at the last sittings in Charleston, and that court, supposing that there was error in a matter of law in the opinion of the law court in the case of the State ex relatione Simmons v. Watson, 2 Speers, 97, to be hereafter noticed, out of which this case arises, but which was binding on the equity court as authority, has directed it to be brought up here, that the judgment of the law court may be examined and revised.

This cause was heard on the circuit, on the bill and answer, without argument, and from the report of the law case and the concessions of the counsel, it appears now that some facts, material, perhaps, to a full view of the whole case, do not appear in the bill and answer: with these additions the case is this.

On the 22d July, 1842, the late Caroline Mayrant, the relict of the late Charles Mayrant, executed the following paper writing, which is conceded on all hands to be her last will and testament, and died shortly after, that is to say:

"It is my wish that my children should be under the guardianship of my brother-in-law, Samuel Mayrant, and my sister, Mrs. Simmons; and I request my sister (should I be removed) to take my daughters to live with her, and to be under her particular guidance and directions, as she has kindly offered. I leave more particularly to Mr. S. Mayrant the charge and direction of my sons; and I think that the oldest should, for two or three years, go to a good school, to prepare him for some useful and respectable course of life, which he must select, with the concurrence of his uncle. I earnestly hope and advise, when selected he will adhere to it. With respect to the younger, he is still such a child that what is best for him can only be judged when his character is more developed, and leave to his uncle and aunt to do by him what they deem best. It appears to me that the opinion of the father was, that his sons should have a good education out of

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the property, and as much as was a *necessary outfit for pursuing the profession or business, and the remainder to be divided between my daughters; and it is my desire this should be carried into effect, according to the judgment of my brother-in-law, Mr. Samuel Mayrant."

"I sign this now, to be formally executed as my will at a more convenient time, after Mr. S. Mayrant's arrival here."

From what transpired at the argument here, I conclude that upon the first examination of this will it did not occur to the appellant, Samuel Mayrant, or any one else, that he was constituted the executor, either directly or indirectly, or according to the tenor; and, under the impression that he was not, Mrs. Simmons applied to and obtained from the ordinary, the complainant, an order appointing her administratrix with the will annexed, on condition of her entering into bond in the penalty of $60,000, with six sufficient sureties, a majority of whom should reside in the District of Greenville, of which he was the ordinary. She did not give the security required, and some time afterwards, but how long after the order referred to does not appear, the complainant, I suppose upon being better advised, came to the conclusion that the appellant was legally constituted executor of the will, and thereupon, and without notice to Mrs. Simmons, issued letters testamentary to him, which of course superseded the order granting administration to her. She did not obtain knowledge of this proceeding until after the time limited by law for appealing from the judgment of the ordinary had passed, and she therefore applied to the law court for the writ of mandamus to compel the complainant so to modify the order granting administration to her, as to dispense with the residence of the sureties to the bond required being in the District of Greenville. Mrs. Simmons was comparatively a stranger in Greenville, and most of her friends resided in a distant part of the State, and the effect of the order requiring her to give as sureties persons residing in Greenville, would be to put it out of her power to comply with the terms: hence the necessity of the application for the writ of mandamus. The defendant was not formally a party to this proceeding, not having had formal notice of it by Mrs. Simmons or otherwise; but he appeared by counsel and shewed cause against the issuing of the writ, but it was, notwithstanding, ordered, and the order was affirmed in the Court of Appeals in the case referred to. The complainant, feeling himself definitively bound by that judgment, and without notice to the defendant, made an

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order re*voking the letters testamentary

granted to him, and upon Mrs. Simmons afterwards giving him notice that she would no further prosecute her claims to the administration, and no other application having been made, he filed this bill, to obtain possession of the estate as derelict, in pursuance of the provisions of the Act of 1839, (Acts 1839, p. 40.)

The whole merits of the case turn upon the question whether the defendant, Samuel Mayrant, is or is not, by the will itself, constituted the executor; and what I have to remark upon the case will be principally confined to it.

The necessity for even that, is in a great degree superseded by the strong and clear view which my brother Butler has put upon it, in the opinion of the minority of the court in the State ex relatione Simmons v. Watson, in which I entirely concur.

The law has very clearly defined what the office and duty of an executor are, and if a testator in his will nominate or appoint one the executor thereof without more, that is enough, and is the ordinary mode, because the term itself sufficiently indicates his rights, powers and duties. But that is not indispensable; the same rights, powers and duties may be expressed and defined by other terms. Thus if a testator by his will authorize one to take possession of his whole personal estate, to make an inventory and appraisement, and to pay his debts and legacies, &c. without saying he shall be executor, he will notwithstanding be entitled to the administration, because these are the duties which belong to an executor, and the appointment of an administrator with the will annexed would be wholly nugatory. So if the testator direct that one shall have the sole management of his whole estate, this would confer on him all the powers of an executor, although he is not so expressly named in the will. This position is fully sustained by the references in 1 Wms. on Ex'ors. 123, referred to by Judge Butler in the State ex relatione Simmons v. Watson, 2 Speers, 106–7–8. Toller, in his treatise on the law of executors and administrators, page 15, holds the same language. He says that the appointment of an executor may be express or implied. "He may be constructively appointed merely by the testator's recommending or committing to him the charge of those duties which it is the province of an executor to perform, or by conferring on him those rights which properly belong to the office, or by any other

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*means from which the testator's intention to invest him with that character may be distinctly inferred. As if a will directs that A. shall have the testator's personal property after his death, and, paying his debts, shall dispose of it at his pleasure; or declares that A. shall have the administration of the testator's goods; this alone constitutes A. an executor according to the tenor. So where the testator, after giving various legacies, appointed that his debts and legacies being paid, his wife should have the residue of his goods, on condition that she gave security for the performance of his will: this was held to make her executrix. And so, where an infant was nominated executor, and A. and B. overseers, with this direction, that they should have the control and disposition of the testator's effects, and so should pay and receive debts till the infant came of age, they were held to be executors in the mean time."

Pickering v. Towers, Amb. 364, is an illustration of the rule. There the testator, after having devised certain real estates, gave several legacies, and appointed P. W. and two others to "receive and pay the contents before mentioned." Held by the ecclesiastical court, upon litigation, that the appointment to receive and pay the contents constituted them executors.

The leading dispositions of this will are limited to two distinct objects; 1st, providing guardians for the testatrix's children, and 2d, the disposition of her estate; and they are so distinctly marked, although both are embraced in the same sentence, that it is impossible to confound them. The first is expressly confided to the defendant, Samuel Mayrant, and Mrs. Simmons jointly,—the sons more particularly to the former, and the daughters more particularly to the latter. The second, according to the correct reading of the will, is confided exclusively to the defendant.

The will, in regard to the estate, in legal effect provides that the sons shall "have a good education out of the property," and as much as should be necessary as an outfit "for pursuing the profession or business" which they might select, and that the remainder should be divided between the daughters;—"and it is my desire," adds the testatrix, that "this" (not the guardianship of the children, for she had before provided for that) "should be carried into effect according to the judgment of my brother-in-law Mr. Samuel Mayrant;" and unles the pronoun "this" refers to the disposition of the property, it can have no operation at all, and that it does

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so, follows from the grammati*cal construction, the dispositions concerning the estate being the last antecedent. These remarks are intended to meet the suggestion that the powers conferred on the defendant and Mrs. Simmons are joint and equal, as well with regard to the dispositions of the estate as the guardianship of the children.

The result of this reading of the will is, that all the dispositions in relation to the estate must "be carried into effect according to the judgment" of the defendant alone; and the question recurs, whether this does or does not constitute him executor. Now, it is true that all the powers and duties of an ex-

cutor are not expressly conferred on the defendant, but every thing is to be done according to his judgment—and certainly, very latitudinary powers are confided to him, at least in regard to the education and outfit of the sons; and to carry them into effect, the possession and use of funds, to an amount to be determined by his own discretion, was indispensable, and it was equally necessary that he should have the command of them when they were wanted. That was a matter on which the testatrix did not intend he should be controlled; and she never could have intended that an administrator should be interposed between him and the means of carrying her will into effect. In Pickering v. Towers, the only powers expressly delegated to the executors were to receive and pay the legacies—and the judgment proceeded on the principle that the right to the administration was necessary to their execution. Here, the will charges the defendant with the education of the sons and providing an outfit for them. To discharge this duty, the power of supplying funds for that purpose was necessarily implied. It is not to be understood that the grant of such a power would supercede an executor expressly appointed, or special powers delegated to others—for a testator may, in his discretion, appoint one to execute his whole will, or distribute the powers amongst several. He may appoint one to administer his estate in Greenville, and another to administer that in Pickens. The question whether one is an executor by implication, or, as it is said, according to the tenor, never can arise when there is an executor by express appointment, and is, in fact, nothing but a question of intention, to be solved by the context of the will.

In the opinion of the court, in the State ex relatione Simmons v. Watson, a doubt is thrown out whether the Act of 1839 has not exploded the whole doctrine of one's being an executor according to the tenor. The Act

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provides that where the testa*tor has left a will in writing, without appointing an executor therein, the Ordinary shall grant administration with the will annexed, and is but the re-enactment of the law as it then stood, and had been ever since the statute of Wills, upon which the doctrine of executorship according to the tenor, was engrafted. It is not doubted that a testator may confide to any one whom he pleases, the management of his estate after his death; and whether he do so by appointing him in terms the executor of his will, or confiding to him the duties which belong to that office, he is as effectually the executor as if he had been directly so nominated; for the obvious reason, that there would be nothing left for an administrator with the will annexed to do.

It struck me that the question whether a mandamus lay in the State ex relatione Simmons v. Watson, peculiarly belonged to the law court, and I did not entertain it in the discussion of this case on circuit, but it has been revived here, and it is, perhaps, fit that it should be disposed of, especially as there was a division upon it in the Law Court. It is well said by Mr. Justice O'Neall, in the case above referred to, that it is the proper remedy when there is a legal right, and no other legal remedy to enforce it, and I concur with him, that although Mrs. Simmons had the right to appeal, as of course, from the decree of the Ordinary granting letters testamentary to the defendant, she had lost that remedy, without any fault on her own part, by not giving notice of the appeal within the time limited by the Act of 1839. She had no notice of the proceeding until after that time had elapsed, and had forfeited no right by any act or omission to act. She had, therefore, I think, clearly a right to have the proceedings certified to the law court, and if the Ordinary refused to do it, and that whether she lost the right to appeal of course or not, mandamus was the appropriate and only remedy.

It is said in one of the grounds of appeal, that the defendant was not a party to the mandamus; that he was not therefore bound, either by the order of the Law Court ordering it, or the execution of the order by the Ordinary.

The writ of mandamus lies in all cases, as before remarked, where there is a legal right without an appropriate remedy; whether in matters which concern the public only, as when an inferior officer refuses or neglects to discharge a public duty, or where he neglects or refuses to discharge his duty between party and party, as where an inferior Judge or

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Magistrate refuses to *try or award judgment in a matter of which he has cognizance. Bac. Abr. Mandamus, D. In both cases, the course of proceeding is to apply to the Court of Sessions for a rule to shew cause why a writ of mandamus should not issue. In the first, that is, where the public only is concerned, it is against the delinquent officer only, because the prosecuting officer represents the public interest. In the last, where the matter is between party and party, involving private interest, the rule issues also against the party interested. Bayly v. Boorne, 1 Stra. 392. Brooke v. Ewers, Ib. 113, are examples, and that has been the uniform practice of our own courts. No party can be affected or concluded by any judicial proceeding to which he is not a party or privy. It appears that no rule to shew cause ever issued against the defendant, or that he had any formal notice of the motion for the writ of mandamus, but he did, in fact, appear by his counsel, and opposed the order, and that was clearly a waiver of the right of notice, as all the objects are attained, and he is as much bound by it as if he had appeared to a suit in the Common Pleas, or pleaded to it

when no process had been served on him. The act of coming in, made him a party.

The third ground of appeal insists that the order of the complainant as Ordinary, revoking the letters testamentary granted to the defendant, was a nullity, because, amongst other things, he was no party to it.

If the Law Court had made an express order that the letters testamentary should be revoked, I suppose there would have been no necessity to make the defendant a party. Acting under such an authority, the office of the Ordinary would have been purely ministerial, and he had no discretion, but was obliged to perform it. But the order was, not that he should revoke the letters testamentary, but that he should grant letters of administration to Mrs. Simmons; and if this order had been literally executed, it might have been made a question whether, without a revocation of the letters testamentary, the letters of administration would have superceded them. The defendant ought, therefore, to have been a party to the proceedings by which the letters testamentary were revoked; and not having been made a party, the order of revocation was irregular, and Mrs. Simmons having declined to prosecute her claim to the administration, the letters testamentary are still of force; and, as in law they were properly granted, the defendant cannot now be disturbed in the exercise of the rights

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and powers which they con*ferred. To avoid all future difficulties, the Ordinary ought, on the application of the defendant, to rescind the order revoking them.

It is ordered and decreed, that complainant's bill be dismissed. I think, however, that the complainant ought not to pay costs, but that he ought to be indemnified not only for the taxed costs, but for the fees incurred by employing counsel. He has acted in good faith throughout, and with a view to discharge an official duty, rendered necessary by the order of the court, and the circumstances of the case; it is, therefore, further ordered and decreed, that the Commissioner of the court do ascertain and report what ought to be the amount allowed the complainant as a counsel fee to his solicitor in prosecuting this suit, and tax his costs, and that the same be paid by the defendant, out of the funds of the estate of his testatrix.

HARPER and DUNKIN, CC., and BUTLER and FROST, JJ., concurred.

JOHNSTON, Ch. I concur, except upon the point of the executorship, on which I doubt whether the will sufficiently appointed the defendant. I have no doubt, however, that the office was in Mr. Mayrant, by the grant of letters to him, which were irregularly revoked.

O'NEALL, J. In this case I adhere to the opinion expressed in the State ex relatione Simmons v. Watson, Ordinary.

I have often examined the question, and I confess that I am utterly unable to understand how Samuel Mayrant is made out to be the executor. To be so by implication, or according to the tenor, he must have the office and charge of an executor devolved upon him, by the plain intent of the testatrix, to be collected from her will. If it be doubtful, he is not entitled to probate. In Richardson on Wills, 316, an example is given of an executor from the tenor. He says, "if the testator by his testament declares that Richard Roe shall have his goods after his death to pay his debts, and otherwise to dispose of them at his will and pleasure," it makes him executor. This presents the ingredients necessary for such an implication. There must be either a direction to pay debts or legacies, or a bequest of the residue after the payment of debts, or debts and legacies, to constitute an executorship by implication of law. For in that way, the office and charge can alone be shewn. The cases from the English Ecclesiastical reports furnish the same rule.

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In the goods *of Fry, 3 Eng. Ecc. R. 35, the testator directed three persons to pay his debts, funeral expenses, and expenses of probate—and also directed them to receive the rent and profits of, and also to sell, his real estate. The court held that the power to pay debts and expenses made them executors, but that the power of receiving rents and profits, and selling the real estate, only constituted them trustees. In the goods of Lieut. Col. Ried, 3 Eng. Ecc. R. 200, the will was made at Madras, where the testator died, and where probate was also had, in the first instance. The will contained the following passages, to wit: "The little property I possess, being in household goods, plate, carriages, horses, &c. I give, after all my just debts in Madras are paid, to my dearly beloved wife Lydia, to apply and dispose of as she may think proper," and concluded in these words. "I refrain from separating into small parcels the little property that may arise from the sale of my effects, but wish my dear and affectionate wife may enjoy the whole, after, as I before said, my just debts, in Madras, are paid." The testator had £330 in England, in his agent's hands. The widow, to whom probate had been granted in Madras, applied to have probate in England. The court (Sir John Nichol) said, "it is very doubtful whether, according to the true construction, the widow is sole legatee and executrix," and declined to allow to her probate, but granted to her administration with the will annexed.

The case just cited is certainly an abundantly stronger case than this. It is plain that the testator gave his wife the residue of his effects in Madras, after payment of

his debts, but, as the will might not carry the funds in England, the judge thought she could not be executrix. Still in the paper, and from it, she had partially the office and charge. That, however, I argue, was not enough, she must have it entire.

In the case before us, who is to pay Mrs. Mayrant's debts? Is there a word said about them? What is to become of her property until the sons' outfit should be furnished, and a division of the balance made? There are no directions in any of these respects. The only thing in the will which looks like executorship is that part which says, "It appears to me that the opinion of the father was, that his sons should have a good education out of the property, and as much as was a necessary outfit for pursuing the profession or business, and the remainder to be divided between my daughters, and it is my desire this should be carried into effect, ac-

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cording to the judgment of my brother-*in-law, Mr. Samuel Mayrant." Now, do these words create the office and charge of an executor? Certainly not. They require three acts to be done. 1st. Educate the sons. 2d. Fix upon an amount of money or property for an outfit for the profession or business which they may respectively pursue; and 3d, the balance to be divided among the daughters. By whom were these things to be done? They were to be according to the judgment of Samuel Mayrant, and the education of the sons by a previous clause was devolved upon him. But there is nothing in the clause which shews that Samuel Mayrant was to be, or do, any thing else beyond that of a mere adviser. He was to say how much he thought would be an outfit for each of the sons—and then he was to say how the balance should be divided between the daughters. In other words, the testatrix, instead of saying how much each should have, said my brother-in-law, Mr. Mayrant, may fix that in my place. That did not make him executor.

I think, as I said in the case of the State ex relatione Simmons v. Watson, that this doctrine of executorship according to the tenor, is not the law of South Carolina. The Act of '89, as well as that of '39, declares that the Ordinary, when no executor is appointed by a will, shall grant administration cum testamento annexo to the person who by law would have been entitled to the administration if the testator had died intestate. It cannot be pretended that an executor according to the tenor is an executor appointed by the testator. The law implies, where no executor is appointed, that the testator intended him to do the duty of an executor. But after an Act directing that where an executor should not be appointed, administration should be granted, it surely cannot be pretended that an executorship according to the tenor may still exist. Judge Grimke, in his law of executors, from the beginning to the end of his work, does not allude to an executor according to the tenor. When commenting on the Act of '89 he says, "If the executors refuse, or there are no executors, the administration must be granted," &c. Grimke Law Ex'ors. 168.

Taking the whole case, there is so much doubt on the executorship, that it is safer and better that administration with the will annexed should be granted, or the estate treated as derelict for the want of such administration.

EVANS, J., concurred.

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*WARDLAW, J. I concur in the result of the opinion of the court, because, whatever may have been the will, Mr. Mayrant had the probate from the Ordinary, and until regularly revoked, that was evidence in all other courts of his being executor.

I agree, however, with Judge O'NEALL, that the will did not make Mr. Mayrant executor, but I do not think that our Acts of Assembly have made any difference in the matter.

RICHARDSON, J., absent at the hearing.

APPENDIX

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*The three following circuit opinions of Chancellor Harper have been furnished the Reporter, with the request that they be reported. The novelty and importance of the questions discussed in them, and the ability with which they are written, would, it is believed, render any apology for reporting them unnecessary, but the request coming, as it does, from distinguished members of the bar, makes it almost the duty of the Reporter to do so.

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1 Rich. Eq. 465

TRUMOND BREITHAUPT, Administrator, v. JOHN BAUSKETT and Others.

[*Bastards* ⇐98; *Gifts* ⇐39.]

Under the 4th section of the Act of 1795, 5 Stat. 271, a gift or devise to a mistress or illegitimate children, is not absolutely void, but only voidable at the election of the wife or legitimate children.

[Ed. Note.—Cited in Beaty v. Richardson, 56 S. C. 190, 34 S. E. 73, 46 L. R. A. 517; Rouse v. Branch, 91 S. C. 117, 74 S. E. 133, 39 L. R. A. (N. S.) 1160, Ann. Cas. 1913E, 1296.

For other cases, see Bastards, Cent. Dig. § 249; Dec. Dig. ⇐98; Gifts, Cent. Dig. § 72; Dec. Dig. ⇐39.]

[*Wills* ⇐17.]

The right to elect, is personal to the wife and children, and cannot be made by their representatives after their decease.

[Ed. Note.—Cited in Ford v. McElray, 1 Rich. Eq. 476; Hull v. Hull, 2 Strob. Eq. 193; Taylor v. McRa, 3 Rich. Eq. 107; Bouknight v. Brown, 16 S. C. 168; Williams v. Halford, 73 S. C. 124, 53 S. E. 88; Williams v. Newton, 86 S. C. 252, 68 S. E. 695.

For other cases, see Wills, Cent. Dig. §§ 20, 22–33; Dec. Dig. ⇐17; Gifts, Cent. Dig. ⇐20.]

[*Bastards* ⇐98.]

The words of the Act, "if any person who is an inhabitant of this State," shall settle or convey, &c., mean an inhabitant of the State at the time of the gift or conveyance, and do not refer to the time the Act was passed.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 249; Dec. Dig. ⇐98.]

Of other matters appertaining to the construction of the said Act of 1795.

[*Wills* ⇐588.]

[Cited in Swinton v. Egleston, 3 Rich. Eq. 208, to the point that a general residuary bequest of personalty carries all the personalty which proves not to have been disposed of by the will.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1280; Dec. Dig. ⇐588.]

[*Wills* ⇐651.]

[A person gave to a mistress and illegitimate children more than the portion of his estate allowed by law, and confirmed the gift by his will; and he provided that any devisee who should disturb, or interfere with, the aforesaid gift, should forfeit his rights under the will. *Held*, that the condition was valid.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1512; Dec. Dig. ⇐651.]

Before Harper, Ch., at Edgefield, June, 1838.

The decree of his Honor is as follows:

Christian Breithaupt, late of Edgefield District, by a deed of trust, executed previously to his will hereafter mentioned, gave a certain portion of his estate, consisting of lands and slaves in Alabama, to Mary Ingram, a woman with whom he had lived in adultery, and to his three natural children by her. By his will, executed in 1831, he made the following dispositions, which it will be sufficient to state in substance and effect.

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*He confirms the deed executed in Alabama, with some modifications, giving certain slaves included in it to his natural daughters Anna E. and Sarah L. residing in this State, and the rest of the property to Mary Ingram and the youngest daughter, Susan, who lived with her. He gives to his executors six hundred and seventy acres of land and thirteen slaves, in trust for his two natural daughters, Anna E. and Sarah L. He gives to his wife Gertrude Jacoba Breithaupt, certain tracts of land, said to contain about 2400 acres, and fifty-eight slaves, with other property, for life, and after her death, to his executors, in trust to settle the said lands and slaves on his daughters Anna E. and Sarah L. in the manner pointed out. He directs his executors to sell certain lands and slaves, the proceeds of which, together with moneys due to him, he makes a fund for the payment of his debts and legacies; "the balance, if any, my executors are to vest in Bank Stock; and all other property which has not been conveyed by me in trust, or is not devised in this will, or any that may revert to my estate, is to be sold, and the amount to be remitted, in undoubted bills of exchange, to my brother Ferdinand Breithaupt, in Mihla, near Eisenach in Saxony, or in case of his death, to my brother, Professor Augustus Breithaupt, in Fregburg in Saxony, to be divided in the manner following: Two shares to my brother Charles, or his le-

gal representatives: two shares to the children of my deceased brother Earnest; one share to my brother Ferdinand or his legal representatives; one share to my brother Augustus or his legal representatives, and one share to my sister Frederica or her legal representatives, making and constituting them, in the proportions before mentioned, and in every respect to all interests and purposes, my residuary legatees." He further provides that "if any person or persons to whom I have devised property in this will, shall disturb the same, or anywise interfere or object to the provisions made therein, then he, she or they, shall be entirely deprived and excluded from the devise or bequest I have made for his, her or their benefit."

The testator had no legitimate children. His wife was living at the time of making the deed and will, and survived him a few weeks. Administration on her estate has been granted to the complainant. The bill is against the executors, the donees under the deed, and the devisees under the will—charging that the property given by the testator to his mistress and illegitimate children, far exceeds the fourth part of his estate, and

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*that the gifts are void for the overplus, under the Act of Assembly of 1795. The first question made was, whether the Act of Assembly can apply to any person who was not an inhabitant of this State at the time of its passage. The evidence seems to shew that the testator was not an inhabitant of the State at that time. The terms of the Act are, that "if any person who is an inhabitant of this State" shall settle or convey, &c. from which it was argued, that they could not apply to any person thereafter to become an inhabitant of the State. But this would be a narrow method of construction, certainly not tending to suppress the mischief and advance the remedy contemplated by the statute. The obvious meaning is, "if any person who is an inhabitant of the State at the time of the gift or conveyance;" a form of expression not, perhaps, of the strictest grammatical propriety, but by no means an unusual one. The next question argued, was whether the deed or will must be regarded as absolutely void under the Act, or only voidable, and valid until the wife or legitimate children shall declare their election to avoid it; and if so, whether it is not a privilege personal to them: and whether, in this case, the personal representative of the wife can make that election after her death. The words of the Act are that "such deed of gift, conveyance, legacy or devise, made or hereafter to be made, shall be, and is hereby declared to be, null and void, for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate." I am of opinion, notwithstanding the terms of the Act, that we must regard the gift or instrument as voidable only, and valid until the parties properly entitled come to avoid it—and it is absolutely impossible to make any other construction, consistently with the meaning and purposes of the Act.

The subject was much considered in the case of Anderson v. Roberts, 18 Johns. Rep. 515. That was a case under the stat. 13 Eliz. c. 5, declaring that gifts made to defraud creditors shall be utterly void. The question was, whether a bona fide purchaser, from a fraudulent grantee, should be protected against creditors. If the first deed were absolutely void, the grantee had no title and could convey none. It was held that he should be protected. It is true that this was held to come within the proviso of the statute, that it should not be taken to extend to conveyances, made bona fide and upon good consideration, to a purchaser without notice—but this was according to the

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common *law and the course of equity. In our own courts, it has been held that the statute of Elizabeth was only declaratory of the common law. Chief Justice Spencer, delivering the opinion of the court, says that "whenever the act done, takes effect as to some purposes, and is void as to persons having an interest in impeaching it, the act is not a nullity, and therefore in a legal sense it is not utterly void, but merely voidable." Another test of a void act or deed is, that every stranger may take advantage of it, but not of a voidable one. 2 Lev. 218. Vin. Abr. Tit. Void and Voidable, A. pl. 11.

Again, a thing may be void in several degrees. "1st. Void so as if never done, to all purposes, so as all persons may take advantage thereof; 2d. Void to some purposes only; 3d. So void by operation of law, that he that will have the benefit of it may make it good." Now, it is true that a will is an ambulatory instrument, which the testator himself may revoke; but if a man should make a conveyance of his whole estate to his illegitimate children, can it be thought that he himself could avoid it? The Chief Justice refers to the case of Prigg v. Adams, 2 Salk. 674. The Act of Parliament erecting the Court of Conscience in Bristol, declared that any judgment entered in it for less than 40 s. should be void. The defendant justified as an officer, for arresting the plaintiff under a ca. sa. upon a judgment for 5 s. entered in that court. It was held, that the judgment was not void, but voidable only, by plea or writ of error. The stat. 13 Eliz. c. 10, provided that ecclesiastical leases, made for a longer term than three lives or twenty-one years, should be void. The courts, considering the object of the Act—to prevent ecclesiastical persons from impoverishing their successors—held, that a lease, though for a longer term, should not be void during the life of the Bishop who made it. 1 Blac. Com. 87. It is said, in the case of Fripp and Talbird, 1 Hill Eq. 143, "when it is said that a

deed, good between the parties, is void as to creditors, there is, perhaps, a want of exact precision in the language. They may treat it as void—they are not compelled to institute any legal proceedings to avoid it, but may seize the property as if there were no deed. But until they do seize the property, the deed remains perfectly good." But the case is much stronger under the Act we are considering, than in any of the instances I have referred to. The Act provides that the gift shall be void, so far as it exceeds one-fourth of the donor's estate, and conse-

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quently, that it shall be good to *the extent of one-fourth. It is impossible to say, without a previous investigation to ascertain if the amount of the gift exceeds the prescribed limit, whether it is void or not. The property is given indiscriminately and in mass; can you select any portion of it to which the legatee is entitled? If the will is absolutely void for the excess above one-fourth, then, the property being otherwise undisposed of, it must be distributable under the statute of distributions. Under that, the wife, there being no lawful children, would be entitled to one-half of the overplus. What shall become of the other half? Shall I declare it to belong to the next of kin of the testator, for whose benefit, certainly, the Act did not intend to provide, and who do not even claim it? Suppose that the wife and legitimate children should agree to accept the provision made for them by the will, and discharge the executor; if the will were absolutely void, the legatees, even in that case, could maintain no suit upon it, for more than the fourth. Shall the executor retain the overplus? or if he should assent and deliver the property, and a stranger should get possession of it, could he defend himself in an action of trover, by shewing that the plaintiff had no title? To say that there is a right of election, is to say that the instrument is not absolutely void—for that which is absolutely void, is incapable of being confirmed. Will it be said that the widow might not have taken the provision made for her by the will? But on a well known principle, if she had done so, she could not claim any thing in opposition to it. Supposing the gift to be voidable only, and that the will is valid until some act is done to avoid it, then, as the widow did no such act in her life time, the question is, whether it is competent for her personal representative now to make the election. Looking to the purposes of the Act, I am of opinion that it is a privilege, personal to the wife and the legitimate children, and that he has no such right of election.

The object of the Act was to provide for the personal support of the wife and legitimate children. It does not avoid the gift to the mistress or illegitimate children, in favor of any other relatives, even grand children. In the case of Smith v. Farr, decided by me in Charleston in 1829, it was held, that where a person having made such a gift, died, having grand children, they were not within the provisions of the Act. If the wife had died a moment before the testator, there is no doubt but that the testator might have given his

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whole estate to his illegiti*mate children. Regarding the true object of the Act, there seems the same reason to say that the right of election shall be no longer open after the death of the wife, when her support is no longer in question. The Act was not intended for the benefit of her next of kin, strangers to the testator, to the prejudice of those whose claims upon him are certainly stronger than any but those of the wife and legitimate children. In the anonymous case, 2 Eq. Rep. 198, it was held that a wife, who had lived apart from her husband who refused to receive and support her, could maintain no suit for alimony, after the husband's death. His refusal was in the nature of a tort, for which no action could be sustained against his representative; though it was urged that her claim was founded in contract, the support of the wife making part of the contract of marriage. By exact parity of reasoning, the neglect to provide for her support after his death, constitutes the same sort of tort, and when she who has suffered the wrong has passed away, there is the same reason why her representative should maintain no suit for its redress. I will not say but that, by possibility, if the will had contained no provision for the wife, or only an illusory one, there might be ground to conclude that she had elected, during her life time, to take against the will, and that her representative came not for the purpose of avoiding it, but to enforce rights already vested by her election. But here was a very ample provision for her support during life, amounting certainly to more than half the entire income of the estate. But suppose the gift to be absolutely void for the excess beyond one fourth, what standing has the complainant in court, and what interest in the subject of the suit? It is hardly necessary to say, that to maintain a suit, the party must have some interest to be enforced. If a deed in fraud of creditors were held to be absolutely void, a stranger, who was no creditor, could not come to have it so declared. If there was no effectual disposition of the land, then, upon the testator's death, one half of the inheritance in the land given to the children beyond the fourth, vested in the wife, if she were capable of taking, and upon her death would go to her heirs. But as she appears to have no heirs who are not aliens, it would remain subject to escheat by the State. The other half would go to the testator's heirs, if he had any capable of taking, which is also doubtful. But at all events the complainant

does not represent his intestate as to her real estate, nor has any interest in it.

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*Then, as to the personal estate. By a clause of the will which I have quoted, the testator gives all his property which he has not disposed of, to his brothers and sister, or their representatives, making them in every respect his residuary legatees. The Act does not declare the will void which contains an illegal bequest to illegitimate children, but the legacy or devise. Then if the bequest be void, the personal property contained in it passes under the residuary clause, and the residuary legatees are the only persons entitled to it; or if it be only voidable, they are the only persons who have an interest to avoid it. It is hardly necessary to refer to authority for a doctrine so well established, as that a general residuary clause will pass every thing that is not effectually disposed of; if a legacy lapses or is void, it will go to the residuary legatee. The case of Durour v. Motteux, 1 Ves. Sr. 321, was one of a legacy void under the mortmain Act, which was held to pass under the residuary clause; "for giving the residue includes every thing, let it fall in by reason of the legacy's being void, or lapsing by dying in the life of the testator." The case of Kennell v. Abbott, 4 Ves. 802, was one of a legacy obtained by fraud, which was held to go to the residuary legatee. As is said by Sir William Grant, the master of the Rolls, in Cambridge v. Rous, 8 Ves. 25, "It has long been settled, that a residuary bequest of personal estate (for it is otherwise as to real) carries not only every thing not disposed of, but every thing that in the event turns out not to be disposed of: not in consequence of any direct or expressed intention, for it may be argued in all cases that particular legacies are separated from the residue, and that the testator does not mean that the residuary legatee should take what is given from him; no, for he does not contemplate the case; the residuary legatee is to take only what is left, but that does not prevent the right of the residuary legatee. A presumption arises for the residuary legatee, against every one but the particular legatee. The testator is supposed to give it away from the residuary legatee, only for the sake of the particular legatee." Then, if I should declare the provisions of the will void at the suit of the complainant, or if his intestate were suing, according to this doctrine, I must declare the property given to the illegitimate children to belong to the residuary legatees. But the testator has imposed a condition, that any devisee or legatee disputing his will, shall forfeit all interest which he may be entitled to under it. To be sure, the terms of the

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condition "shall disturb the same or in *any wise interfere or object to the provisions made therein," are not very definite or intelligible. But independently of the express condition, on a general well known principle, no person can be permitted to take any benefit under a will without giving effect, so far as depends on him, to all its provisions. Then if the residuary legatees should come to avoid the gift, by the very act of suing they would forfeit all benefit under the will. Now I see plainly enough that here is evasion of the statute. The complainant cannot contest the will (nor could his intestate if living) because he has no interest in doing so, and would take nothing if it should be declared void. The residuary legatees cannot do so, for they can take nothing under the will, without giving effect to its provisions; and the next of kin (supposing them to be other than the residuary legatees) certainly could not do so, for as against them the residuary legatees are entitled, and it was not for their benefit that the statute was intended to provide. But the difficulty is how I am to avoid this, and whether it is not the imperfection of the statute itself, which necessarily leaves it liable to evasion. We must recollect that the object of the Act is not to protect the wife and legitimate children against strangers. The testator may give the whole of his estate to strangers if he pleases. The Act does not declare the will void which contains such illegal bequest, but only the legacy or devise to the mistress or illegitimate children. Can I say that this residuary bequest is a devise to the illegitimate children? The Act does not say that the property illegally devised or bequeathed, shall go to the wife and legitimate children. Can I supply this omission, if it be one? Declaring the legacy or devise void, it leaves the property to be disposed of according to law. If there were no residuary clause, it would go, under the statute of distributions, to the wife and legitimate children, if there were such. There being such a clause, the law is fully as clear that it must pass under that. Shall I say that the residuary clause shall not operate on the property given to the illegitimate children? This would be to depart from a perfectly well settled principle of law, and to do in effect what I have before suggested the statute does not do—declare that the property illegally devised shall go to the wife and legitimate children, or there being no legitimate children, that it shall go to the wife and next of kin. Or shall I say that the residuary clause shall be inoperative as

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to the property *illegally bequeathed, only so far as the interests of the wife are concerned? It would have the same effect of preventing a fraud on the statute, if I should declare that this was an exception to the doctrine of election; that the condition is void, and that the residuary legatees might avoid the gift to the illegitimate children,

and take under and against the will. We may suppose the former course to be more consonant to the policy of the law, though, as I have said, it does not appear to be the policy of the law to protect the wife and children against strangers; but it appears to me that either course would be equally arbitrary.

One topic was urged on which I think it proper to make some remarks, though it is not necessarily involved in the case, because I believe it is often the subject of great abuse. It was suggested that the present complainant was not entitled to the administration, being neither of kindred to his intestate, nor a creditor, and therefore should not be permitted to carry on the suit. But this did not appear, nor could I take cognizance of the matter in this collateral way. Administration granted to an improper person, is not void, but voidable, (1 Salk. 38.) and application should be made to the ordinary. The case of Thompson v. Huckett, 2 Hill 347, was referred to, and I repeat what is said in that case, that under the statutes on the subject, the ordinary is authorized to grant administration to the next of kin. By custom it may be granted to a creditor. Toll. Ex'ors. 104. But in this case, it is requisite that there should be a special citation to the next of kin. If there are neither kindred or creditors, the ordinary is only authorized to grant letters ad colligenda bona, which give no authority to bring suits. 2 Blac. Com. 505. Blackstone enumerates the order in which the kindred are entitled to administration, and adds that in defect of these, the ordinary either commits administration to some discreet person, as he might have done at common law, before the statute Ed. 3d. or letters ad colligenda. But at common law the administrator had no power to sue; Plowd. 278.(*a*). It is commonly for the purpose of vexatious litigation, that administration is improperly taken out. "If administration be committed to a wrong party, in such case

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the ordinary may *repeal it and grant it to another, for he has not executed his authority, and it is incident to every court to correct its errors;" Toll. Ex'ors. 125: and I think he is bound to do so upon a proper shewing, and if he should refuse, would be compelled by a mandamus from the court of law. The repealing of the administration would of course put an end to suits which he might have brought.

It is ordered and decreed that the bill be dismissed with costs.

(*a*) By the 3d sec. of the Ordinary's Act of 1839, 11 Stat. 39, the ordinary, in default of kindred or creditors, that is, "if there be none such or they do not apply," may grant letters of administration "to such other persons as the court" (the ordinary) "shall appoint." R.

1 Rich. Eq. 474

JOHN FORD and Others v. JAMES McELRAY and ELIZABETH, His Wife.

[*Wills* ⇐17.]

Testator devised the whole of his estate to his wife for life, and after her death to E. an illegitimate daughter of the testator. Testator had no legitimate children. The widow took and kept possession of the estate until her death, and then E. took possession. *Held*, that the next of kin of the testator could not avoid the devise to E. under the 4th sec. of the Act of 1795, 5 Stat. 271.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 40–42; Dec. Dig. ⇐17.]

[*Bastards* ⇐98.]

The privilege, under the Act, of avoiding a gift to a mistress or illegitimate children, is personal to the wife and legitimate children, and if they fail to avoid it, the next of kin of the donor cannot do so.

[Ed. Note.—Cited in Taylor v. McRa, 3 Rich. Eq. 107; Bouknight v. Brown, 16 S. C. 168; Williams v. Halford, 73 S. C. 124, 53 S. E. 88.

For other cases, see Bastards, Cent. Dig. § 249; Dec. Dig. ⇐98.]

[*Wills* ⇐17.]

The wife or children, in order to be entitled to avoid the gift, must be living at the time it is to take effect.

[Ed. Note.—Cited in Keys v. Norris, 6 Rich. Eq. 398.

For other cases, see Wills, Cent. Dig. §§ 40–42; Dec. Dig. ⇐17.]

[This case is also cited in Williams v. Newton, 84 S. C. 101, 65 S. E. 959, without specific application.]

Before Harper, Ch., at Greenville, June, 1844.

This bill was filed by the next of kin of Daniel Ford, alleging that the devise of his estate, consisting both of lands and personalty, to his illegitimate daughter Elizabeth McElray, the defendant, was void, as to three fourths thereof, under the fourth section of the Act of 1795, 5 Stat. 271, and claiming distribution of the same among the complainants.

Sullivan, for the complainants.

Perry, contra.

The decree of his Honor is as follows:

Daniel Ford, by his will dated in 1813, gave all his estate to his wife for life, and at her

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death to the defendant Elizabeth *McElray, the wife of James McElray, and soon after died. His widow took and kept possession of the estate, until her death in 1843, upon which event McElray and wife took possession. The bill charges that the defendant, Elizabeth, was a natural child, born before the marriage of her mother and father, and that the devise to her was void under our Act of 1795, 5 Stat. 271, respecting gifts to a mistress or bastard children, for all above one fourth of the estate, of which they claim an account, and that three fourths may be adjudged to them.

I am of opinion that the privilege of avoid-

ing such a gift is personal to the wife and legitimate children, and if they fail to do so, it is not in the power of the next of kin of the donor. It was argued that the terms of the statute are peremptory, that the gift shall be void, for the excess above one fourth. But wherever an instrument is declared to be void, it is universally understood quoad certain persons or purposes. When a deed is declared by statute to be void for want of registration, it is held to be good between the parties to it, and this independently of the terms of any particular statute. A deed void for fraud, will enable the donee to hold the property as against any one but the person defrauded or true owner having the right to impugn it. In Fripp v. Talbird, 1 Hill Eq. 143, it is said that "when a deed, good between the parties, is said to be void as to creditors, there is a want of exact precision in the language. They may treat it as void—they are not compelled to institute any legal proceedings to avoid it, but may seize the property, as if there were no deed. But until they do seize the property, the deed remains perfectly good." It can hardly be supposed, if there were a wife and legitimate children exclusively entitled to the property, and they thought proper to acquiesce in what their father and husband had done, that the instrument should be so absolutely void as that the donee should not recover against a stranger, into whose possession the property had come. The instrument is made void as against the wife and legitimate children, and no one else.

Certainly this comes fairly within the rule of construing a law according to its reason and spirit. The instance put by Blackstone, (1 Com. 61,) in illustrating the true meaning of the maxim, cessante ratione, cessat et ipsa lex, is this. There was a law, that those who forsook the ship in a storm should forfeit all right in her, and those who remained should have the ship and cargo. This was held not to apply to one who was left on board unable to make his escape from sick-

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ness. He was not *within the spirit of the law, though within its express letter. So of the case put by Plowden, 466. There was a law that strangers going on the city walls should be put to death, but this was not held to apply, when on a sudden alarm of an attack of enemies, they rushed to the walls to defend them. See Plowden's remarks, through the whole case, on the equitable construction of laws. Here the manifest object of the statute was to protect the wife and legitimate children, not the next of kin of the donor, as against whom he may give his whole estate to a mistress or a bastard.

Judge Brevard, in his note to the Act,(*a*) observes that "the wording of this Act leaves it doubtful to what era the fourth part spoken of in the Act shall have relation, whether to the time of the death of the party making the gift, &c. or to the time of the gift, devise, &c." The same ambiguity exists as to the "persons having a wife or lawful children of his own living"—at what time must they be living? I am of opinion that to give effect to the statute according to its true spirit and intention, this must be taken to mean when the gift is to take effect in possession. If a party, leaving a wife and lawful children, should give his estate by will to a bastard, and the wife and children should afterwards die in the life time of the testator, what wrong was done to those whom the statute was intended to protect, by permitting the gift to the bastard to have effect? Nature and humanity would require this. So, if in the present case the testator had had legitimate children, and these had died in the life time of the mother, what purpose of the Act would be defeated by sustaining the gift to the natural daughter? If a testator, having a legitimate and an illegitimate child, should give his whole estate to the legitimate child, with a provision that if he should die under age or without issue, it should go to the bastard, what is there to impugn this disposition in the event of the contingency's happening? And in that event who would be entitled to claim? In a case of Breithaupt v. Bauskett, [1 Rich. Eq. 465,] decided at Edgefield, I think I expressed the opinion that where the wife had not contested such a gift during her life time, her administrator could not do it after her death, in favor of his next of kin. Such would be my present opinion.

It is ordered and decreed that the bill be dismissed with costs.

From this decree an appeal was taken but afterwards abandoned.

(*a*) 1 Brev. Dig. 68.

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1 Rich. Eq. *477

*MILLEY MEDLOCK and Others v. JOHN COGBURN and Others.

[*Insane Persons* ⟸25.]

The statute 2d and 3d Edw. 6, c. 8, s. 6, providing for a traverse in the case of a person being found a lunatic on inquest, is, it seems, of force in this State, under the provision of the Act of 1712 declaring of force all statutes which "declare the rights and liberties of the subject and enact the better securing the same."

[Ed. Note.—Cited in Keys v. Norris, 6 Rich. Eq. 390, 394.

For other cases, see Insane Persons, Cent. Dig. §§ 32–34; Dec. Dig. ⟸25.]

[*Insane Persons* ⟸25.]

After inquisition of lunacy found, if the party, or any one having an interest, is dissatisfied with the finding of the jury on the evidence, the proper course is to apply by petition to the court for leave to traverse the inquisition.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 32; Dec. Dig. ⟸25.]

[*Insane Persons* ⟸13.]

It is not necessary that a party should have notice of the inquisition by which he was found of unsound mind.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 21; Dec. Dig. ⟸13.]

[*Insane Persons* ⟸25.]

The alience of the lunatic may traverse, or join the lunatic in traversing, the inquisition.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 32–34; Dec. Dig. ⟸25.]

Of other matters relating to the practice of the court in such cases.

[*Injunction* ⟸31.]

[The court will not enjoin its own proceedings, though it may suspend its own order.]

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 68; Dec. Dig. ⟸31.]

Before Harper, Ch., at Chambers, June 20th, 1838.

The decree of his Honor is as follows:

A bill has been filed for the purpose of injoining, as it is said, the defendant, John Cogburn, from acting as the committee of the complainant Milley Medlock, who was found to be of unsound mind and incapable of managing her affairs, by an inquisition taken under a writ in the nature of a writ de lunatico inquirendo.

The proceeding is altogether irregular. The court does not injoin its own proceedings; though it may rescind or suspend its own order, upon proper cause shewn.

After finding a person of unsound mind by an inquisition, if there be any irregularity in the finding, or if it appear on the face of it to be insufficient, it may be quashed and a new commission awarded. Ex parte Barnsley, 3 Atk. 168, 184; Ex parte Cranmer, 12 Ves. 454.

It is also said, that after inquisition, the party may be inspected and examined by the Chancellor, and if he is clearly satisfied of the soundness of mind, the proceedings may be discharged. Ex parte Roberts, 3 Atk. 6.

If the party, or any one having an interest, is dissatisfied with the finding of the jury on the evidence, the course is to traverse it in the court of law. The right to traverse is referred by the English cases to the statute 2d and 3d Edw. 6, c. 8, s. 6, providing that "if any person be or shall be untruly found-

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*en lunatic, &c., be it enacted, that every person or persons grieved or to be grieved by any such office or inquisition, shall or may have his or their traverse to the same, immediately, or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices founden."(*a*)

That statute is not expressly enumerated among those made of force by our Act of 1712. I think, however, that it comes very clearly within the general description of all such statutes "as declare the rights and liberties of the subject, and enact the better securing the same."(*b*) All the cases on the subject regard the proceedings in lunacy as affecting in the highest degree the rights and liberties of the citizen, as they manifestly do. The statute has accordingly been always followed in this State. It is in conformity, too, with the principles of the common law. It appears from the terms of the statute, and as explained by Lord Hardwick in ex parte Southcot, 2 Ves. Sr. 402, that the inquisition was regarded as an ex parte proceeding on behalf of the crown, like the inquisition of escheat, &c. But by the common law, no one is concluded by proceedings to which he was not a party.

No irregularity is alleged to exist on the face of the inquisition, nor is it before me, nor has the party offered herself to my inspection and examination.

The grounds for relief alleged by the bill are, first, that the complainant, Milley Medlock, had not notice of the application to the court, and of the inquisition by which she was found of unsound mind; and secondly, that she is not in fact of unsound mind; in support of which allegation various affidavits are produced.

As to the first, I think from the authorities that notice was not necessary. In ex parte Southcot it was held that the presence of the party was not necessary. In that case he was in a foreign country, and plainly it was not intended that notice should be given him. This may be inferred from Ex parte Hall, 7 Ves. 261, in which, under the circumstances of the case, Lord Eldon directed that the party should have notice, and quashed the inquisition for the want of it. In the King v. Daly,

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1 *Ves. Sr. 269, which was a case of inquisition of escheat, it was said, in all cases of inquest, not to be the general rule that notice should be given; yet when the party was apprised of the proceedings and desired notice, he was entitled to it. It was his privilege to be present, if he thought proper. So it is said the jury may require the presence of the party, if they think proper, but they are not bound to do so. This is on the ground to which I have before referred, that the inquest is regarded as an ex parte proceeding. No application was made, that the party in this case should have notice, and therefore no order to that effect was made.

With respect to the allegation that the complainant Milley Medlock is not in fact of unsound mind, it is plain that after the inquisition the bill cannot be entertained with a view to the court's deciding that question upon evidence. That can only be done by a traverse in the court of law. But though as

(*a*) Vide Shelf. on Lunatics, 113, 498. 2 Law Lib. 72, 316.

(*b*) 2 Stat. 413.

a bill, it must, I apprehend, be dismissed, yet I may properly regard it as an application for leave to traverse. This is commonly done by the leave of the court, and the application has been made by petition. Ex parte Wragg, 5 Ves. 450; ex parte Hall, 7 Ves. 261. As said by the Chancellor in the last case, the traverse under the statute is matter of right at law, and perhaps no order of this court would be necessary for that purpose. The necessity for an application to the court arises out of the circumstance mentioned by Lord Hardwick in ex parte Roberts, 3 Atk. 7, that without the leave of the court, the custody could not be suspended. The common course, as indicated in ex parte Wragg, is to suspend the custody when leave is given to traverse; "for supposing upon the traverse she is found compos mentis, I cannot take her property." Under peculiar circumstances, it seems to be within the discretion of the court not to suspend the custody. In the matter of Ludlam, (reported 1 Collinson on Idiots, 174) after the inquisition and appointment of a committee, Lord Erskine, on the application of the lunatic, granted an order restraining the committee from interfering with his person until the trial of the traverse. On the representation of his physician, that he was in such a state of lunacy as to render it necessary that he should be strictly guarded, Lord Eldon discharged the order. I see nothing in this case to require a departure from the usual course, and think the custody must be suspended until the trial.

John M. Kinard, to whom the complainant

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Milley Medlock *has conveyed her estate, is a proper party to this application. Not only the lunatic himself, but his alienee, or any person who has contracted to purchase from or sell to him, may traverse, or join the lunatic in traversing, and will be bound by the verdict. Ex parte Roberts, 3 Atk. 308; ex parte Hall; Niel v. Morley, 9 Ves. 478.

It may be proper to observe that although the alleged lunatic and her alienee suggest the proceedings on the inquisition and tender the traverse, they are regarded as defendants, and the case must be made out on the part of the State as plaintiff. Rex v. Roberts, 2 Stra. 1208.

It is ordered that Milley Medlock, and her alienee, John M. Kinard, have leave to traverse the inquisition of the jury by which the said Milley Medlock was found to be of unsound mind, to the next sitting of the Court of General Sessions for Edgefield District; and that John Cogburn, who has been appointed the committee of the said Milley Medlock, be restrained from interfering with her person or estate until the trial of the said traverse.

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[End of Volume 1 Rich. Eq.]

REPORTS

OF

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS IN EQUITY AND COURT OF ERRORS OF SOUTH CAROLINA

VOLUME II

FROM NOVEMBER, 1845, TO MAY, 1846, BOTH INCLUSIVE

By J. S. G. RICHARDSON

STATE REPORTER

COLUMBIA, S. C.
PRINTED BY A. S. JOHNSTON
1847

ANNOTATED EDITION

ST. PAUL
WEST PUBLISHING CO.
1917

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COLUMBIA, DECEMBER, 1845.

CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
" WILLIAM HARPER, (a)
" JOB JOHNSTON,
" B. F. DUNKIN.

2 Rich. Eq. *1

*SUSAN CASTON v. A. M. CASTON et al.

(Columbia, Dec., 1845.)

[*Wills* ⇐794.]

Testator devised and bequeathed his plantation and forty or fifty negroes to the complainant, his widow, during her widowhood, charging the same with the payment of his debts and the support of his minor children. The complainant held, used and enjoyed the property, under this provision of the will, for eleven years, and then filed her bill claiming dower in the plantation. *Held*, that she could not take the plantation under the will and claim dower in the same also, and that her conduct sufficiently indicated her election to take under the will.

[Ed. Note.—Cited in Braxton v. Freeman, 6 Rich. 36, 57 Am. Dec. 775; Buist v. Dawes, 3 Rich. Eq. 303; Cunningham v. Shannon, 4 Rich. Eq. 150.

For other cases, see Wills, Cent. Dig. § 2056; Dec. Dig. ⇐794.]

[*Adverse Possession* ⇐43; *Dower* ⇐75.]

The possession of a devisee may be connected with the possession of a purchaser from the devisee, so as to defeat, under the statute of limitations, the right of the widow of the devisor to dower in the premises, although neither the possession of the devisee nor that of the purchaser be for ten years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 220; Dec. Dig. ⇐43; Dower, Cent. Dig. § 260; Dec. Dig. ⇐75.]

[This case is also cited in Heirs v. Gooding, 43 S. C. 435, 21 S. E. 310, and distinguished therefrom.]

Before Dunkin, Ch., at Lancaster, June, 1845.

The Chancellor. Samuel Caston, the husband of the complainant, died in May, 1831, possessed of several tracts of land, and possessed of considerable personal property. By his will, dated in May, 1829, he disposed of his estate among his family, and appointed the complainant executrix, and A. M. Caston and Glass G. Caston, executors of the same.

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*This bill was filed on the 13th June, 1843, claiming dower in four several tracts of land therein specifically described, of which the testator was alleged to have been seized during the coverture.

The first may be called the Farm and Mill tract. This plantation, with forty or fifty negroes and other personalty, was devised and bequeathed to the complainant during her widowhood, charged with the payment of his debts and the support of the testator's minor children. The complainant has held, used and enjoyed the property under this provision of the will for eleven years prior to the institution of this suit.

It is impossible that the testator could have intended that the complainant should have enjoyed this plantation during her natural life or widowhood and yet be entitled to her legal right of dower, or the enjoyment of one third of the premises, at the same time that she enjoyed the whole by the will. Her conduct is a sufficient indication of her election to take under the provisions of the will. See Wilson v. Hayne, Chev. Eq. R. 37.

The second tract in which dower is claimed, is that on which the testator lived and died, and which is devised to his daughter Elizabeth G. Caston, during her natural life, with a limitation to her issue living at her death. Elizabeth G. Caston died some years after the testator, leaving children. Neither of the defendants is in possession of the premises, and the children are not parties to these proceedings. No judgment can therefore be pronounced on this claim.

The Patrick McKenna tract was devised to Middleton Caston. Before he became of age he sold and conveyed the land to Uriah Blackman (who is no party to these proceedings) and the complainant united in the conveyance, with a warranty of title. This seems to preclude any claim on the part of the complainant to the aid of this court.

The remaining tract, out of which the complainant insists on her right of dower, is the McShane tract. This land was devised to the defendant, Asia Minor Caston, who was then in possession of the premises. He continued in possession for two or three year afterwards, and then, as he alleges in his answer, conveyed or sold the premises to his co-defendant Glass G. Caston, who has

(a) During part of the term.

ever since held and enjoyed the same. Glass G. Caston in his answer insists on a possession of twelve years, in bar of the complainant's claim. The continued possession by A. M. Caston, or Glass G. Caston, from the
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death of the testator *until the present time, was abundantly proved. It was insisted, that as no conveyance was made from A. M. Caston to his co-defendant Glass G. Caston, the latter could not protect himself under his possession or statutory title. The objection was not made until the argument of the case, and the effect of sustaining it would only be to occasion delay and protract litigation. But the court is of opinion, from the state of the pleadings and the evidence, enough appeared to establish a privity between A. M. Caston and Glass G. Caston, and that their possession may be connected for the purpose of protecting the title to the premises. Wilson v. McLenaghan, McM. Eq. R. 35.

The bill may be retained for the purpose of making the children of Elizabeth G. Williams party to the proceedings, if the complainant shall be so advised—as to the remaining tracts of land the bill is dismissed.

The complainant appealed, on the following grounds.

1. Because, it is respectfully submitted, there is no provision in the testator's will which would bar her of her right of dower, or that would put her to an election. And if she had elected, this court ought now to permit her to alter it.

2. Because there was no evidence or circumstance to connect the possessions of A. M. and Glass Caston so as to bar her right of dower in the tract, now in possession of Glass, by the statute of limitations.

3. Because, it is most respectfully submitted, there was no act of complainant which would, in equity, exclude her from dower in the above tracts and all the others in which it is claimed by the bill.

Curia, per JOHNSON, Ch. This court concur in the decree of the circuit court, and the appeal is dismissed.

JOHNSTON, Ch., concurred.

HARPER, Ch., absent.

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2 Rich. Eq. *4

*RICHARD MADDOX v. HEWLET SULLIVAN, JOHN MAHORN, SAMUEL MADDOX, et al.

(Columbia. Dec., 1845.)

[Reported and annotated in 44 Am. Dec. 234.]

[*Equity* ⟸345.]

The testimony of one witness, though in some degree supported by corroborating circumstances, *held* insufficient to disprove defendant's answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 715–724; Dec. Dig. ⟸345.]

[*Equity* ⟸345.]

Where the testimony of one witness and corroborating circumstances are relied on to disprove an answer, the circumstances must, it seems, be such that, standing alone, a reasonable conclusion, as to the truth of the fact, might be deduced from them.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 723; Dec. Dig. ⟸345.]

[*Execution* ⟸222, 249.]

Mere irregularities or omissions will not vitiate a sheriff's sale. Where, therefore, a sheriff sold land which had not been advertised twenty-one days, *held* that the sale was valid.

[Ed. Note.—Cited in Eason v. Witcofskey, 29 S. C. 245, 7 S. E. 291; Ex parte Alexander, 35 S. C. 415, 14 S. E. 854.

For other cases, see Execution, Cent. Dig. §§ 633, 697; Dec. Dig. ⟸222, 249.]

[*Execution* ⟸139.]

So also, where a sheriff, having a number of executions against a defendant, levied on all his property, consisting of a plantation, slaves, &c., but made no entry of the levy except on the oldest execution, and, at the proper time, sold, first, the slaves, the proceeds whereof amounted to more than sufficient to satisfy the oldest execution, and then the plantation; *held* that the sale of the plantation was valid, although there was no entry of the levy on the junior executions under which the sale was in fact made.

[Ed. Note.—Cited in Ward v. Cohen, 3 S. C. 345.

For other cases, see Execution, Cent. Dig. § 332; Dec. Dig. ⟸139.]

Before Johnson, Ch., at Abbeville, June, 1845.

The Chancellor. The defendant, John Mahorn, having become largely indebted, judgments were obtained against him, by confession or otherwise, at the suit of divers creditors, to a large amount. The first in order of time was at the suit of C. T. Latimer for the use of Samuel L. Maddox, for $642, besides interest and costs: an execution on which was lodged in the sheriff's office on the 19th day of April, 1841; and after several intervening judgments, was one in favor of the complainant; execution on which was lodged in the sheriff's office on the 11th January, 1843.

The defendant, Sullivan, had also obtained a judgment against him in Laurens district, and execution was lodged in the sheriff's office there, on the 3d September, 1842, and in the sheriff's office of this district, on the 3d April, 1843. In all, I think, there were about fifteen judgments against him, on which executions had been lodged in the sheriff's office of this district; but the order of priority is unimportant to the determination of this cause.

In the sheriff's return on the execution at the suit of Latimer for the use of Maddox, first above named, is endorsed a levy on all the valuable property of the defendant, Ma-

horn, including the plantation on which he

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lived, four slaves, live stock, furni*ture, &c.; but there was no entry of the levy on any of the other executions.

On the sale day in April, 1843, being the third day of the month, the sheriff offered for sale at the court house door, first the slaves, the sales of whom amounted to more than sufficient to pay Latimer's judgment. He then offered for sale the tract of land levied on, which was bid off by the defendant, Sullivan, at the price of $200. The rest of the property levied on was sold on the day following, at the residence of the defendant, Mahorn; but the whole proceeds of the sales were swallowed in satisfying judgments and executions prior in point of time to that of the complainant, and entitled to precedence of it.

The bill charges that the lands were sold at a greatly inadequate price, in consequence of a corrupt agreement between the defendants, Hewlet Sullivan and Samuel Maddox, not to bid against each other: and that one of them should bid it off for their joint benefit, and that they should share the profits; and therefore prays that the sale may be set aside.

This charge is distinctly and circumstantially denied in the answer of the defendant, Sullivan. Samuel Maddox, although a party defendant, has not answered; but was called by complainant to prove the agreement between Sullivan and himself, charged in the bill.

He testified that he was present at the sale; and that after the negroes were sold, the sheriff enquired of him what he intended to do about the land. To which he replied that the sales of the negroes were sufficient to pay Latimer's execution, to which he was entitled, and he had no further concern about it. The sheriff, notwithstanding, determined to sell; and the witness enquired of him whether, if he bid it off, he, the sheriff, would wait until the sale of the rest of Mahorn's property, which was to take place the next day, for the money: who replied that he would; and witness, therefore, contemplated bidding for it: knowing, however, that Sullivan, as one of the judgment creditors, was interested to make the land bring its value, he went to him and said, "it is not worth while for us to bid against each other." To this he made no direct reply, but said, "then I'll bid;" and but for this, witness would have bid more for the land, having money enough at home. That on the evening of the same day, witness offered to pay Sullivan one-half of the sum he had bid for the land; but he declined accepting it, saying that he had enough of his own, and that another

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time would do as well; *and that on the morning afterwards, Sullivan told him that he would call on him at his own house, when they would determine what they would give Mrs. Mahorn, the wife of the defendant, Mahorn, for her right of dower in the land. Besides this, there was no proof of the agreement; and the only circumstance relied on in support of it, was the fact proved by several witnesses, that the land was worth $1000 or $1200. It would be unprofitable to enquire here whether if the agreement charged in bill had been fully proved, it would have vitiated the sale; because the fact of the agreement has not been sufficiently proved. The answer of the defendant, as before stated, positively and circumstantially denies its existence.

The old rule was, that two positive witnesses were necessary to disprove the answer of the defendant: otherwise, it is said, as in perjury, there is only oath against oath; and the Court will not undertake to determine between them. That strictness is now dispensed with, and it is held that one positive witness and other strong corroborating circumstances are sufficient. What these circumstances shall be, can't be defined by rule; but I apprehend they must be such that, standing alone, a reasonable conclusion as to the truth of the fact might be deduced from them. Here, the inadequacy of price is the only circumstance in support of the evidence of Samuel Maddox, and that, standing alone, is not sufficient evidence of fraud, especially in judicial and other public sales, if otherwise perfectly fair. There are numerous cases in which such sales have been sustained, when the price paid was very grossly inadequate—in some, where it was less than one-hundredth part of the value. The allegations of this bill are not, therefore, supported by sufficient evidence.

The complainant relies on two other grounds, to set aside this sale. The 1st is that the sheriff neglected to advertise the land the length of time required by law, before the sale. The sale, as before stated, was made on the 3d day of April, 1843, and the entry of the levy on the execution bears the date of the 14th March preceding; and the deputy who made the levy, and the sheriff's clerk who prepared the advertisement, both testified that, according to their belief, the entry bore the true date, and that the advertisement of the sale was posted up at the court house, about sun down, or a little after, that day. But the great preponderance of the evidence is, that the levy was not made, nor the advertisement put up, until the day after (fifteenth March.) The Act of 1839 directs the sheriff to advertise real

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estates "at *least twenty-one days before the day of sale." The time must, therefore, be computed as exclusive of the day of sale. Excluding that, and including the day on which the advertisement was set up, only twenty days could have elapsed between that and the day of sale. The advertising was

irregular in another respect. The same Act requires that the sales of all property taken in execution shall be advertised at the court house and two other public places, if there is no public gazette published in the district; and it is conclusively proved that these were not advertised at any other place but the court house, until after the 15th March.

The 2d ground is, that the only execution levied on the property, (Latimer's execution) was satisfied, by the sale of the slaves, before the land was sold, and therefore the sale was void, and the fact has been before stated.

Both these grounds are based on mere irregularities or omissions of the sheriff, in the discharge of the duties of his office; and that these do not vitiate a sale of property made by him, has been so long and so fully settled, and upon such well defined principles, as to render all commentary upon them unnecessary: See Turner v. McCrea, 1 N. & McC. 12; Cain v. Maples, 1 Hill, 304 [26 Am. Dec. 184]; Gist v. McJunkin, 1 McM. 342.

In reference to the second ground, it may be further remarked, that all the executions were in the sheriff's hands, at the time that of Latimer was levied, and having possession of the property, his duty required that he should retain it until they were all satisfied, or the property exhausted.

There is no magic in the mere indorsement of the levy on the execution, although in strictness, and as a means of preserving the evidence of it, the sheriff ought to have made it: and having regard to the substance rather than the form, the Court will presume that done which ought to have been done.

The complainant's bill is therefore dismissed with costs.

The complainant appealed, and moved to reverse the decree of the Chancellor, on the following grounds:—

1st. Because the direct and positive testimony of the witness, Samuel L. Maddox, as to the combination between himself and the defendant, Hewlet Sullivan, strengthened and confirmed by the other corroborating circumstances of fraud, was sufficient to entitle the complainant to the relief prayed for.

2d. Because, when the sheriff sold the land, he had no legal authority to sell, inasmuch

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as the only execution which had been *levied, (that of Latimer for S. L. Maddox,) was previously satisfied out of the proceeds of the sale of the personal property of the defendant Mahorn.

3d. Because the sheriff sold the land without having levied upon and advertised the same, as required by law, and the sale was therefore void.

4th. Because the sale having been made by the sheriff under an execution which had been previously satisfied—without legal notice of the same—and the proof of the fraudulent combination between creditors at the sale, with the corroborating circumstances, and the gross inadequacy of price—all taken together, make such a case of unfair advantage as, in favor of judgment creditors, without actual notice, will avoid the sale.

Curia, per DUNKIN, Ch. This Court concur in the decree of the Chancellor, and the appeal is dismissed.

HARPER and JOHNSTON, CC., concurred.

JOHNSON, Ch., absent from indisposition.

Perrin & McGowen for the motion.

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2 Rich. Eq. 8

W. E. HASKELL v. WILLIAM WATIES.

(Columbia. Dec., 1845.)

[*Equity* ⟸220, 248.]

If a bill appear on its face to be prematurely filed, and advantage be taken of this by demurrer, the demurrer will be fatal. But where there is no demurrer, and at the hearing the bill appears to have been prematurely filed, the court is not bound to dismiss it, but may, if the plaintiff is then entitled to the relief he seeks, decree for him.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 495, 497; Dec. Dig. ⟸220, 248.]

Before Harper, Ch., at Orangeburg, February, 1845.

The Chancellor. This was a bill to foreclose a mortgage. It is alleged by the answer, and so the fact appears to be, that at the time of the filing of the bill there was nothing due, either of principal or interest, on the bond, the payment of which the mortgage was intended to secure. It had become due, however, before the hearing, and the question was, whether the defendant was entitled to have the bill dismissed, on the score

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of its having *been prematurely filed, or whether the complainant was entitled to a decree for foreclosure.

In the case of Sarter v. Gordon, 2 Hill Ch. 121, it is said—"If a bill appear on the face of it to be prematurely filed, and advantage be taken of this by demurrer, the demurrer will be fatal. If there be no demurrer, and the cause be brought to a hearing before the time fixed for the performance of the contract, there might be reason to contend that the bill should be dismissed; but if no advantage be taken by demurrer, and it be not brought to a hearing till the proper time for performance has elapsed the Court would not do so nugatory a thing as to dismiss the bill, in order to compel the party to file another bill for the very same purpose. Equity can do full justice to the parties by preventing surprise, and imposing costs on the party by whose fault they were prematurely and unnecessarily incurred."

In the present case, it did not appear on the face of the bill, that it was prematurely filed. The fact that nothing was due at the time of filing, depended on a question of disputed payment. If the bill should be dismissed, of what advantage would this be to the defendant? If he is prepared to pay the money upon the dismissal, he will suffer no injury, for he will be protected from the payment of costs. If otherwise, and a new suit should be necessary, it would be contrary to the maxims of the Court to compel parties to incur the costs of two suits, when those of one would be sufficient. It may be thought that a defendant is entitled to a certain delay, which would be consequent on the commencement of a new suit. But this delay is no matter of right. It is upon a general presumption, that the party may need certain time to prepare for his defence. But consistently with this, the speediest administration of justice is desirable; and, as suggested in Sarter v. Gordon, if we can be sure that the party is not surprised or precluded from defence, any delay would be injustice to the opposite party. To defer justice is to deny justice. The Court can, and will, in all cases, guard against such surprise. In the present case, no delay was moved for, nor was there any suggestion that, by delay, any defence might be prepared.

The defendant appealed, and now moved this Court to reverse the decretal order and dismiss the bill, on the grounds:

1st. Because when the bill was filed on the 23d December, 1844, nothing was due on the bond in question, all the interest due up to that time having been paid.

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*2d. Because the amount which the commissioner reports due, was the interest for the year 1844, not due until January, 1845—which interest could not be claimed in a bill filed on the 23d day of December, 1844. At least, the defendant should have been allowed the usual forty days from January, 1845, to answer the same.

3d. Because the said order is, in other respects, irregular and contrary to law and equity.

Bellinger, for the appellant.
Glover, contra.

Curia, per HARPER, Ch. In this case the Court agrees with the conclusion of the Chancellor as to the matter of practice involved. As the time appointed for the sale of the mortgaged premises, however, has elapsed, in consequence of the appeal, it becomes necessary to extend the time for selling. It is therefore ordered, that unless the defendant shall pay the amount due by him before the tenth day of January next, the commissioner proceed to sell the mortgaged premises, on the terms and in the manner directed by the circuit decree. In all other respects the decree is affirmed.

JOHNSTON, Ch., concurred.

JOHNSON, Ch., absent from indisposition.

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2 Rich. Eq. *11

*M. L. BRYAN, Adm'or, and J. C. RICHARDSON v. U. M. ROBERT.

(Columbia. Dec., 1845.)

[*Chattel Mortgages* ⇐213.]

A surety, who obtains an assignment of the mortgage of a slave, given by his principal to secure the same debt on account of which he is surety, may file a bill against an innocent purchaser from the mortgagor for a specific delivery of the slave.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 463; Dec. Dig. ⇐213.]

[*Chattel Mortgages* ⇐213.]

If the innocent purchaser of a mortgaged slave should, on coming to a knowledge of the mortgage, send the slave out of the State, with a view to defeat the lien of the mortgage, quære, would he be liable to account for the value of the slave to the parties whose interests the mortgage was intended to protect?

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 463–465; Dec. Dig. ⇐213.]

Before Harper, Ch., at Barnwell, February, 1844.

The Chancellor. At a sale of the personal estate of one Robert Minors, deceased, James M. Loper became the purchaser of a slave named Stephen, for which he gave his bond to Benjamin Coleman, the administrator, with Joseph C. Bryan, the intestate of the complainant, Martin L. Bryan, and the complainant James C. Richardson, as sureties, together with a mortgage of the property. Loper shortly afterwards sold the slave to one J. M. Myers, and as it is stated, delivered the possession of him. Before any bill of sale executed, the defendant Ulysses M. Robert bargained with Myers for the purchase of Stephen, at the alleged price of $625, and the bill of sale was executed directly from Loper to Robert. The complainants state their liability on the bond; that Loper is utterly insolvent; that Myers and defendant purchased with knowledge of the mortgage; that defendant has sent the slave out of the state, and they pray that he may be compelled to produce him, or to account for his value towards satisfaction of the debt to the estate of Minors.

The defendant pleads that he is a bona fide purchaser for valuable consideration without notice, and answers, denying notice fully and explicitly.

An attempt was made to prove notice, but I think it failed entirely. It amounted to no more than this: that an advertisement of the sale of the estate of Minors, specifying

its terms, was put up at a store, where was the defendant's post office, and to which he was in the habit of resorting.

A witness proved the acknowledgment of Myers of his having received of defendant $625. as the price of Stephen.

I have no doubt but that the complainants

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might have sus*tained their bill against Loper, while the negro was in his possession, and the administrator of Minors, to compel the former to pay off his debt, or the latter to enforce his mortgage. And they would have the same equity against any purchaser from Loper, having notice. But as it would be merely an equity, they could not enforce it against a bona fide purchaser without notice. Notice is denied, and as I have said it has not been proved. It was shewn that the mortgage had been assigned to the complainants, and it was urged that this vested the legal title in them, and that they may recover on this legal title. It appeared, however, that the assignment was made after the filing of the bill, and only the day before the hearing. This was not, therefore, and could not be, a part of the case made by the bill, and cannot properly be considered. It might perhaps be within the discretion of the court, if justice and convenience required it, to retain the bill and give leave to amend. But I am satisfied such a bill could never be sustained. It is plain that this does not come within the class of cases in which a bill is held to lie for the specific delivery of a slave. It is plain that if complainants have the legal right, their remedy is by action of trover at law. It is true, that it is said in Miller v. Furse, Bail. Eq. 187, that such an objection to the jurisdiction must be taken by demurrer, plea or answer, and not ore tenus at the hearing. But it was impossible for the defendant in this case to object otherwise than he did at the hearing, as the charge formed no part of the bill. A claim that is made dehors the bill, may certainly be defended dehors the answer. The bill is dismissed.

The complainants appealed, and now moved this court to reverse the decree of his Honor the Chancellor, and for a decree in their favor, on the following grounds.

1. Because the plea that the defendant was a purchaser for valuable consideration without notice was informal, insufficient and contrary to the rule and practice of the court.

2. Because the legal title being in the complainants, the plea could not avail.

3. Because it was proven that the defendant had notice of the mortgage before he removed the negro, and he cannot therefore be protected by his own wrong, and should be compelled to bring back the negro within the jurisdiction, or account for his value.

4. Because upon the case as made by the bill, answer and proof, the decree should have been for the complainants.

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*And also, (if need be) the following ground will be used.

That leave should have been granted to amend the bill so as to state the assignment of the mortgage to the complainants.

Bellinger, for the appellants.

J. T. Aldrich, contra.

Curia, per JOHNSTON, Ch. It appears to have come out in evidence, at the hearing, (and, so far as we can see, without objection to the evidence,) that the plaintiffs had obtained an assignment of the mortgage after the filing of their bill. The court was precluded from giving effect to the case thus made out, because it transcended the statements of the bill.

The Chancellor, speaking of the case thus presented, says it was not "a part of the case, made by the bill, and cannot properly be considered. It might be within the discretion of the court, if justice and convenience required it, to retain the bill and give leave to amend. But I am satisfied," he continues, "such a bill could never be sustained. It is plain that this does not come within the class of cases in which a bill is held to lie for the specific delivery of a slave: it is plain that if complainants have the legal right, their remedy is by action of trover at law."

These observations show, that, if the Chancellor had been of the opinion, that the legal title, superadded to the equities of the plaintiffs, could have countervailed the defendant's plea of innocent purchase, and that this case came within the principle of Young v. Burton, McM. Eq. 255, he would have given leave to make the amendment indicated by him.

We are of opinion, that this is one of the cases calling for a specific delivery. The case, in my judgment, is much stronger than Young v. Burton. A portion of the court, in that case, doubted whether a decree should be made for the delivery of specific slaves, unless the bill stated the peculiar circumstances imparting a particular value to the property, or set forth the particular purposes which rendered its delivery necessary. It was held, however, by a majority of the Judges, that wherever the plaintiff stated a case in which the defendant was in possession of his slave, he stated a case entitling himself to the interposition of this court, unless, indeed, the defendant, by the exhibition of an equity on his part superior to that of the plaintiff, could turn him over to his legal remedy.

Although one of the dissenting Judges in that case, I should not, even then, have doubted the authority or duty of the court

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*to interpose in such a case as this. The plaintiffs, since their assignment, stand as

mortgagees of a chattel, out of which, specifically, their debt is to be paid. The defendant, as purchaser of the mortgaged property, is entitled to redeem; and, if the property should be subjected to the mortgage, he is also entitled to whatever of the proceeds of sale may remain, after the mortgage debt is satisfied. The plaintiffs' case, therefore, is one for the foreclosure of their mortgage; and it is not perceived how an action of trover, even if one lay, would furnish them their appropriate remedy.

We think, therefore, the plaintiffs should have leave to amend: but this should be granted upon payment of the costs of the amendment.

In granting this leave, we purposely abstain from expressing any opinion upon the judgment which should be given in the case, as it will then stand. But we conceive that it will not be improper to indicate that one part of the bill, as it was originally framed, and stood at the hearing, and which seems to have escaped the Chancellor's attention, deserves to be maturely considered: and it is that part which charges that the defendant, (supposing him to have had no notice of the mortgage when he bought,) yet that coming to a knowledge of it afterwards, he removed the property, with a view to defeat its lien and to destroy those interests which the plaintiffs had in its enforcement. It may be, that such a case may fall within the principle of Pickett v. Pickett, 2 Hill Ch. 470, or some analogous principle.

It is ordered that the decree be set aside; that the cause be remanded to the circuit court; and that the plaintiffs have leave to amend the bill upon payment of the costs of their amendment.

JOHNSON and DUNKIN, CC., concurred.

HARPER, Ch., absent.

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2 Rich. Eq. *15

*WILLIAM McKENNA v. SUSANNAH GEORGE, Administratrix of David George, Deceased.

(Columbia. Dec., 1845.)

[*Principal and Surety* ⟸194.]

Where one of several sureties to a joint obligation pays the debt, he has the same right to contribution from the representatives of a deceased cosurety, as from a surviving co-surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 612; Dec. Dig. ⟸194.]

[*Principal and Surety* ⟸196.]

A surety who has left the State is in the same condition as if he were insolvent, and the solvent sureties, or their representatives, who remain within the jurisdiction, are liable to contribute in equal proportions. Where, therefore, of six sureties to a sheriff's bond, three left the State, and of the three who remained two died, and the survivor was compelled to pay a considerable sum on the bond; *held*, that he might compel the representatives of the other two, who remained, to contribute each one third.

[Ed. Note.—Cited in Sloan v. Gibbes, 56 S. C. 491, 35 S. E. 408, 76 Am. St. Rep. 559.

For other cases, see Principal and Surety, Cent. Dig. § 628; Dec. Dig. ⟸196.]

[*Principal and Surety* ⟸194.]

A surety may, before he has paid the debt, file a bill against his co-surety to compel him to contribute towards its payment.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 619; Dec. Dig. ⟸194.]

[*Equity* ⟸96.]

To a bill for contribution, co-sureties who have removed beyond the jurisdiction of the court need not be made parties.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 254; Dec. Dig. ⟸96.]

[*Equity* ⟸91.]

To a bill to compel co-sureties to contribute towards the payment of a judgment recovered against the plaintiff, the judgment creditor should, it seems, be made a party.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 250; Dec. Dig. ⟸91.]

[*Principal and Surety* ⟸196.]

Where the only surviving surety to a joint bond, (he being alone subject to an action at law,) is sued, and defends the action bona fide, and thereby reduces the amount of the creditor's demand, the representatives of the deceased co-sureties are liable to contribute towards payment of the costs and other expenses incurred in defending the action at law.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 630½; Dec. Dig. ⟸196.]

[*Costs* ⟸28.]

Where a surety filed two separate bills against the representatives of his deceased co-sureties for contribution, he was ordered to pay the costs of one of them.

[Ed. Note.—Cited in Williams & Clinton v. Sims, 1 Rich. Eq. 55.

For other cases, see Costs, Cent. Dig. § 94; Dec. Dig. ⟸28.]

[This case is also cited in Alsobrook v. Alsobrook, 14 S. C. 176, as to the doctrine of contribution.]

Before Johnson, Ch., at Lancaster, June, 1843.

The Chancellor. In 1833, John Sims was elected sheriff of Lancaster district, and the complainant, and David George, the defendant's intestate, John McKenzie, Samuel F. Dunlap, Amasa Howard and William Williams, became jointly bound with him in a bond in the penal sum of $12,000, conditioned for the faithful discharge of the duties of his office; and the bill states that during his continuation in office, Sims received large sums of money in his official capacity, belonging to divers persons therein named, which he neglected to pay over to the persons entitled, and in the end became insolvent and removed to Mississippi, immediately after the expiration of his term of office, and still resides there. That Amasa Howard and John McKenzie, two of the sureties,

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*have removed from without the limits of

the State, to parts unknown, and are supposed to be in embarrassed and doubtful circumstances. That in 184—, Catharine Blair, the administratrix of James Blair, commenced actions at law against complainant, William Williams and David George, to recover moneys received by the said John Sims, in his official capacity, on account of her intestate, which he neglected to pay, (their remaining co-surety Samuel F. Dunlap having before departed this life;) that the action against the said David George abated by his death, and at the fall term of the court of common pleas, the said Catharine Blair recovered judgments against the complainant and William Williams for a considerable sum, the amount of which is exhibited with the bill, but that pending the said actions the said William Williams removed to parts unknown to complainant; and that an execution was sued out on the said judgment, which complainant has been obliged to pay, as the only surety remaining alive within the State. The bill further states that actions at law were commenced against the complainant, William Williams and David George, to recover monies received by the said John Sims in his official capacity, on account of B. H. Saunders, T. & M. Parish, McClellan Williams, and others, which he appropriated to his own use, and neglected to pay over; these actions abated as to David George, as in the case before stated, and at the fall term of the common pleas, 1842, judgments were recovered against the complainant and the said William Williams for large sums of money, for which executions have been sued out and lodged in the sheriff's office, and complainant being the only party defendant resident in the State, his property is liable to be taken in execution, and sold, in satisfaction thereof. That besides the taxed costs to which he was subjected, in consequence of the recoveries against him in the case before alluded to, the complainant expended considerable sums of money in employing counsel to defend the said actions, and particularly in successfully defending a suit brought against him by one Clarke, on the same bond, for a supposed defalcation of the said John Sims, in not paying money which he had received on his account.

The bill further states that the estate of the said David George, in the hands of the defendant, his administratrix, is abundantly solvent, and also that of the estate of Samuel G. Dunlap; and as all the other securities reside without the jurisdiction of the Court, it is insisted that the

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defendant is bound to contribute in *the proportion of one-third, to the payment of all the moneys recovered against the complainant, in the actions at law before referred to, including the taxed costs, and to the payment of the moneys expended by complainant in defending the said actions, and particularly in successfully defending that at the instance of the said Clarke.

The defendant states in her answer, that she is not the administratrix of David George, as stated in the bill, but that by his last will he appointed her sole executrix, and that she has assumed the execution thereof, and that his estate is inconsiderable in amount, and greatly embarrassed. She denies all personal knowledge of most or all of the material allegations of the bill, and requires proof. In the event of these being established she insists—

1st. That the surviving sureties alone are bound to contribute towards the payment of the sums recovered against the complainant.

2nd. That as there were six sureties to the bond, in any event the estate of her testator is only liable to contribute in the proportion of one-sixth, and that complainant must pursue the other co-sureties to recover the balance.

3d. That the complainant is not entitled to contribution on account of the taxed costs recovered against him, nor for the moneys expended by him in defending the suits, particularly in the case at the instance of Clarke.

4th. That all the co-sureties now alive, and the legal representatives of those that are dead, and all the official creditors of Sims, as well those that have sued as those who have demands against him, ought to have been made parties.

1. There is certainly nothing in the first ground of this defence. The liability of co-sureties to contribute equally to the payment of the debt of their principal, when he is unable to pay it, is not founded on contract, but on the general principles of equity. If several engage in any enterprise or undertaking, without stipulating as to what each is to gain in the event of success, or lose in the event of failure, it is but equitable and just that they should share the profit or loss equally, and the principle applies with full force to the case of co-sureties—their undertaking that their principal shall do or perform what the contract imposes on him, is, as between themselves, joint, and if he fails they must contribute equally in aid of each other. The principle is strongly illustrated

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in Harris v. Ferguson, 2 Bail. 400, in *which the sureties to several different bonds, given with a view to the same common object, were held bound to contribute equally to satisfy the defalcation, although the contracts were without concert or agreement between them; and the idea that the death of a party discharges his liabilities, whether legal or equitable, is altogether novel and unfounded. 2. Nor do I think the second ground of defence has a better foundation. That proposes that the defendant should be held liable to contribute only in proportion to the whole number of sureties, that is to say,

one-sixth part, and that complainant should be left to pursue the other co-sureties, who have removed without the State, and without the jurisdiction of the Court, leaving him to incur the delay, the trouble and expense, of prosecuting suits under such circumstances, and abide the risk of their solvency. Is this equality of burthen, within the principle laid down? clearly not. The defendant must share them. 3. I at first entertained some doubts about the liability of the defendant to contribute to the payment of the costs, taxed against complainant, in the suits recovered against him, but on more reflection I am satisfied he is entitled to it—as between the sureties, all were bound to contribute equally upon demand made, and the defendant's intestate was made a party defendant in several of the suits brought, and if he had paid his proportion of the demands, the complainant would have been left to defend himself as he might, and upon his own responsibility, nor could he have discharged himself from his liability to the plaintiff without paying, not only what he was equitably bound to pay, but all that his co-sureties were bound for; and unless he had done so, costs were inevitable, and must be regarded as a common burthen.

The same principle applies, I think, to the expenses incurred in defending the suits. If the complainant, knowing that the demands were just, and that his co-sureties and himself were bound to pay them, had voluntarily incurred expenses, in unnecessarily defending the suits, he would have been without remedy—but from their nature, it cannot be supposed that he was fully aware of the bona fides and amounts of these demands, and he owed it to himself and to his co-sureties to see that they were established according to the principles of law; and that he could not do without incurring the expense of employing counsel. It must have been done in good faith, for no one would voluntarily part with his money, with the expectation of recovering only a portion of it back from others. It must have been intended for the

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com*mon benefit, and must be borne equally. The costs incurred in defending the suit at the instance of Clarke, stands upon a different footing. The result of that suit shows that it was vexatious and unfounded—surely there is nothing in the nature of the relations between the complainant and his co-sureties, which imposes on them any obligation, legal or equitable, to contribute towards the expenses of every groundless suit that might be brought against him, under the pretence that he was liable on the bond in which they are jointly bound; nor would the recovery in his favor be any protection to them from similar suits at the instance of the same parties—this, therefore, is a burthen which he must bear himself.

It is objected in the answer and was, I suppose, intended as a substitute for a formal demurrer, that all the sureties that are alive, and the representatives of those that are dead, ought to have been made parties—and also all persons having demands against them.

The general rule is, that all persons materially interested in the subject, ought to be parties, but it is said by Lord Eldon in Cockburn v. Thomson, 16 Ves. 325, that the rule was established for the convenient administration of justice, and must not be adhered to in cases to which, consistently with practical convenience, it is inapplicable.

All the sureties that are alive live without the jurisdiction of the Court, except the complainant, and in respect to them it is enough that it was impracticable to make them parties in Court. There are cases in which persons not within the jurisdiction of the Court may be made parties, and will be bound by the judgment of the Court. That is effected by the publication of a rule to plead—but that is applicable only to cases in which the thing, the subject matter of the suit, is within the power and jurisdiction of the Court. In this case, therefore, the Court could give no judgment which would in any way conclude or affect the interest of the absent sureties, nor is there any process by which they could be made parties. The rule is not so absurd as to require impossibilities to be performed.

G. Mc. Witherspoon, who represents the estate of Samuel F. Dunlap, might and ought to have been made a party to this bill—but he is before the Court on a separate bill for the same cause, and the judgment of the Court in that case will be found appended to the decree. Being in Court on the same case would be a sufficient answer to a de-

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murrer because he was not made a *party to this bill. The proper course would have been to move to consolidate the two cases, to save the expenses of one, if the defendant desired it.

It is said that all others who may have claims under this bond ought to have been made parties. It is not suggested, either in the bill or the answer, nor was it at the bar, that there were any others, and if there be none, it would have been idle to have framed the bill with a view to that object. If the defendant apprehends that there are others, she might have taken the necessary steps to bring them in with the same facility as the complainant.

Something was said in the argument against the propriety of the complainant calling on the defendant for contribution, until he had actually paid the money. It is not difficult to conceive of a case in which it might prove ruinous to one of several co-sureties, if he was obliged to pay the whole debt before he could call on his fellows for contribution. The last article of his prop-

erty might have been sold and his body taken in execution, and I dont know how the Court would go about to equalize these burthens. The rule is otherwise—he has a right to contribution as soon as the amount of the debt is ascertained, and he is put in danger—that is the rule as between sureties and principal, [Taylor v. Heriot, 4 Des. 227,] and the reason of it applies with equal force to the case of co-sureties.

It is therefore ordered and decreed. that the commissioner do ascertain and report how much has been recovered against the complainant in the actions mentioned in the pleadings, distinguishing between the principal debt and interest, and the taxed costs, and also the amount expended by the defendant in defending the said actions.

No order will be made in relation to the costs of this suit until the coming in of the report.

William McKenna v. George McWitherspoon, guardian, &c.

The Chancellor. On the death of Samuel F. Dunlap, one of the sureties to the official bond of John Sims, mentioned in the preceding cause, administration of his estate was granted to James H. Witherspoon—he, Samuel F. Dunlap, died, leaving an infant and only child, Jane Dunlap, his sole heir, and the defendant admits in his answer that he has been regularly appointed the guardian of her person and estate, and that the administra-

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*tor has paid and transferred to him the whole estate of his intestate for the use of his ward.

The object of the bill is to charge the estate of Samuel F. Dunlap with a contribution in the proportion of one-third towards the sums recovered against the complainant in the suits referred to in the preceding case. All the material allegations in this bill are the same as in that case, and the defences relied on in the answer are substantially the same, with the addition that in this case the defendant, to avoid litigation, offered to pay complainant one-sixth part of the principal sums and interest recovered against him, which he refused to accept, and he admits that he was aware that suits were pending against complainant on the bond.

The cases being the same, the commissioner will also report on this case, and in making up, he will pursue the direction of the order of reference made in the case of McKenna v. George.

The defendants appealed, on the following grounds:

1. Because, it is submitted, the complainant and the other surviving co-obligors are exclusively liable for the default of their principal; and, at all events, to the extent of their aliquot portion of the bond.

2. Because defendants are only liable for the one-sixth of the recoveries against the complainant, there being no evidence of the insolvency of the other co-obligors; and not for this proportion till paid by complainant.

3. Because the bill should have been dismissed for want of proper parties; the surviving co-obligors and the representatives of those deceased ought to have been made parties.

4. Because defendants can in no event, in equity, be made liable for any proportion of the costs of the recoveries against complainant, or the fees he may have expended in defending the actions against him.

5. Because filing separate bills against defendants is vexatious, and complainant should be made to pay costs.

Wright, for the appellants.
Clinton, contra.

Curia, per DUNKIN, Ch. The second and fourth grounds of appeal may render it proper to say something in explanation of the decree, or, rather, to state the reasons which induce the court to concur generally in the conclusions of the Chancellor.

In Hole v. Harrison, 1 Ch. Cas. 246, it is

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said that "if three *are bound in a recognisance, one is sued and paid the whole, another is insolvent, the third is sued for contribution, he shall contribute a moiety and not a third part." For the purposes of the case, a co-obligor, beyond the jurisdiction of the Court, is in the same condition as if he were insolvent. Neither he, nor his estate, can be subjected to contribution. In the statement of Hole v. Harrison, it is said that "S. was runaway," and the decree is, that Hole should contribute a moiety—"for S. is insolvent."

But it is urged that the defendant is not liable to contribute until the complainant has actually paid the debt. If the decree had directed any amount to be paid, by the defendant, to the complainant, there would be force in the objection. But no such order has yet been made. It is a misapprehension, however, to suppose that a co-surety may not file his bill for contribution, until he has actually paid his money. The authorities cited do not sustain this proposition. In 1 Eq. Cas. Abr. 114, it is said "one surety may compel another, in equity, to contribute towards payment of a debt for which they were jointly bound." In Deering v. Earl of Winchelsea, 1 Cox, 318, s. c. 2 Bos. & Pul. 270, Sir Edward Deering, being joint surety with the Earl of Winchelsea and Sir John Rous, for Thomas Deering, in bonds to the crown, was sued, and "judgment was obtained against him for £3,883 14s; whereupon Sir Edward Deering filed this bill against the Earl of Winchelsea and Sir John Rous, claiming from them a contribution towards the sum so recovered against him." There were several grounds of defence which it is not important to notice. It was held that each of the defendants should contribute in equal shares

with the complainant to the payment of the judgment; and that, "on payment thereof the Attorney General should acknowledge satisfaction, on the record, of the said judgment," and that the bonds should be delivered up to be cancelled.

The decree of the circuit court directs only that the commissioner should ascertain the amount which has been recovered against the complainant, and report thereon. We think the judgment creditors should be made parties, and that the complainant should have leave to amend his bill for that purpose or to give them notice.

Then, as to the fourth ground of appeal;

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the complainant was *alone subject to an action at law. If, in making the defence, he has removed a common burthen: if, for instance, the amount demanded from the sureties was five thousand dollars, which he reduced to two thousand dollars, (as was stated in the argument,) he is entitled to reimbursement of his expenses, on acknowledged principles of equity as applicable to cosureties. This we think, is a proper subject of inquiry before the commissioner, and that the order of reference should be enlarged with that view; and it is so decreed.

The complainant must pay the costs of the suit against G. Mc. Witherspoon.

In all other respects the decrees of the circuit court are affirmed.

JOHNSON and JOHNSTON, CC., concurred.

HARPER, Ch., absent.

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2 Rich. Eq. 23

ELIZA WOODWARD v. OSMUND WOODWARD, Executor of William T. Woodward, Deceased, and Others.

(Columbia. Dec., 1845.)

[*Dower* ⇐107.]

Where commissioners assess a sum of money in lieu of the widow's dower in lands of which her husband died seized, she is entitled, in equity, in addition to the sum assessed, to one third of the mesne profits from the death of her husband until the return of the commissioners is confirmed; and to interest, on the sum assessed, from the time the return is confirmed, until the money is paid.

[Ed. Note.—Cited in Phinney v. Johnson, 15 S. C. 163.

For other cases, see Dower, Cent. Dig. § 184; Dec. Dig. ⇐107.]

[*Dower* ⇐107.]

That the widow has been put to her election, whether to take dower or under her husband's will, does not, of itself, affect her right to an account of the mesne profits from her husband's death.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 180; Dec. Dig. ⇐107.]

[This case is also cited in Stewart v. Pearson, 4 S. C. 8, as to rules for admeasurement of dower.]

Before Johnson, Ch., at Fairfield, July, 1843.

The Chancellor. The complainant, and Wm. T. Woodward, the defendant's testator, in contemplation of their marriage, entered into a contract, whereby the complainant conveyed and assigned to trustees one half of all her real and personal estate, estimated at about $30,000, in trust for her sole and

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separate *use, and subject to her own control and disposition. The remaining one half of her said estate she grants, demises and assigns to the testator absolutely, which is expressed to be in consideration of the said intended marriage, and also in consideration of interests in the property of said William T. Woodward inchoate upon the consummation of said marriage. The marriage was had and solemnized, and the testator, by his last will and testament, devised to the complainant all the real estate which he acquired by his marriage with her, and thereby declared that the same, if accepted or received by her, should be in satisfaction, lieu and bar of her dower in any other part or portion of his estate. The whole residue of his estate he devised and bequeathed to his children by a former marriage.

The complainant insists in her bill, that in virtue of the contract referred to, she is entitled, as the widow of testator, notwithstanding the will, to one third part of the estate of which he died seized and possessed, as if he had died intestate, and prays a writ of partition.

It is not pretended that there is, in this or any other contract, (for there was no other) any express grant to the complainant, of any portion of the testator's estate, or any express covenant that she should be entitled to any portion of it on his death; but it is insisted, that a covenant that she should, on his death, be entitled, if she survived him, to the same proportion of his estate as she would be if he died intestate, will be implied from the recital in the grant made by her to the testator of one half of her estate, that it was also in consideration of interest in the property of said Wm. T. Woodward, inchoate on the consummation of said marriage.

The various provisions of this deed, and the appropriate terms in which they are expressed, leave no doubt that it was prepared by some one who had some general knowledge of conveyancing, and it is altogether improbable that a covenant so important as to secure to the complainant one third part of all the estate of which the testator should die seized and possessed, would have been left to mere implication. Contracts are often implied where it is necessary to give effect to what is expressed, or where they necessarily arise out of it; but never in opposition to what is clearly expressed. The consideration of the inchoate right which the

complainant would acquire in the property of the testator, by her marriage, was not necessary to give effect to the contract, because the marriage itself was a sufficient con-

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*sideration; nor does a covenant that she should be entitled to one third part of his estate, in the event of her surviving him, necessarily arise out of it, but is in direct opposition. If it be conceded that the recital implies a grant of an inchoate right in the testator's estate, the contract does not itself define what that right is, and the law must determine it. Now every one knows that the wife acquires no interest at all in the personal estate of her husband by the marriage—that he may dispose of it in his life time, or by will. Dower in his real estate is all to which she is entitled by law, and that right is well expressed as inchoate, because it is dependent on her surviving him, and that must have been intended, if indeed it was not altogether idle and useless, as I suppose it was, inasmuch as the law entitled her to dower.

The complainant will of course be entitled to elect whether she will take her dower, or the property devised to her by the will. And she prays in her bill, that in the event of her being obliged to elect, the defendants may discover the quantity and value of the real estate whereof the testator died seized, and of the real estate devised to her.

I would suppose that the means of ascertaining the quantity and value of the estates devised, were accessible to the complainant; and defendant has stated what he supposes the value of the other real estate. The complainant must therefore make her election from the information which she has, or may otherwise obtain.

It is ordered and decreed, that the complainant do, on or before the first day of January next, elect whether she will take dower in the real estates whereof the testator was seized during the coverture, or the property devised to her by his will, before referred to; and in the event of her electing to take dower, it is further ordered, that on her signifying the same, under her hand and seal, a writ do issue for admeasurement of her dower in the land and tenements described in the pleadings, as lately belonging to the testator. And if she shall neglect to make such election within the time here limited, or shall elect not to take dower, the bill be dismissed with costs.

On the 21st November, 1843, the complainant signified her election to take dower; whereupon a writ of admeasurement of dower was issued, to which the commissioners made the following return.

"We, the undersigned, appointed commis-

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sioners to lay off to *the complainant her dower in the lands of Wm. T. Woodward, her late husband, do hereby certify that in pursuance of the instructions to us given in the writ for admeasurement of her dower, we have been upon the lands mentioned in the proceedings, and after being sworn fairly and impartially to do our duty in the premises, we return, that in our opinion the said lands cannot be divided so as to put the complainant in possession of one third part thereof, as her dower, without injury to some of the parties. We further certify, that according to a recent survey made in this case, by M. A. M. Leggo, defendants' surveyor, the tract contains thirteen hundred and seventy-seven acres, and we have appraised the same at twelve dollars eighty cents per acre, and that we have assessed the sum of two thousand nine hundred and twenty dollars ninety-three cents, as the sum of money to be paid by the heirs of the said Wm. T. Woodward to the complainant, in satisfaction of her dower in the said lands. Given under our hands and seals, this third day of July, 1844."

In November, 1844, the following order was, on motion of the complainant, granted by his Honor, Chancellor Harper, at chambers.

The commissioners appointed to admeasure and lay off the dower of the complainant in the lands mentioned in the bill, having made their return to this court, that in their opinion the lands cannot be divided so as to put the demandant in possession of one third part thereof for her dower, without injury to the parties, and having returned the appraised value of the said lands to the court, and assessed the sum of two thousand nine hundred and twenty dollars ninety-three cents, to be paid by the defendants to the complainants, in satisfaction of her dower: It is ordered, that the said return be confirmed and made the decree of this court, and that the defendants do pay over the said sum to the complainant, with interest from the thirteenth day of May, eighteen hundred and forty-three, that being the time of filing the bill.

Defendants appealed, and moved the Court of Appeals to modify the above order in regard to the interest, upon the following grounds:

1. Because, under the circumstances of this case, and the decree of his Honor, Chancellor Johnson, the defendants are not liable to pay interest, but only the gross sum assessed by the commissioners.

2. Because, if the defendants are liable to

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pay any interest *whatever, they are liable to be charged with interest only from the confirmation of the return of the commissioners.

3. In regard to the question of costs, defendants insist that, under the circumstances of the case, and the decree of his Honor, Chancellor Johnson, the complainant is liable for costs, and not the defendants; more especially as complainant never made her

election until long after the decree, whether she would take dower, or under the will—and because every point in controversy between the parties was decided in favor of the defendants, and therefore they are entitled to tax their costs against the complainant.

McDowell, for the defendants.
McCall, contra.

Curia, per JOHNSON, Ch. The principal question raised by the grounds of appeal is, whether the complainant is or is not entitled to interest on the sum assessed by the commissioners in lieu of her dower in the lands of which her husband died seized, and, if so, from what time it should be computed. At the common law, the widow was only entitled to recover dower in the land itself. No commutation was allowed, and being purely a real action, she could not recover damages or costs for the illegal detention. To remedy these evils, the statutes of Merton and Gloucester were enacted by the British Parliament, which gave her an action at law, in which, where the husband died seized, she was entitled to recover one third part of the value of the land from her husband's death until she recovered judgment of seizin, compensation by way of damages for the loss she had sustained by the detention of it, and costs; 1 Roper on Husb. and Wife, 439. And it seems that, afterwards, it became a much controverted question whether, having this remedy at law, she was entitled to come into this court for relief, which ended in establishing here a concurrent jurisdiction with the law court; 1 Story Eq. 576; Curtis v. Curtis, 2 Bro. Ch. R. 620; and, having no authority to assess damages, an account of mesne profits from the time of the death of the husband has been substituted, as most according with justice, and has been allowed. In this respect, our own statutes have made no alteration in the law, but have authorized the assessment of a sum of money as a substitute for dower, when, in the judgment of the commissioners appointed to admeasure and lay it off, the land itself cannot be divided without injury to some of the parties;

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and, *even in these cases, the court directs an account of mesne profits, as furnishing the measure of remuneration to which the widow is entitled, instead of computing interest on the sum assessed. Gordon v. Stevens, 2 Hill Ch. R. 429. The question raised in the grounds of appeal is not therefore directly pertinent to the case. It is not interest, eo nomine, on the sum assessed, to which the complainant is entitled, but a share (one third,) of the mesne profits. There is one case only in which interest is allowed on a sum of money assessed in lieu of dower, and that is provided for by the Act of the Legislature of 1824, which directs that, where the husband has alienea the land in his life time, and a sum of money is assessed for the widow's dower, the value shall be assessed at the time of alienation, and that interest should be computed on it; and the Act of 1825 provides that the interest shall be computed from the time the right of dower accrued; and the case of Payne v. Payne, Dud. Eq. R. 124, in which interest was allowed, was decided upon the authority of these Acts.

It is said, in the argument, that the complainant's right to interest, or mesne profits, is concluded by the commissioners having assessed a gross sum in lieu of dower. But the writ for the admeasurement of dower conferred on them no authority to take an account of mesne profits, or to commute them for money, nor has the court any warrant in law to delegate such a power to them; and, upon referring to the return, it will be seen that they do not assume it. The sum assessed is one sixth part of the fee simple value of the land, and is in exact conformity with the settled and long established rule by which the value of dower is ascertained without reference to interest or mesne profits. It has been insisted, too, (if I understood the counsel,) that the complainant, having been put to her election, is not entitled to mesne profits, until she had elected and demanded her dower, and such seems to have been the rule at common law. 1 Roper on Husband and Wife, 444; Co. Lit. 32, b. and Mr. Roper, in his treatise on the rights of Husband and Wife, vol. 1, p. 453, refers to Delver v. Hunter, Bunb. 57, where the same rule was applied in chancery. But he questions, upon high authority, the authority of the book itself, and controverts, in his usual felicitous manner, and I think successfully, the doctrine of the case, and maintains that the Courts of Equity, in decreeing an account for mesne profits, proceed without reference to any statute or positive rule of the common law, but upon the principle that the right of the widow to have her dower assigned to her

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immediate*ly on the death of her husband, draws after it the right to an account of the profits; that, in effect, the tenant in possession, by the receipt of the profits, incurs a debt, which in equity he ought to pay; and he further remarks that, in equity, the tenant may be regarded as her bailiff, and therefore answerable for her share of the profits. The circumstance, that the complainant was driven to elect between the legacy bequeathed to her and her right of dower, so far from detracting from the merits of her claim to an account, adds additional force to it. It was a difficulty thrown in her way without any agency of her own, and she was not bound to elect, until it was removed by a discovery of the quantity and value of the real estate of which the testator died seized. She filed her bill to obtain that discovery before the next sitting of the court after his death, so that no unnecessary delay or negligence is imputable to her. I am

of opinion, therefore, that the complainant is entitled to an account of the profits from the death of the testator until the time when the return of the commissioners was confirmed; and it is ordered and decreed that the defendant, Osmund Woodward, do account before the commissioner of the court for the rents and profits of the real estate of the testator, in which dower has been assessed for the complainant, from the time of his (the testator's) death to the time the return of the commissioners was confirmed; and that the said defendant do pay to complainant interest on the sum assessed from that time until the money shall be paid. We do not think it a case for costs:—each party must pay their own.

HARPER and DUNKIN, CC., concurred.

JOHNSTON, Ch., gave no opinion, being related to some of the parties.

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2 Rich. Eq. *30

*MARTHA BELLINGER (late MARTHA MORRIS) v. A. W. THOMSON.

(Columbia. Dec., 1845.)

[*Husband and Wife* ⟹207.]

A feme covert, who is prosecuting a suit at law in her own name under the 16th section of the Act of 1712, 2 Stat. 587, may, without joining her husband, file a bill by her next friend for a discovery in aid of the suit at law.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 756; Dec. Dig. ⟹207.]

This case came up on appeal from the decision of the Circuit Court for Union District. The questions made and decided will sufficiently appear from the opinion delivered in the Court of Appeals.

Dawkins, for the appellant.
Herndon, contra.

Curia, per DUNKIN, Ch. There is no doubt of the general rule both at law and in this court. A married woman cannot maintain a suit in her own name. Her separate existence is merged in that of her husband. Her suit is a nullity; and no person would be responsible for the costs.

But the Act of 1712 authorises a feme covert to appoint an attorney by whom she may maintain an action either in her own name, or in the name of her husband and herself, which suit her husband shall not be permitted to discontinue. It seems that, under the provisions of this Act, a suit at law is now pending by the complainant against the defendant; and this bill is filed for discovery, in order to enable the complainant to proceed in her action.

It may be very well questioned whether the Act of 1712 can be regarded in reference to proceedings in this court,(*a*.) The law was passed nine years before the organization of Courts of Chancery in South Carolina. But there was no necessity for it here. Although the general rule is as has been stated, there are cases in which, by the well settled practice of this court, femes covert are permitted to maintain actions in their own name, and not only without joining the husband but

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against *him. But when the wife does not sue under the protection of her husband, "she must" says Mr. Mitford, "seek other protection, and the bill must be exhibited in her name by her next friend, who is also named in the bill, in the same manner as in the case of an infant." Mit. Pl. 28. And in Barlee v. Barlee, 1 Sim. & Stu. 100, where a married woman was the complainant, and her prochein ami died, Vice Ch. Sir John Leach ordered a new next friend to be named within two months, or that the complainant's bill should be dismissed.

We think that, as the Act of 1712 authorises a feme covert to maintain a suit at law in her own name, and the proceedings in this court are merely ancillary to the cause now pending at law, the complainant should be permitted to sue in her own name, but it must be, according to the practice of this court, by her next friend, who must be named in the bill, and who will be responsible for the costs.

It is ordered and decreed, that the decree of the circuit court, overruling the defendant's plea, be reversed. It is further ordered that the complainant have leave to amend her bill, within sixty days, by naming therein some responsible person as her prochein ami, and that, in default thereof, her bill stand dismissed. It is also ordered that, on the amendment being made, and notice thereof to the defendant, and payment of the costs of his defence in this court hitherto incurred, he file his answer to the said bill within thirty days thereafter.

HARPER and JOHNSTON, CC., concurred.

(*a*) Vide Baker v. Baker and Red, Bail. Eq. 165.

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2 Rich. Eq. *32

*A. W. THOMSON, Executor, v. E. M. PALMER et al.

(Columbia. Dec., 1845.)

[*Equity* ⟹22.]

Where separate judgments were obtained, on the same demand, against a principal debtor and his two sureties, and one of the sureties paid the judgment against himself, under an understanding that the judgment against his principal should be assigned to him, and then the principal died; *held*, that the executor of the principal, whose estate was insolvent, might

file a bill to have it decided whether the surety was entitled to rank as a judgment creditor.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 53; Dec. Dig. ⟸22.]

[*Executors and Administrators* ⟸408.]

The executor of an insolvent estate may, when the creditors are numerous, file a bill against the creditors to enjoin them from proceeding at law, and to have the estate administered in equity; and he may, it seems, make the heirs and devisees defendants, in order to compel a sale of the real estate in aid of assets.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1615; Dec. Dig. ⟸408.]

[*Executors and Administrators* ⟸408.]

Where the executor files such a bill, the practice is to select one or two of the principal creditors, as defendants, and to bring in the others by an order. None of them need answer except when specially required, or ordered by the court: the rest appear and litigate orally. But all are enjoined, either by order or by injunction issued in conformity to an order, from suing elsewhere.

[Ed. Note.—Cited in Brewster & Dickson v. Gillison, 10 Rich. Eq. 439; Westfield v. Westfield, 13 S. C. 485; Jenkins v. Jenkins, 83 S. C. 540, 65 S. E. 736.

For other cases, see Executors and Administrators, Cent. Dig. § 1615; Dec. Dig. ⟸408.]

[*Executors and Administrators* ⟸408.]

Where such a bill is filed, the funds in the hands of the executor should be placed in the possession of the court to be administered; and if a sale be ordered, whether, it seems, of real or personal estate, the sale should be made by the master and the funds received by him.

[Ed. Note.—Cited in Stackhouse v. Wheeler, 17 S. C. 98; Rose v. Thornley, 33 S. C. 322, 12 S. E. 11.

For other cases, see Executors and Administrators, Cent. Dig. § 1615; Dec. Dig. ⟸408.]

[This case is also cited in Buerhaus v. De Saussure, 41 S. C. 490, 19 S. E. 926, 20 S. E. 64, and distinguished therefrom.]

Before Johnson, Ch., at Union, October, 1845.

The Chancellor. The original bill in this cause was filed against the heirs and devisees of the testator, and the complainant stated therein that the means placed in his power for that purpose by the testator's will, were insufficient to pay his debts, and that the whole of his estate, real and personal, would be necessary to meet them, and the prayer was, that the whole might be decreed to be sold, and it was accordingly so decreed. The creditors were not made parties to that bill; the complainant, however, procured an order, requiring them to come in and establish their demands and to restrain them from suing at law. Under this order some of the creditors

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did come in and prove *their demands, and others declined to do so, and have sued at law. The present bill is in the nature of a supplement to the bill before referred to, and the suing creditors, about twenty in number, are made defendants. This bill states that the estate of the testator, real and personal, has been sold in pursuance of the decree of the court, and that the whole assets, thus ascertained, amount to about fifteen thousand dollars, and that but an inconsiderable portion of that sum has been received, the sales having been made on a credit, and the time, as to a portion of it, not yet having expired. That the creditors are over one hundred in number, and that their joint demands amount to about twenty thousand dollars. About $3,797 are claimed to be due on judgments and other specialties. The prayer of the bill is, that the defendant creditors may be restrained from prosecuting their suits at law, and that they, and all other creditors who have not acquiesced and come in under the former order of the court, may be decreed now to come in and establish their demands against the testator, and that they be enjoined from the further prosecution of their actions at law.

To prevent multiplicity of suits, and thus to save unnecessary expenses and costs, is a familiar branch of equity jurisdiction, and from the facts stated in this bill, the defendants not having answered, it strikes me that the case is one furnishing a striking illustration of the necessity and propriety of exercising such a jurisdiction. The funds of this estate fall one fourth short of the demands upon it, and only a small portion of these have been received in money, and every one having experience must know the delay and difficulties that are encountered in realizing funds that are out-standing—creditors become impatient of delay, and the insolvency of an estate is calculated to strengthen that feeling, and they resort to suits at law. The costs must be paid out of the funds of the estate, if that is sufficient, if not, by some one else. Here there is said to be one hundred creditors, and all have the same right to sue, and I will not undertake to estimate the expense of such a number of suits: it is enough that they would be onerous to some.

The only objections that were seriously urged against the bill, are, that the complainant might obtain all the objects of the bill in a plea of plene administravit præter, and the delays incident to suits in equity, and it is true that the plea would prevail at law, but that would not save the expenses. He must plead in every case, and the cost of the

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pleas must be paid. If the delays *in this court are as grievous as they are supposed, they arise out of the organization of the court, which the Chancellor has no power to control, and where a suit is carried on in the manner prescribed by law, the delays incident to it cannot be regarded as a source of reproach and vexation.

It is therefore ordered and decreed, that the defendants, the creditors of the testator, do forthwith desist from the further prosecution of their suits at law referred to in the

bill, until the further order of this court, and that the complainant do forthwith account before the commissioner for the administration of the estate of his testator.

And it is further ordered and decreed, that the defendants, the said creditors, do prove their several demands against the said testator before the said commissioner, and that the said commissioner do summon all the other creditors of the said testator, who are known and reside within the limits of this State, to come in, within a time to be prescribed by himself, and establish their respective demands, and that he cause to be published in two of the newspapers published in the town of Columbia, a notice requiring all other creditors also to come in and prove their demands within the said time.

The defendants appealed, and moved to reverse the decree, on the following grounds, viz:

1. Because, from the case made by the bill, and the other facts brought before the Chancellor, the injunction ought not to have been granted, especially as to the specialty creditors.

2. Because the decree does not require any security to be given by the complainant; and the decree is, in other respects, against law and equity.

Herndon, for the motion.

A. W. Thomson, contra.

Curia, per JOHNSTON, Ch. There is no doubt whatever, that, upon any principle assumed in argument, this bill is well filed. The claim of Reives is sufficient ground for it. It is stated that one Wells obtained three several judgments in the federal court against the testator, and against Williamson and Reives, his sureties; and that Reives paid off the judgment against himself, under an understanding that the judgment against the testator should be assigned to him; and he claims to rank as a judgment, instead of a simple contract, creditor, against the testator's estate. Now, consider that this is an

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insolvent estate, with *scarcely a possibility that the assets, real and personal, shall extend very far towards the payment of the simple contracts—that there are nearly a hundred creditors, holding every variety and amount of claim; and that the executor is liable to be sued, and has been sued, in every court, from that of a justice up to the highest jurisdiction: and it will be perceived, at once, that his position is one of indescribable embarrassment. How is he to meet all these creditors at once? How shall he frame his pleadings, so as to protect himself, or the estate in his hands, from loss? Is he to determine at his own hazard, whether the facts, upon which Reives founds his claim, really exist, or can be substantiated? or is he, at his peril, to decide the law applicable to the facts as they may be made out?

The case stands as that of a trustee in possession of funds, upon which numerous parties have conflicting claims; and who calls them together, to interplead, and to determine their claims among themselves; being ready, himself, to disburse the fund according to the result.

It is true that, independently of the claim of Reives, such a bill as the present is not known to the English practice: but it has been long established among us, is well known to every member of the profession, and is too wholesome to be abrogated.

Among us the real estate, as well as the personal estate, is liable for the debts of the deceased. But no order for the sale of the former, in aid of assets, can be obtained except in this court. It is manifestly for the benefit of all parties, when this is necessary, that the whole of the funds should be brought together, and all the creditors brought in, and that the estate should be administered in one suit. This practice adjusts conflicting claims without prejudice to the trustee, and without injury to any party, and prevents unnecessary litigation.

Where the executor files such a bill; the practice is to select one or two of the principal creditors, as defendants; and to bring in the others by an order. None of them need answer except when specially required, or ordered by the court. The rest appear and litigate orally. But all are enjoined either by an order, or by injunction issued in conformity to an order obtained, from suing elsewhere.

It appears that the plaintiff in this case has incautiously required answers from all the creditors. But leave is hereby granted him to amend his bill in that matter, so as to indicate those from whom he requires an answer.

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*There remains another point, requiring the special notice of the court. When an executor, or administrator, comes for the aid of the court in administering the estate in his hands, the court should be placed in possession of the fund to be administered. And when the court is called upon to order a sale of land in aid of assets, it should have the command of the proceeds of sale, to be administered. We should not be required to enjoin creditors from proceeding elsewhere, unless we are placed in possession of the funds to which the creditors are entitled; so as to enable us to satisfy all the just rights with which we have interfered.

The sale which the executor was allowed to make, should have been made by the officer of this court: by which not only the fund would have been in the hands of the court, but the sale would have been made at far less expense, the commissions of the master being less than those of the executor. As a

different course was taken, however, we must endeavour to restore matters to their proper posture, as best we can. And it is ordered that the executor do, before the 1st of February, 1846, deliver to the commissioner all the securities of the estate, including those taken for the sale of property sold under the order of Chancellor Johnson, together with whatever monies he may have collected or received belonging to the estate, or arising from sales made by him, except such sums as he may have already disbursed in his administration.

Finally it is ordered that the decree be modified as above indicated. In all other respects, it is affirmed and the appeal dismissed.

JOHNSON, HARPER and DUNKIN, CC., concurred.

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2 Rich. Eq. *37

*DUNCAN McKEITHEN v. HENRY S. BUTLER et al.

(Columbia. Dec., 1845.)

[*Chattel Mortgages* ⇐265.]

B. removed from this State to Alabama, leaving behind him some unsatisfied judgments and executions. While in Alabama he executed a mortgage to the plaintiff of three slaves, and shortly thereafter clandestinely returned, with the slaves, to this State. After his return he confessed two judgments, under the executions issued on which the slaves were sold by the sheriff, and purchased by one of the creditors to whom the judgments had been confessed. The proceeds of the sale were applied, first, to the older executions, and then, the balance, to the executions on the two confessions. *Held*, that the plaintiff was entitled to the balance after satisfying the older executions, and the creditors, who had received it, were ordered to account to him for it.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 547; Dec. Dig. ⇐265.]

[*Costs* ⇐12.]

Where a party seeks to enforce a usurious contract entered into in Alabama, and recovers the amount bona fide due, with interest at 8 per cent., which by the law of that State he is entitled to, it is discretionary with the court whether he shall be allowed costs, though, under such circumstances, he would, in Alabama, be entitled to costs as a matter of legal right.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 20; Dec. Dig. ⇐12.]

Before Johnston, Ch., at Richland, June, 1845.

The Chancellor. On the 7th of February, 1840, the defendant, Henry S. Butler, then residing in Autauga county, Alabama, having borrowed from the plaintiff, also a citizen of said county, a considerable sum of money, and also, having purchased a quantity of corn from him, executed and delivered to him, several notes described in the pleadings, in the whole amounting to $677, payable on the first of March following. These notes appear to have been given for the sum of money actually borrowed and for the price of the corn purchased; to wit: about $600 of the former and about 77 bushels of the latter at $1 per bushel.

Cotemporaneously with these notes, the said defendant appears to have executed and delivered to the plaintiff several other notes, which with those already mentioned amounted to $1000. There were 15 notes in all. At the same time, the said defendant also executed and delivered to the said plaintiff, a deed by way of mortgage, for three slaves,

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then in his possession, *and named in the pleadings, and a tract of land, situate in Alabama, and particularly described in the mortgage; which mortgage was conditioned for the payment of the said sum of $1000, the aggregate of all the notes, by the first of January, 1841.

Sometime in December, 1840, and before the time for the redemption of the mortgage arrived, the said defendant clandestinely removed the three mortgaged slaves from Alabama to Richland or Lexington, in this State, where he arrived with them some time in that month, or early in the next.

On the 6th of the succeeding month, (January, 1841,) he gave his notes, and confessed judgments to his co-defendant, William Butler, for $1300, and to his other co-defendant, William Geiger, Jr., for $1700. These confessions appear to have been taken to cover debts bona fide due by him. The exact amount of these debts not being then ascertainable, the judgments were extended to sums sufficient to cover them; and it in fact appears, that the debts really due to the respective creditors, exceeded the amounts received by them, respectively, under the proceedings to be hereafter mentioned.

Henry S. Butler had migrated to Alabama from this State; and left behind him sundry debts, in the form of judgments and executions older, of course, than the plaintiff's mortgage; which, as I have stated was executed in Alabama after he had removed thither.

On the 18th of January, 1841, shortly after Wm. Butler and Wm. Geiger had taken their confessions, their executions were levied by the sheriff of Richland, on the three slaves, which had been mortgaged to the plaintiff, and removed to this State; and on the first Monday in March following, the said slaves were sold by the sheriff at auction, and purchased by the defendant Geiger, at $1635.

Of this purchase money, about $600 or $700 were applied to the older executions aforesaid, and of the residue, applications were made to Geiger's and Wm. Butler's executions in the ratio of about $600 or $700 to the former and near $300 to the latter.

Henry S. Butler is a bankrupt; and the plaintiff being without other remedy, comes

to have his debt paid out of the proceeds of the sale, praying a preference over Geiger's and Wm. Butler's executions, or that the slaves be re-sold in satisfaction of his demand.

It is charged in the bill that these defendants obtained their present advantage by fraud; that they incited Henry S. Butler

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*to abscond with the property from Alabama, and to bring it into this State and give them a lien on it, with the view of defeating the plaintiff's claim; and that, in fact, no debt was really due by him to them. It is moreover charged that Geiger's purchase was made at an inadequate price.

None of these charges have been made out by proof. But it appears to me the plaintiff must still prevail, unless deprived of his right by the taint of usury, or by his possession of a remedy out of the mortgaged land in Alabama, or by his having already received payment. These are the defences.

It is clearly made out that the pretended payment is without foundation. The defendant, Henry S. Butler, lays claim to have applied to this debt the proceeds of a slave left in the possession of the plaintiff by a third person to be sold. The slave was sold and the price paid to the depositor: and there is not the shadow of evidence that she ever belonged to this defendant, or that he had anything to do with the bailment. The land included in the mortgage never belonged to this defendant. He had made a contract for the purchase of it; but the bargain was rescinded, and the part of the purchase money advanced by him, received back, before he got a title. The evidence of these facts came from the purchaser of the slave and the vendor of the land; and they were objected to as incompetent witnesses, on the score of their self-interest. But they have no interest in this cause; and they were competent to prove by parol the substance of the transactions, (although they may have been in writing) in this suit, where the proof comes in collaterally.

Then with respect to the usury. It is clearly established that there was usury to some extent in the transaction. I shall not determine here how far the usury extended, but leave that to be ascertained on reference. My concern is with the general principle.

By the older statutes of Alabama, as formerly with us, where usury existed, the usurer could not enforce his contract. But by subsequent enactments, it is provided that he may recover the bona fide debt, with interest, which in this case must be at the rate of eight per cent. per annum, which is the interest of Alabama, where the contract was made.

The case is then reduced to the question, whether this mortgage, so far as the debt secured by it, is bona fide, is entitled under the circumstances of the case to precedence over the executions of the two creditor defendants.

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*I had forgotten to state that the instrument was regularly registered in Alabama, as required by the laws of that State; and to put its validity beyond question, it was also registered here, in conformity to our recent statute upon the subject of mortgages personal.

But it is still a foreign mortgage, and the conflict is between it and the two domestic liens. It depends entirely upon its effect in its own State, whether it can prevail. By the adjudications of Alabama, we learn that a mortgage of personalty carries the title to the mortgagee, as it does with us. The case stands then, as if Henry S. Butler "had alienated this property intermediately between" the entering up of the older executions, and that of the two junior executions. The law is plain. Suppose before the junior executions were obtained and lodged, the older executions had sold these slaves in the hands of the alienee—the sale would have been good, and the purchaser would have had a good title; but after the vending executions should have been satisfied out of the proceeds, the alienee would have been entitled to the residue, as the owner of the property subject to the vending incumbrance. Again, suppose there were no executions older than the alienation; suppose those obtained after the alienation to be the only executions. They would form no incumbrance upon the property, and would neither be entitled to sell it nor to receive satisfaction out of it. A sale under such executions would be void; and the alienee would be entitled to reclaim for the property or the avails at his pleasure. These positions by a very plain combination are decisive of this case. The sale, according to our decided cases must be referred to the senior executions and was well made. Geiger obtained a good title to the negroes by his purchase. But the residue of the proceeds after satisfying the older liens were wrongfully received by himself and Wm. Butler, in opposition to the better and older right of the plaintiff.

It is ordered and decreed, that the debt of the plaintiff be referred to the commissioner, to ascertain what portion thereof is untainted with usury, with interest at the rate of 8 per cent. per annum—and that the plaintiff is entitled to recover the same. That the commissioner do also ascertain the amount applicable to the liens senior to the plaintiff's mortgage; and what was the residue of the proceeds of sale over and above them; as, also, the portion of such residue received by each of the defendants, Geiger and William Butler, upon their executions; and whether

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*there be any further remains of said residue in the hands of Geiger, the purchaser; and that said Geiger and William Butler do pay

the plaintiff, pro rata, the sums that may be thus found in their hands respectively, with interest thereon at seven per cent. per annum, so far as may be necessary to satisfy his demand, when ascertained, with its interest at eight per cent. as aforesaid.

The only remaining question relates to the costs. The law of Alabama entitles the usurer to recover the bona fide part of his debt, not only with interest but costs. This statute, however, can only operate as a direction to her own forums. The suit is brought here—and here the rule in such cases is otherwise, in relation to usury involving a breach of our own laws. This usury is not a violation of our law, but of that of Alabama. Still these considerations leave the point undecided. We are not to vindicate the law of Alabama, further than she vindicates it, nor are we to burden our citizens with costs under her directions.

The point must be referred to that class of cases where there is no statutory regulation; and falls within the discretion of the court, under the general rules of practice in this forum. Let each party pay his own costs.

The defendants appealed, and moved the Court of Appeals to reverse or modify the decree of the Chancellor, on the following grounds, to wit:

1. Because the mortgage of the slaves Toney, Chubbey and Ben, made in Alabama, by H. S. Butler to D. McKeithen, on the 7th of February, 1840, conditioned for the payment of $1000 on or before the 1st of January, 1841, or to be void, did not convey an estate to him, but merely created a lien on the slaves (who continued in the possession of the mortgagor) being subsequent to the older judgments and executions of Smith and Drafts, F. McCully and others, is not entitled to a preference over the judgments and executions of William Geiger and William Butler obtained in South-Carolina against H. S. Butler, who in December, 1840, had returned and had removed the said slaves to this State, which mortgage had not been recorded here, (a copy of it was recorded in the office of Secretary of State on 30th of April, 1844,) and of which the said William Geiger and William Butler had no notice at the sale of the said slaves under the said executions.

2. Because William Geiger was a purchaser

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of the said slaves *for a valuable consideration under executions older than the mortgage, without notice of it, and ought to be protected.

3. Because no interest ought to be allowed on McKeithen's demand against H. S. Butler, as there was usury in the transaction.

4. Because the complainant ought to have been decreed to pay the costs.

The complainant also moved the Court of Appeals to reform the decree of the Chancellor, so far as to require the defendants William Geiger and William Butler, to pay the costs, upon the ground, that the complainant demanded nothing more from them before the bill was filed, and claimed nothing more in the bill, than the principal sum due, and lawful interest, which have been allowed by the Chancellor, and which were allowed, with costs, by the law of Alabama.

Caldwell, for the defendants.
Gregg & Gregg, for the complainant.

PER CURIAM. This court concurs in the decree of the circuit court, and the appeal is dismissed.

JOHNSON, HARPER, JOHNSTON and DUNKIN, CC., concurring.

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2 Rich. Eq. *43

*ELISHA BLACKMAN, Ex'or, v. MILLY GORDON.

(Columbia. Dec., 1845.)

[*Wills* ⇐9.]

Testator, who died in 1839, directed his executor, after a certain event, "to transport all of" his slaves "to the nearest non-slave-holding State in the United States, or to the free colony in Africa." Before this provision of the will was executed, the Act of 1841, providing that any bequest, whereby the removal of any slaves, without the limits of this State, with a view to their emancipation, is secured or intended, shall be void, was passed. *Held*, that the Act avoided this provision of the will, and that the executor must account to the next of kin of the testator for the slaves.

[Ed. Note.—Cited in People's Loan & Exchange Bank v. Garlington, 54 S. C. 427, 32 S. E. 513, 71 Am. St. Rep. 800.

For other cases, see Wills, Cent. Dig. § 15; Dec. Dig. ⇐9.]

[*Statutes* ⇐263.]

As a rule of construction, it shall be intended that an Act of the Legislature was intended to act prospectively and not retrospectively; but, if an Act be plainly intended to have a retrospective effect, it is valid, unless contrary to some provision of the constitution.

[Ed. Note.—Cited in Finley v. Hunter, 2 Strob. Eq. 214, 215.

For other cases, see Statutes, Cent. Dig. §§ 344, 349; Dec. Dig. ⇐263.]

[*Constitutional Law* ⇐92; *Slaves* ⇐22.]

Slaves are mere chattels, and are not protected by the constitution. A bequest, therefore, providing for the emancipation of slaves, which is valid at the time of the testator's death, may be avoided, by an Act of the Legislature, at any time before it is carried into effect.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 174, 175, 178–180, 186, 207, 225–227, 237; Dec. Dig. ⇐92; Slaves, Cent. Dig. § 92; Dec. Dig. ⇐22.]

[*Wills* ⇐335.]

If the bequests of a will are void, the next of kin of the testator are not excluded by a clause providing that the testator's relations

and kindred should enjoy no part of his property.

[Ed. Note.—Cited in Johnson v. Clarkson, 3 Rich. Eq. 316; Ford v. Dangerfield, 8 Rich. Eq. 110.

For other cases, see Wills, Cent. Dig. § 1157½; Dec. Dig. ⟸535.]

[*Slaves* ⟸22.]

[The statute of 1841, declaring bequests which direct the removal of slaves from the state with a view to emancipation void, applies to all bequests, although made by a testator who died before the passage of that act, where the bequest had not been actnally executed.]

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 92; Dec. Dig. ⟸22.]

Petition for re-hearing addressed to the Court of Appeals.

The questions raised by this petition will be fully understood from the case of Gordon v. Blackman, 1 Rich. Eq. 61, and the opinion of the Court of Appeals.

Curia, per HARPER, Ch. The principal ground relied upon in this case is either, that the Act of 1841 does not apply to the case, or, that the Act itself is invalid. I do not find the ground for the former opinion. The Act declares, in general terms, that every bequest directing slaves to be carried out of the State, with a view to their emancipation, shall be void. This, in plain and explicit terms, applies to every bequest, whether made before the passing of the Act, or to be made subsequently. It is mentioned by Blackstone as a rule of construction, that it shall be intended by the courts that an Act of the Legislature was intended to operate prospectively and

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not retrospectively. But if *an Act of the British Parliament be plainly intended to have a retrospective effect, there is no limit to its authority, and it must be carried into execution. We shall presently inquire how far the Act of Assembly of 1841, can be regarded as retrospective.

I know of no ground on which an Act of the Legislature can be declared void, but that it is in opposition to some provision of the constitution. I do not know to what provisions of the constitution the Act of 1841 can be regarded as opposed, but that no ex post facto law shall be passed, or law impairing the obligation of contracts. There is no question of contract. The provision, that no freeman shall be disseised of his rights, &c., but by the judgment of his peers or the law of the land, is plainly inapplicable. An ex post facto law and a law having a retrospective effect, are very commonly regarded as identical. An ex post facto law has been construed to mean a law declaring that to be a criminal offense, and subjecting the perpetrator to punishment, which was no legal offence when the act was committed. But suppose the meaning to be extended further, and to include every thing that can be understood by a retrospective Act; that not only no criminal responsibility shall be incurred, but no civil liability by way of damages, forfeiture, &c., by an act which was not unlawful at the time, or which the party had no means of knowing to be unlawful. This is the rule of justice: which it was intended to preserve, both by the constitution and the rule of construction. But what injustice has been done to this petitioner by the Act in question? If the executor had actually sent the slaves out of the State, and the Legislature had then passed an Act declaring that he should be liable for their value, this would have been a retrospective Act, or might have been called an Act ex post facto. But there can be no doubt but that the negroes were still slaves: the act of emancipation was to be in future, and the Act of the Legislature has intervened to forbid that future action. How then can it be regarded as retrospective, any more than if the testator himself had expressed an intention of liberating his slaves, and before his execution of that intention, an Act of the Legislature had forbidden it? The executor only stands in the place of the testator.

But is it said that an injury is done to the slaves themselves; that they had a vested right to freedom; and that the Act was retrospective, or ex post facto, with respect to them? Certainly, in a legal point of view, they remained the slaves of the executor. It is true that they were so upon a trust; but

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the law de*clares them to be mere chattels. They had no status in court, and could not have come into court to enforce the execution of the trust. In the case of Frazier v. Frazier, [2 Hill, Eq. 304,] the court decided that it would not interfere to prevent the execution of such a trust, when there was no law to forbid it. But here is a law to forbid it. This case is certainly in point with that of Lenoir v. Sylvester, [1 Bailey, 632.] In both cases, the testator directed his slaves to be emancipated on a future event: in both cases, the law intervened to prohibit it, before they were actually emancipated. Certainly, it does not appear that a sufficient sum has been raised, by the hiring of the slaves, to pay off the testator's debts, and to defray the expenses of their transportation to another state, or to Liberia. This was the event, on which they were to be manumitted. But this we do not consider as essential to the determination of the case. It is enough, that they were not actually manumitted, before the Act of the Legislature was passed. This applies equally to the slaves, Simpson and Harriet, mentioned in the petition, as to any of the others.

It has been so often decided, that a mere exclusion of the heir at law or next of kin, without a valid disposition of the property, will not exclude them, that it is hardly necessary to consider the other principal ground

of the petition. Such was the decision in the case of Hall v. Hall, 2 Mc. C. Eq. 269. It was contended, that when the next of kin were excluded, the other nearest relations should take as though the former were naturally dead. But this is not a case of the exclusion of the next of kin, but of all kindred and relations whatsoever; and we believe that it has never been contended, or suggested, that a will, merely providing that no kindred or relations shall take any part of the testator's property, is such a disposition in favor of the State, as that the property will escheat.

It is ordered, that the petition be dismissed.

DUNKIN and JOHNSTON, CC., concurred.

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2 Rich. Eq. *46

*JOHN CANTEY, Executor, v. JOHN J. BLAIR and Others.

(Columbia, Dec., 1845.)

[*Witnesses* ⇐98.]

A principal is not a competent witness to diminish the amount of the demand against his surety.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 338; Dec. Dig. ⇐98.]

[*Usury* ⇐127.]

J. W. C. gave two bonds, for money loaned, to the same party, to one of which H. C. was surety, and afterwards paid the bond to which there was no surety. *Held*, in a suit in which the amount of H. C.'s liability was in question, that J. W. C., though no party to the suit, was an incompetent witness to prove that the bond which he had paid was usurious, the object being to transfer the payments to the bond to which H. C. was surety. *Held* further, that the testimony if received could not avail the surety, he having no interest in the bond paid and no right to question the payments.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 494; Usury, Dec. Dig. ⇐127.]

Before Johnston, Ch., at Kershaw, June, 1845.

This case, which will be found reported in 1 Rich. Eq. 41, again came before the court on the following, amongst other exceptions, to the commissioner's report.

1. Because the commissioner rejected James W. Cantey as a witness to prove that the third bond for $1,885, dated 30th Dec. 1833, to which defendant Blair had applied the payments, was null and void, being wholly usurious.

His Honor, the Chancellor, overruled the exception, and the complainant appealed.

J. M. DeSaussure, for the appellant.

Wethers and Moses, contra.

Curia, per JOHNSTON, Ch. This appeal has not been insisted on, except so far as it renews, before us, the first exception to the commissioner's report. It may be proper to explain the circumstances applicable to this exception.

James W. Cantey and Henry T. Cantey, (plaintiff's testator, the latter being surety,) executed their joint and several bond to the defendant, Blair, for the sum of $3,337.50; and, subsequently, James W. Cantey, alone, gave the said Blair his bond for the further sum of $1885. The consideration of these bonds was money loaned by Blair to the said James W. Cantey.

After the death of Henry T. Cantey, Blair

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brought suit against *the plaintiff, as his executor, on the bond first mentioned, and recovered a judgment for the full amount of said bond, with interest. The plaintiff, having subsequently discovered that the bond was usurious, filed this bill, to be relieved from the judgment, upon payment of the sum really loaned, with lawful interest; and to be allowed the benefit of payments which had been made by James W. Cantey, the principal debtor.

At the hearing of the cause, James W. Cantey was admitted as a witness to prove the usury and the payments made by him to Blair. [Cantey v. Blair] 1 Rich. Eq. 41.

Upon appeal, this court held him incompetent, on the authority of Endicott v. Gillam. A joint and several note had been given to Endicott by Briggs and Gillam, (Gillam being surety,) upon which they were sued separately. On the trial, Gillam was offered as a witness for Briggs, and Briggs as a witness for Gillam. They were both rejected; and, upon appeal, it was held that Gillam was a good witness for Briggs, because Briggs, being the principal in the note, could have no recourse to Gillam, his surety, for the amount that might be recovered against him; and therefore Gillam had no interest in diminishing the amount of the recovery; but that Briggs was incompetent as a witness for Gillam, because as Gillam could recover over from him only the amount which he would be compelled to pay by virtue of the judgment to be rendered against him as surety, it followed that Briggs had an interest to diminish that judgment by his testimony.

It was also ruled, upon the appeal, in the present cause, that "the answer of the defendant, Blair, was conclusive as to the payments made to him by James W. Cantey, and their application, on the ground, that it did not appear that the plaintiff might not, with due diligence, have obtained evidence of the fact of payment, and availed himself of it, on the trial at law."

Under these opinions, expressed by the Appeal Court, the cause came before the commissioner, to take the accounts; and James W. Cantey was again offered as a witness, to prove that the bond of $1885, given by himself, and upon which he had made payments, was usurious. The commissioner re-

jected him; and the exception, we are now considering, insists that he was competent for the purposes for which he was offered as a witness.

This is manifestly an attempt to renew a point already decided, and is to be discour-

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aged, because such a practice tends to *burden the parties with costs, and, if indulged, would render litigation endless.

The object of the evidence, manifestly, was to transfer the payments, which had been made on the bond for $1885, to the bond for $3,337.50. This was to be effected by proving that the smaller bond was usurious, and therefore not entitled to the payments which had been made on it. That is to say, payments upon the larger bond, beyond those admitted in Blair's answer, were to be established by indirect proof, in opposition to the decree that the answer was conclusive, and that no proof, direct or indirect, should be received contrary to it; and James W. Cantey was, by indirection, to reduce the amount of his surety's liability, for which he was liable over to the surety, when it had been expressly ruled that he could not do so directly.

There is another consideration just as conclusive against the appeal. Supposing the smaller bond to be wholly usurious, the plaintiff's testator was no party to it. It was given by James W. Cantey alone; and, if he chose to pay it off, what interest has the plaintiff in that matter?—what right to question the payment?

It is ordered that the decree be affirmed, and the appeal dismissed.

JOHNSON and DUNKIN, CC., concurred.

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2 Rich. Eq. *49

*B. M. PORTER, Adm'r of Edmund Williams, v. JOHN M. DOBY, Executor, et al.

(Columbia. Dec., 1845.)

[*Wills* ⟸687.]

Testator bequeathed as follows. "I will and desire that" my negroes and other personalty "be placed in the hands of J. D. upon trust and condition that he apply the proceeds of the negroes to the maintenance and support of my son Edmund and daughter Susannah, during their natural lives; and after the death of the said Edmund, I will and bequeath all the before mentioned estate to his heirs forever. Should my daughter Susannah survive my son Edmund, I will and desire my friend J. D., and so will, that he keep in his hands a sufficiency to support said daughter comfortably during her life, and that the balance in his hands be disposed of as before mentioned. Also should any thing remain in his hands, at the death of Susannah, I will and desire that the same be given to the heirs of Edmund forever." *Held* that, on the death of Edmund, the property vested in his heirs as purchasers.

[Ed. Note.—Cited in Shaw v. Robinson, 42 S. C. 347, 20 S. E. 161.

For other cases, see Wills, Cent. Dig. § 1642; Dec. Dig. ⟸687.]

[*Trusts* ⟸140.]

Executory trusts are exempted from the operation of the rule in Shelley's case.

[Ed. Note.—Cited in Reynolds v. Reynolds, 61 S. C. 250, 39 S. E. 391; Steele v. Smith, 84 S. C. 469, 66 S. E. 200.

For other cases, see Trusts, Cent. Dig. § 186; Dec. Dig. ⟸140.]

[*Trusts* ⟸114.]

The test of an executory trust is that the trustee has some duty to perform, for the performance of which it is necessary that the title be regarded as abiding in him.

[Ed. Note.—Cited in Smith v. Smith, 24 S. C. 314; Ayer v. Ritter, 29 S. C. 138, 7 S. E. 53; Shaw v. Robinson, 42 S. C. 346, 20 S. E. 161; Reynolds v. Reynolds, 61 S. C. 249, 39 S. E. 391; Steele v. Smith, 84 S. C. 468, 66 S. E. 200.

For other cases, see Trusts, Cent. Dig. § 164; Dec. Dig. ⟸114.]

[*Alteration of Instruments* ⟸8, 27.]

Where a sealed note was found among the papers of the payee after his death, with the seal carefully cut out, leaving a mere filament by which it was allowed to remain attached, to show what had been the character of the instrument; *held*, that the destruction of the seal must be attributed to the payee, and that such destruction vitiated the instrument.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 44, 237; Dec. Dig. ⟸8, 27.]

Before Johnston, Ch., at Lancaster, July, 1843.

The bill in this case was filed for the recovery of the amount of the note mentioned in the Chancellor's decree, and the property specified in the following clause of the will of George Williams, deceased, viz: "I will and desire that the plantation whereon I now reside; also my negro woman Rose, my negro woman Pauline and her child Mariah, and all their future increase; also my negro men George, Charles and Washington; also my household and kitchen furniture of every kind and description; also my horses, cattle, hogs and every kind of stock that I have; also my road wagon and har-

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ness, be placed, immediately after my *decease, in the hands of John M. Doby, upon trust and condition, however, that he have no power to sell or dispose of the same unless it should be for an advantage, and further trust and condition that he apply the proceeds of the plantation negroes beforementioned to the maintenance and support of my son Edmund and daughter Susannah Williams, during their natural lives; and after the death of the said Edmund, I will and bequeath all the beforementioned estate to his heirs forever. Should my daughter Susannah survive my son Edmund, I will and desire my friend John M. Doby, and so will, that he keep in his hands a sufficiency to support said daughter comfortably during her life, and that the balance in his hands be disposed of as before mentioned. Also, should any thing remain in his hands at the death of Susannah, I will and

desire that the same be given to the heirs of Edmund Williams forever."

Susannah survived Edmund, but had died before the trial of the case.

The decree of his Honor, the Chancellor, is as follows:

The case is stated in the pleadings and in my notes of testimony. The press of business prevents my stating it at length; I therefore, refer to the pleadings and evidence for a clear statement.

The first part relates to the claim made under the will of George Williams; I do not think there is any doubt upon this point. The plain intention of the will was to secure a maintenance and support to Edmund and Susannah, during their lives out of the "proceeds" of the property. The property itself is not given to them or either of them, but vested in the trustee, who is directed to apply the proceeds to the purpose indicated. This does not even give the "proceeds" to these cestuy que trusts, but only so much as may be necessary to their support.—The trustee has a duty to perform; which prevents the use, even as to the lands from being executed in the cestuy que use. Then at the death of Edmund the property is vested in his heirs as purchasers; subject to the support of Susannah, or rather a reservation in her favor is first to be made and the rest is vested in Edmund's heirs.

With respect to the sealed note there is as little doubt in my mind. It is dated in 1832; and there is proof enough of a consideration to entitle plaintiff to a recovery, upon the foot of it, if the circumstances did not discredit it.

The obligor died in 1835, but Edmund rais-

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ed no claim, so far *as we know from that time till his death, although he was aware that the executor was disposing of and did dispose of the estate without knowledge of or reference to this obligation.

Then upon the death of Edmund the note is found among his papers with the seal detached.

We have two hypotheses; and upon either of them the obligation is destroyed. If we suppose that the note had got back into the possession of the obligor, and was taken possession of by Edmund, the obligee, who lived with him at his death; there is no doubt the obligation was gone, especially as the seal was cut off.

If on the other hand, we assume that Edmund had never parted from the possession, it appears to me the obligation is equally destroyed: any material alteration of a written paper will be attributed to him who has the possession unless he accounts for it, and such alteration, unless explained, vitiates the paper.

The alteration will not be assumed to be accidental without proof. But in this case, the alteration was evidently not accidental. The seal was carefully cut out, leaving a mere filament by which it was allowed to remain attached, to show what had been the character of the instrument. The seal was as effectually destroyed as if it had been crossed or cancelled.

Then the silence of Edmund in relation to the note during his whole life, notwithstanding the administration of the estate by the executor, according to the provisions of the will, is strong confirmation of the idea that he regarded the instrument as defunct.

It is decreed that the bill be dismissed with costs: to be allowed the plaintiff out of his intestate's estate.

The complainant appealed, on the following grounds:

1. Because it is respectfully submitted that by the terms of testator's will an absolute estate in the property mentioned in the will was conveyed to the intestate of complainant, and the Chancellor should have so decreed.

2. Because complainant was entitled to recover the amount of the note mentioned in the bill, there being no evidence to invalidate it.

Wright, for the appellant.
Clinton, contra.

Curia, per JOHNSTON, Ch. The second ground of appeal, in relation to the sealed note, has not been pressed here: and the

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*court is perfectly satisfied of the correctness of the circuit decree upon that point of the case.

The first ground of appeal, which was pressed and argued, by the appellant's counsel, with zeal and ingenuity, is equally untenable.

It is insisted, that Edmund took an absolute property in the personalty bequeathed by his father, under the rule in Shelley's case, (1 Co. 104.)

The rule is stated in that case to be, that, "when the ancestor, by any gift or conveyance, takes an estate of freehold, and, in the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, the heirs are words of limitation of the estate and not words of purchase." It has been supposed to be more fully and accurately defined by Mr. Preston in words to the following effect: that, "when a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and, in the same instrument, there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 1 Preston on Estates, cited 4 Kent Com. 215. If this rule can be applied to the will under consideration, the plaintiff will

be entitled to a decree for the personal property of the testator.

There is no doubt that where, by any instrument, an effort is made "to give the property to the ancestor, for life only, and yet extend the enjoyment of it to his heirs, in the same manner, and to the same extent, precisely, as if they took by hereditary succession," they shall not take by purchase, but by inheritance: and "the freehold of the ancestor shall attract to him the estate imparted by the limitation to his heirs." 4 Kent, 217. And, generally, wherever the question occurs in relation to a legal interest, or in relation to an equitable interest, not executory in its nature, the rule will be applied.

"The rule," says Mr. Kent, (4 Kent, 218,) "as to legal estates, has had a prescriptive and uncontrollable authority; but the Courts of Equity have not considered themselves bound to an implicit observance of it in respect to limitations which do not include or carry the legal estate." They have generally yielded to the obligation of the rule, not only in cases of legal interests, but, also, in cases of executed trusts.

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*There is, indeed, the great case of Bagshaw v. Spencer, 1 Ves. Sr. 143, decided in opposition to the previous case of Coulson v. Coulson, 2 Atk. 246, 570; Str. 1125, in which Lord Hardwicke endeavored, by an elaborate examination of cases, to establish a distinction between legal estates and trusts of every description; and to appropriate the rule in Shelley's case exclusively to the former. But this decision, after being much questioned, was overruled in Wright v. Pearson, 1 Eden, 119, and Jones v. Morgan, 1 Bro. C. C. 206; and the doctrine seems to be well settled, that executory trusts alone are, as a general class, exempted from the operation of the rule. There are, to be sure, other exceptions to its operation not necessary to be noticed here: but this one is sufficient for the decision of this case.

The test of an executory trust is, that the trustee has some duty to perform, for the performance of which, it is necessary that the title be regarded as abiding in him. Here, nothing can be plainer than that the trustee could not perform the trusts conferred on him without retaining the title and the property. His trust was to maintain Edmund and Susannah during their joint lives, and Susannah, if she should be the survivor, out of the profits and income of the property. She actually survived; and it was, therefore, impossible, that the trust should have been executed at any time during Edmund's life. The point is too plain for further discussion.

It is ordered that the decree be affirmed, and the appeal dismissed.

JOHNSON and DUNKIN, CC., concurred.

2 Rich. Eq. *54

*G. D. BECKHAM and Wife v. JAMES F. SECREST.

(Columbia. Dec., 1845.)

[*Fraudulent Conveyances* ⟸74.]

Voluntary deed held void as against the claims of creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 188; Dec. Dig. ⟸74.]

[*Fraudulent Conveyances* ⟸315.]

Where a party made a voluntary deed of gift of a slave, reserving to herself a life estate, and the sheriff, under a fi. fa. obtained after the gift, levied on the slave, and advertised and sold it "as the property of" the donor—*Held* that the purchaser, who had notice of the deed, took, not merely the life estate, but the whole estate in the slave, the deed being declared fraudulent and void as to creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 973–975; Dec. Dig. ⟸315.]

Before Dunkin, Ch., at Lancaster, June, 1845.

The Chancellor. The complainants claim a negro girl Clarissa, under a deed of gift from Dicy Caston, dated 3d Feb. 1834. By the terms of the deed a life estate is reserved to the donor.

In Sept. 1843, Clarissa was sold by the sheriff under an execution against Dicy Caston, and purchased by the defendant for three hundred and ten dollars. Clarissa was advertised "as the property of Dicy Caston" and was sold as her property, but at the sale the complainant gave notice of the deed, and the defendant purchased with this notice. On the part of the defendant it is insisted that the deed of 1834, being voluntary, is void as against creditors and purchasers. The execution, under which Clarissa was sold, issued from the court of chancery to enforce a decree in a cause in which the defendant and his wife were complainants, and Dicy Caston was defendant. The object of that proceeding was to obtain an account from the defendant as administratrix of William Caston deceased, the father of Secrest's wife, and as her guardian. A decree was entered at July term, 1843, for $4567. The account commenced in 1827, and at the date of the deed in 1834 it appears by the accounts that she was indebted between six and seven hundred dollars.

It was replied, that this decree was obtained by collusion; and there are many circumstances which indicate that the suit was not hostile. But this evidence rather goes to shew that the defendant, Dicy Caston, was

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indifferent as to the amount of the *decree—that if she had been so disposed, she could have charged the defendant, (Secrest's wife,) with board &c. But there can be no doubt that she held the negroes of her ward dur-

ing a long minority, and was fairly accountable for a considerable sum. But, however suspicious some of the circumstances may be, they are, at most, equivocal, and furnish ground for conjecture, but not for impeaching the judgment of the court.

Then, as to existing creditors, the deed of 1831 cannot be sustained. The donor was indebted at the date of the deed, the debt is yet unpaid, and the donor is yet insolvent. According to the decision of Izard v. Izard, Bail. Eq. 228, the deed is void.

It is ordered and decreed that the bill be dismissed, but without costs.

The complainants appealed, on the following grounds.

1. Because was expressly proved that, at the sale of the negro Clarissa, by the sheriff, when purchased by defendant, nothing was offered or sold but the life-estate of Dicy Caston, and complainants were therefore entitled to the relief prayed for.

2. Because it is submitted, that by the terms of the deed from Dicy Caston to complainant, an absolute estate in the negro Clarissa vested in them at the time of its execution—the reservation in favor of Dicy being void in law, and there was no indebtedness by Dicy at the time, to avoid the deed.

Wright, for the appellants.
Clinton, contra.

Curia, per DUNKIN, Ch. In relation to the first ground of appeal, it is only necessary to repeat what is said in the decree. The slave Clarissa was levied on by the sheriff under an execution against Dicy Caston. She was advertised by the sheriff "as the property of Dicy Caston," and was sold as her property. It is true that the complainant was present at the sale and gave notice of the deed, declaring that Mrs. Caston had only a life estate. John Adams, the deputy sheriff, thence inferred that this was all that was offered to be sold on that occasion. Notwithstanding this, she was sold at sheriff's sales in September, 1843, for three hundred and ten dollars.

It was quite clear to the chancellor, who heard the case, that all the right, title and interest of Dicy Caston, whatever it might be, was offered for sale and was sold.

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*The court is satisfied that the voluntary deed of February, 1831, cannot stand against the claims of creditors, and that the bill of the complainants was therefore properly dismissed.

The decree of the circuit court is affirmed.

JOHNSON and JOHNSTON, CC., concurred.

HARPER, Ch., absent.

2 Rich. Eq. 56

Ex parte JOHN W. MOBLEY.

(Columbia, Dec., 1845.)

[*Husband and Wife* ⟸9.]

Where land, to a share of which a married woman was entitled, was sold for partition, and, after the sale, her husband assigned his interest in the proceeds, and after the assignment, but whilst the fund was still in the hands of the commissioner, the wife died; *held*, that the proceeds of the sale were to be regarded as land,—that the husband's marital rights had never attached therein,—and, consequently, that his assignee was only entitled to the share which the husband, as distributee of his wife, was entitled to under the statute of distributions.

[Ed. Note.—Cited in Ex parte Geddes, 4 Rich. Eq. 304, 57 Am. Dec. 730; Bonknight v. Epting, 11 S. C. 77; Major v. Hunt, 64 S. C. 101, 41 S. E. 816.

For other cases, see Husband and Wife, Cent. Dig. § 34; Dec. Dig. ⟸9.]

Before Dunkin, Ch., at Chester, June, 1845.

The Chancellor. The wife of Leroy Griffin was entitled to a tract of land in Chester district, or to a proportional part thereof, as one of the heirs at law of Edward Mobley, deceased. For the purpose of making partition among the heirs of Edward Mobley, deceased, the land was sold by the commissioner in equity, and the proceeds are now in his hands.

The sale took place in October, 1841, and in December, 1841, Leroy Griffin assigned to the petitioner his interest in the proceeds.

Prior to the sale, the land belonged to the wife. The husband had no interest but in the rents and profits, as they accrued. After the sale, the proceeds continued so much the property of the wife, that they could not be paid over without her order or receipt. Although her land had been con-

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verted into money, it *was only done to facilitate partition. The fund partakes of the qualities of the realty. The marital right had never attached. It never could have been reduced into possession without some further act done on her part. But, before that act was done, Mrs. Griffin has departed this life. The fund, the proceeds of her inheritance, is still in the custody of the court.

It appears to the court that the laws of Georgia cannot affect the distribution of this fund, and that the petition is properly framed, claiming for the petitioner one third of Mrs. Griffin's interest in the premises.

It is ordered and decreed, that the costs be paid out of the share of Mrs. Griffin, and the petitioner have credit on his bond, for one third of the surplus thereof.

The petitioner appealed, on the grounds:

1. Because the interest of Leroy Griffin in the fund depends upon the laws of Georgia, as the fund in dispute is personal property.

2. Because Leroy Griffin had assigned all his interest in petitioner's bond, to petitioner, which was substantially stated in the petition, and Leroy Griffin was, and is, entitled to the whole of his deceased wife's interest in said bond, and not the one third part thereof.

3. Because the Chancellor erred in deciding that Leroy Griffin was only entitled to one third part of his wife's interest in petitioner's bond, whereas it is submitted he is entitled to the whole of her interest.

Curia, per DUNKIN, Ch. The land belonging to the wife was sold only because it could not be properly divided among those entitled to it. The sale was then for the purposes of partition. Ackroyd v. Smithson, 1 Bro. C. C. 503, was decided by Lord Thurlow, who was induced to change his opinion on the argument of Mr. Scott, afterwards Lord Chancellor Eldon. The language of Lord Thurlow in that case is—"that he used to think, where it was necessary for any purposes of the testator's disposition, to convert the land into money, that the undisposed money should be personalty; but the cases fully proved the contrary." This principle has been recognized in our own courts. But the very point submitted by the appeal has been decided by the court of law. In Hood v. Archer, 2 N. and McC. 149, the wife's inheritance was sold by the sheriff, who had received the purchase money. The wife then

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died, and the *question was whether the money belonged to the husband, by virtue of his marital rights, or whether the right did not remain in the wife so as to vest in her administrator. The court held that it belonged to the administrator of the wife. The authority of this case is fully recognized and the principle applied in Wardlaw v. Gray, 2 Hill Eq. 644. Of course the assignee of the husband can stand in no better situation.

The appeal is dismissed.

JOHNSON and JOHNSTON, CC., concurred.

Boyce, for the appellant.

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2 Rich. Eq. 58

JOHN M. FELDER v. JOHN D. A. MURPHY et al.

(Columbia. Dec., 1845.)

[*Bankruptcy* ⇐214; *Mortgages* ⇐419, 427.] Where a party mortgaged land to secure the payment of a bond, and afterwards became a bankrupt, and the land was sold by his assignee, *held* that the mortgagee had the right to foreclose the mortgage against the purchaser from the assignee, although it appeared that he had sued and recovered judgment on the bond, and that the sheriff had sold other property of the mortgagor, and had in his hands sufficient of the proceeds to satisfy the plaintiff's debt, it at the same time appearing that a junior judgment creditor of the mortgagor had, by proceedings in Equity, enjoined the plaintiff from receiving the money in the sheriff's hands, until he should have exhausted his mortgage lien: *held* further, that the bill to foreclose was properly filed by the mortgagee alone, and that the junior judgment creditors of the mortgagor were properly not made parties, complainants, thereto.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 344; Dec. Dig. ⇐214; Mortgages, Cent. Dig. §§ 1245, 1285; Dec. Dig. ⇐419, 427.]

Before Johnston, Ch., at Lexington, June, 1845.

The Chancellor. This is a bill for the foreclosure of a mortgage under the following circumstances:

The mortgage (which is of certain real estate lying in Lexington District, more particularly described in the pleadings,) was executed by the defendant, Murphy, then owner of the premises, to the plaintiff, on the 14th

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of April, 1839, the better to *secure the payment of a bond cotemporaneously given to the latter, conditioned for the payment of a large sum of money in instalments; upon which, as appears from the report of the commissioner, there remained due on the 23d of June, 1845, of principal and interest, the sum of $3,452.04, of which amount, the sum of $2,818.72 was to bear interest from that date.

Some time in 1843, upon an application of the said defendant, he was declared a bankrupt, under the Act of Congress, then recently passed, and the defendant, Pooser, was appointed his assignee, and took upon himself the duties of his trust. In August of that year, under an order of the district court, he advertised the property of his principal for sale, and on the 4th of December following, in conformity to his advertisement, proceeded to make sale of the premises included in the plaintiff's mortgage. It is charged and proved, that the plaintiff attended on that occasion, and forbade the sale, and gave explicit notice of his lien. Nevertheless, the sale proceeded, and the premises were bid off by the defendant, Hilliard, at a very inconsiderable price: the diminution being occasioned, as Mr. Stroman, a most respectable witness, testifies, by the incumbrance; but for which he, himself, would have given a large sum for the property.

It was not pretended, at the hearing, that the lien of the mortgage was divested by the assignment, or sale in bankruptcy: and, indeed, the Act of Congress expressly reserves the liens of mortgages and judgments.

It will not be denied, that the property of a debtor in the hands of his alienee, is still liable to all legal incumbrance which attaches to it in the hands of the debtor himself; and that all pre-existing equities of which the

alience has notice at the time of the alienation, attend the property into his possession.

But the defence here takes other grounds: and they were argued with a sincerity which I cannot doubt: although I have not been convinced of their sufficiency.

A great many judgments and executions were obtained against Murphy, the debtor, from as early as February, 1841, down to the middle of October, 1843. The plaintiff himself, had in March, 1842 taken a confession and entered up judgment and execution for the instalments then due. Murphy was in possession of a large property, real and personal, in Orangeburg and Lexington districts. Sometime before the assignee's sale of the mortgaged premises, the sheriff of Orangeburg district had levied these executions upon part of his slaves, &c. in his bailiwick,

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*and sold a part, sufficient to raise a sum of money, which, if applied to the executions in their order, would have satisfied the plaintiff's: and but a few days before the assignee's sale aforesaid, he had levied on other property, and was about to make a further sale when one Phillip Chartrand, a junior execution creditor interposed.

This creditor, whose execution stood posterior to that of the plaintiff, filed a bill for the purpose of displacing the plaintiff's execution, as against the unmortgaged property, until the specific lien of his mortgage should have been enforced and exhausted, upon the familiar equity principle, that a creditor having a lien common to himself and other creditors, and also a lien peculiar to himself, shall not be allowed to select the remedy, common to all, to the injury of other just creditors; but shall be driven to his own peculiar remedy, so long as it can avail him; and only allowed to come back to the remedy common to all, when he has no other resort.

An order was passed, that the fund arising from the sheriff's sale should be locked up from him until he shall have exhausted his mortgage lien.

Upon this statement, which, I believe, embraces all the facts relied on, it was contended that the plaintiff has no right to enforce his mortgage lien.

It cannot be said that his debt has been paid. That could not be, unless he had been allowed to receive the money under his execution: but that is precisely what he was not allowed to do. He was in the course of enforcing his execution for that purpose, but was arrested in his course, and his remedy rendered fruitless.

A case has been quoted, Davis v. Barkley, 1 Bail. 140, to shew that the reception of the money by the sheriff was a satisfaction to him, because it was held at law, that such receipt satisfies the debt. And no doubt, when there is nothing to intercept it from the creditor, and nothing to rebut the presumption of its regular application, that is correct. But here the evidence is directly the contrary.

No doubt again, when the sheriff receives money, properly applicable to the demand of a given creditor, the debtor shall not be the loser, though the sheriff fails to pay it over. But here the debtor will not lose, though the sheriff never pays the fund to the plaintiff; it stands to the debtor's credit, and he has the benefit of every cent of it, in the application of it to other creditors.

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*But the real state of the case is this: that no disposition, whatever, has been made of the fund. It is yet in transitu, and it may be, that on a contingency yet to be determined, (I mean if the mortgaged property should prove insufficient,) a portion at least, of it, may be adjudged to the plaintiff; and in that case (where the principle contended for, will be truly applicable) the receipt of the sheriff will be a satisfaction of the plaintiff, even though the sheriff should prove a defaulter.

But give the argument what turn you may, it is a singular proposition to be urged to this court, that it is bound to pronounce a creditor satisfied, whom its own order forbade to receive the money.

Again, it is urged that it is not the plaintiff's right, to come here by himself, while he has a sufficient lien in another court. The evidence is, that his lien there is not sufficient. If I understand the argument, however, it is rather this:

That as the resort to this court on the score of the mortgage, is not for the peculiar benefit of the plaintiff, but for that of the other general creditors, it is not he, but they who should have filed this bill; at least, that they should come in with him.

I may misconceive the argument: but if this is its tendency, (and I can make nothing else of it,) neither reason nor authority has been brought to support it.

Shall we say, in every case where creditors drive one of their companions from a general to a specific remedy, that they must either enforce it for him, or go with him to see it done? And if not in all cases, why in this? For what purpose should the other creditors join in the bill? Certainly not for the purpose of shewing the existence of the mortgage. That the plaintiff is as competent to establish as they. Nor for the purpose of shewing an insufficiency of funds to pay all without resorting to the mortgaged property. That too, he is as fully competent to prove as they can be: and he has proved it; if, indeed, it were not necessarily implied in the bankruptcy of the debtor. In short, what earthly functions would the other creditors subserve in this Court, which the plaintiff cannot accomplish?

Prima facie, the mortgaged property is liable to the mortgagee, whether he have another remedy or not. That is the import of

the mortgage contract. If the alienee of the mortgaged premises can point out other property liable to the debt, and sufficient to pay it, he has a right to turn the creditor to that in the first instance; but that must be so,

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always, upon the supposition *that the creditor, thus turned round, is not made to disappoint, or come in conflict with other creditors having equal equities with the alienee himself.

It may be in this case, that if the plaintiff be allowed to raise his whole debt out of the mortgaged land, the proceeds of the other property may exceed the amount of the general liens; (the plaintiff's execution being out of the way) in which case, Hilliard will have been deprived of part of his purchase without necessity.

But if he has any reason to apprehend this or any other circumstance calculated to reduce the amount of his liability, this is matter of defence, and it is for him, and not for the plaintiff to bring in the parties necessary to make it out.

There was one point of the defence which I excluded, by overruling a motion to continue the case for the absence of the witness, who was to prove it.

Chartrand was summoned to prove that his bill was filed at the plaintiff's instance; and if that evidence should have affected this case, I was wrong, and have excluded the merits of the case. I state this for the benefit of the defendants.

But I could not conceive that the plaintiff's right could be impaired by his voluntarily doing what this court would have compelled him to do.

Chartrand was not summoned to prove that the statements of his bill were untrue, but to prove that, under a given state of facts, admitted to be true (and proved to be true in this case) Felder had voluntarily yielded to the equities arising from those facts. I did not, and do not conceive that this was a good defence.

Suppose the other creditors were co-plaintiffs, would it be a defence to this bill that they came in at Felder's instance?

It is ordered and decreed, that the commissioner's report of the mortgaged debt be confirmed: and that unless the defendant shall, on or before the first day of March next, pay the same, with the interest thereon, according to the report, the mortgaged premises described in the pleadings, be sold by the commissioner, after duly advertising the same twenty-one days, for cash or on credit, as the plaintiff shall direct, for satisfaction thereof; the residue of the proceeds of sale, if any, to be paid to the defendant, Hilliard, and that the defendants pay the costs; for which the said Hilliard is, as among themselves, to be primarily liable.

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*The defendants appealed, on the following grounds:

1st. That the mortgage of the complainant was satisfied before his bill was filed to foreclose the same.

2d. That even if it should be considered that the levy and sale by the sheriff under the executions at law, of the complainant, for the same debt which was secured by the mortgage,—and the collection by the sheriff of more than enough to satisfy the same, was not an extinguishment of the mortgage; —still, the facts of the case did not warrant any application to the court of equity to foreclose the said mortgage in favor of the other judgment creditors of Murphy;—inasmuch as the mortgaged property was as subject to their executions if the mortgage was discharged, as it could have been at any time to the said mortgage, and the proceeding was altogether unnecessary and vexatious.

Northrop, for the defendants.

Curia, per JOHNSTON, Ch. This court feels no hesitation in affirming the decree and dismissing the appeal: and it is so ordered.

JOHNSON, HARPER and DUNKIN, CC., concurred.

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2 Rich. Eq. 63

ABNER JONES et al. v. JOSIAH KILGORE, Adm'r.

(Columbia. Dec., 1845.)

[*Principal and Surety* ⇐=145.]

Plaintiffs, as sureties of one C. to a joint and several note, were sued in Laurens district, where they resided, and being ignorant of the consideration of the note, and of any just defence to it, suffered judgments to be taken against them. C., the principal, having died, his administrator was sued in Greenville. This suit was protracted until long after the judgments were recovered against the sureties; and the defence, of usury, being successfully made out, by means of a slip of paper, accidentally discovered among the intestate's papers, a judgment was rendered against the administrator only for the amount really loaned, without interest or costs. The judgment against the administrator was paid in full by the administrator and the sureties; and then this bill was filed by the sureties, praying that the judgments against them might be perpetually enjoined. *Held*, 1st, that the payment of the judgment against the administrator was not sat-

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isfaction in full of the *judgments against the sureties; 2d, that the sureties were entitled to relief on the ground of usury, but only on condition of their paying the amount really loaned, with lawful interest.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 401; Dec. Dig. ⇐=145.]

[*Judgment* ⇐=433.]

Mere ignorance that a party had a valid defence is not a sufficient ground for opening a judgment at law; but where to ignorance is

added the fact, that he had no means of discovering the defence by exercise of due diligence, or, if the evidence rested in the knowledge of the plaintiff at law, had no means of knowing it, so as put him upon filing a bill for discovery, he may, on discovering his defence, file a bill in equity to be relieved against the judgment at law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 817; Dec. Dig. ⟸433.]

[*Payment* ⟸38, 39, 41.]

If a party making a payment give no directions as to the application thereof, the right to make the application is with the party receiving it. If neither party has fixed the application, it devolves upon the court, and will be made pro rata, to the demands held by him who received the money against him who paid it: or, if one of the demands be less secured than the others, the application will be made to it, in the first instance.

[Ed. Note.—Cited in State v. Spartanburg & U. R. Co., 8 S. C. 165; Brice v. Hamilton, 12 S. C. 32, 37, 38; Wiesenfeld, Stern & Co. v. Byrd, 17 S. C. 114; Bell v. Bell, 20 S. C. 46, 47; McSween v. Windham, 89 S. E. 503.

For other cases, see Payment, Cent. Dig. §§ 99, 104, 116; Dec. Dig. ⟸38, 39, 41.]

[*Judgment* ⟸891.]

Where judgments on the same cause of action are identical in amount, satisfaction of one is satisfaction of all: where, however, they are not for the same amount, satisfaction of the one for the smallest sum, is only satisfaction pro tanto of the others.

[Ed. Note.—Cited in Lumpkin v. Ferguson, 10 Rich. 427; Noble v. Cothran, 18 S. C. 443.

For other cases, see Judgment, Cent. Dig. §§ 1702, 1703; Dec. Dig. ⟸891.]

[*Usury* ⟸95.]

Relief from a usurious contract will not be granted in equity except on condition that the sum really due with lawful interest be paid.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 198–202; Dec. Dig. ⟸95.]

[This case is also cited in Thatcher & Co. v. Massey, 20 S. C. 548, and distinguished therefrom.]

The facts of this case, and the points decided, will be sufficiently understood from the decree of the Court of Appeals.

Curia, per JOHNSTON, Ch. The plaintiffs were the sureties of one Thomas Crymes to a note given by him to the late Banister Stone defendant's intestate, for $2,909, due the 1 Jan. 1837. The note, which was joint and several, was sued on by Stone, and the suits against the plaintiffs were brought in Laurens district, where they resided; and they, being ignorant of the consideration of the note, and of any just defence to it, suffered judgments to be taken against them. Crymes, the principal, having died, his administrator was sued in Greenville. This suit was protracted, by the defence of the administrator until long after the judgments were obtained against the sureties. The defence of usury was successfully made out by the administrator, by means of a slip of paper, accidentally discovered among the intestate's papers, containing calculations in the hand-writing of Stone, the lender: and a judgment was rendered in 1841, for the sum of $2,909, but without interest or costs.

At the same time, Stone recovered another judgment against the administrator of Crymes for $671.87.

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*The administrator of Crymes made two payments to Stone, amounting, together, to $2,426.51 but was not able to make further payments:—his intestate's estate being insolvent.

The plaintiffs have paid the further sum of $482.49, upon the larger judgment obtained against Crymes's administrator, which, with the sums paid by the administrator, will be sufficient to satisfy it, if the latter are exclusively applicable to that judgment. In confirmation of their right to have them thus applied, a letter of Stone to the sheriff of Laurens is relied on, in which under the date of the 23rd of May, 1843, he says: "In the cases, myself against R. Owings, A. Jones, and E. Crymes, as sureties of Thomas Crymes, dec'd, there is a credit due on those judgments of $2,369, dated in August, 1841, and $57.51, in October 1841, which I have not been able to have entered on the judgment in Greenville owing to the manner in which the receipts were drawn. I will, as soon as I can get them drawn in suitable form, forward them to your office."

My brother, Johnson, who heard the cause, has sustained the bill fully by a decree for a perpetual injunction of the judgments against the sureties: and this is an appeal from his decision.

The question is presented, whether the plaintiffs are not concluded by the judgments at law. So far as this point is involved, the case is analogous to that of Cantey v. Blair, 1 Rich. Eq., 41. The plaintiffs allege that they were not privy to the transaction, and were ignorant of the usury. It is said in Cantey v. Blair, "That one was ignorant of the fact is not strictly susceptible of proof; but the allegation is made (as that of a fraud having been discovered within four years,) to put the opposite party upon proof of knowledge."

The principle is recognized in that case, that mere ignorance is not a sufficient ground for opening a judgment. "To this must be added, that the party had no means of discovering the fact by exercise of due diligence; or, if the evidence rested in the knowledge of the plaintiff at law, had no means of knowing that fact so as to put him upon filing a bill for discovery."

I suppose that this negative allegation is equally incapable of strict proof with that of ignorance. But when it is made, it is sufficient to throw the burden upon the other party of shewing what reasonable means of inquiry were suggested, by the circumstances, to the party asking relief, and neglected by

him. It does not appear that any such proof

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was made in this case; or that *the circumstances were either calculated to engender suspicion in the minds of the sureties, or to furnish them with the means of defence, if suspicion had been excited.

Turning to the other point, it is very clear that the plaintiffs are entitled to have the $2,426.51, paid by the administrator of Crymes, placed to their credit, by applying it to the larger judgment obtained against himself.

There is no doubt, if no directions are given by the party making the payment, the right to make the application is with the party receiving. If neither party has fixed the application, it devolves upon the court, and will be made, pro rata, to the demands held by him who receives the money against him who paid it: or, if one of the demands be less secured than the others, the application will be made to it, in the first instance. [United States v. Wardwell] 5 Mason, 82, [Fed. Cas. No. 16,640;] 4 J. J. Marsh. 97; 9 Cowen, 420.

But here, the letter of Stone shews his application, which concludes his administrator, and may, also, be taken as evidence of directions given by the administrator of Crymes, when he paid the money.

To the $2,426.51, paid by the administrator of Crymes, the plaintiffs have added a sum sufficient to satisfy the larger judgment against him: and to the extent of all these payments, they are entitled to credit upon the judgments obtained against themselves.

But the decree goes beyond this, and proceeds upon the principle, that the satisfaction of the judgment against the principal is a satisfaction of the judgments against the sureties; and I should have no doubt of the correctness of this, if the judgments were identical in amount. But the judgment against the principal excludes costs and interest, where as those against the sureties include them both.

The principal was excused from the interest and costs by his defence under the Acts of 1831 and 1832. The sureties made no such defence; and, therefore, suffered a recovery as in other cases.

This recovery is conclusive upon them at law; and, when they come to be relieved in equity, relief will be granted only upon the terms which equity requires; to wit, upon the payment of the sum really loaned, with lawful interest. Some of the authorities for this rule are mentioned in Pickett v. Pickett, 2 Hill Eq. 470; and the rule is so unquestionable, that it is unnecessary to support it here by reference to cases.

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*No doubt, the plaintiffs are entitled to relief on the ground of accident: but no exception can be found to the proposition, that wherever one party, by whatever accident, has obtained a right or advantage at law, equity will not deprive him of what the law has given him, but upon condition that the other party shall do what equity requires.

The decree has been justified upon the ground that the plaintiffs may be considered as entitled to open the judgment, and make such defence as they could have made, if they had been cognizant of the usury: and that, if a new trial were ordered, the judgment at law would be rendered only for the principal sum: wherefore, it is insisted, that the decree is correct in restricting the lender to that sum. But I apprehend this is a misconception. If the court had the power to grant a new trial for the purpose of letting in the defence which might have been made, it would exercise that power only upon equitable terms; and, in a case of usury, its constant maxim is, that it will not interfere or grant any relief, but upon a submission to pay what is really due, with lawful interest.

Before the Acts of 1831–2, the usurious borrower could, at law, have deprived the lender of every cent loaned to him. Was it ever heard, that, under that state of the law, a party, who was accidentally deprived of an opportunity to make the defence of usury, was helped by this court to a decree so sweeping as that? No. But how does the decree, we are asked to give here, differ, in principle, though it may differ, in degree, from the one I have supposed?

It has been intimated that, since the Acts of 1831–2, equity should require the payment only of the principal sum loaned: but I cannot perceive any ground for this opinion. If it results from the supposition, that we are bound to conform to the obligation at law, the answer is, that equity never did take that for its guide. As the law stood before these Acts, the whole loan was forfeited at law; and, if equity had conformed to it, she would have relieved from the whole debt. The Acts, I have mentioned, have declared the borrower liable at law for the principal sum loaned; and it would be extraordinary that an increase of the liability at law should be made the ground of diminishing the liability in equity.

It results, from these observations, that the sureties will have to pay a greater sum than was recovered against their principal. But there is no injustice in the principle of such

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a decision. It *happens they will sustain loss from the insolvency of him, who is bound to indemnify them. If their principal were solvent, they would be entitled to recover whatever they may be obliged to pay on his account. If they had given him, or his administrator, notice when they were sued, the judgments obtained against them would have been conclusive, in an action for reimbursement. As they did not, the only difference is, that they would be obliged to make out their case.

It is ordered, that the decree be modified, by declaring the plaintiffs entitled to credit, on the judgments against them, for the two payments made by the administrators of Crymes, as well as for the payment made by themselves; and that they are liable for the sum really loaned, with lawful interest thereon, to be ascertained by the commissioner, to whom the accounts are hereby referred.

HARPER and DUNKIN, CC., concurred.

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2 Rich. Eq. 68

MARY A. E. ALLEN, by Her Guardian, v. DAVID CROSLAND et al.

(Columbia, Dec., 1845.)

[*Guardian and Ward* ⇐174; *Wills* ⇐733.]

Testator bequeathed as follows. "I give to my daughter Mary, at her marriage, or when she attains the full age of twenty-one years, two-thirds of my personal estate. But should she die before she marries, or attains the full age of twenty-one years, then, and in that case, I give" the same to my wife, &c. *Held* that, as long as Mary remained unmarried and under age, her guardian was not entitled to receive from the executor of the testator the corpus of the said legacy, and, consequently, that the sureties to his guardianship bond were not liable therefor, the same having been wrongfully paid over to him; but that, Mary being otherwise unprovided for, he was entitled to receive interest on the said legacy, by way of maintenance, and that for such interest his sureties were liable.

[Ed. Note.—Cited in Chisolm v. Chisolm, 4 Rich. Eq. 270.

For other cases, see Guardian and Ward, Cent. Dig. § 596; Dec. Dig. ⇐174; Wills, Cent. Dig. 1825; Dec. Dig. ⇐733.]

[*Wills* ⇐734.]

As a general rule, a legacy payable at a future day, does not carry interest, until after it is payable. Where, however, the legacy is to a child who is otherwise unprovided for, it carries interest immediately.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1852; Dec. Dig. ⇐734.]

Before Johnson, Ch., at Marion, February, 1845.

The Chancellor. The late Matthew Allen, who died in 1834, by his last will and testa-

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ment gave to his widow one-third part *of all his estate, real and personal; and the following are the terms in which he gives the remaining two-thirds to the complainant, his only child, viz: "Item, I give, devise and bequeath to my dearly beloved daughter, Mary Ann Elizabeth, at her marriage, or when she attains the full age of twenty-one years, two-thirds of my estate, both real and personal, to her and her heirs and assigns forever. But should my said beloved daughter, Mary Ann Elizabeth, die before she marries or attains the full age of twenty-one years aforesaid, then and in that case I give, devise and bequeath to my beloved wife, Eliza Ann Allen, one molety of the said two-thirds of my estate aforesaid, her heirs and assigns forever; and the other remaining molety of the said two-thirds, I give, devise and bequeath to the surviving children of my brother Robert Allen," &c.; and he goes on to authorize his executors to sell his lands and negroes, and to put the proceeds at interest, or to hire out the negroes, or work them on the plantation, as they might think most conducive to the interest of the estate. He appointed John R. Easterling and Thomas McConnell his executors. McConnell alone qualified, and assumed the burthen of the administration; and in the execution of the powers vested in him by the will, he sold the whole real and personal estate of the testator, in January, 1835, except a plantation on Pee Dee River, called Hasty Point, which the testator acquired after the execution of the will, and which was not, therefore subject to its dispositions. Some time after, the testator's widow intermarried with one Cook, who died shortly after;—she afterwards intermarried with the defendant, David Crosland, who, at the January term, 1839, of the court of equity, for Georgetown district, was appointed guardian in chief of the complainant. On the 4th of March, 1839, he entered into bond to the commissioner of that court, in the penalty of $16,000, conditioned for the faithful discharge of his duties, with the defendants, Samuel Sparks and John W. Bowyer, the intestate of the defendant, Jemima Bowyer, as sureties. On the 22d of March, of the same year, administration de bonis non, with the will annexed, of the estate of the testator, Allen, (McConnell, his executor, having died some time before,) was granted to the defendant, Crosland, who thereupon entered into bond to the ordinary, in the penalty of $6000, for the faithful discharge of that duty, with Halden W. Lyles and P. E. Crosland, as sureties. At the foot of that bond are the following memoranda, viz: "I have understood that Mr. Crosland has already given bond to the commissioner

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*in equity, for that part of the estate of Matthew Allen which he did not inherit by intermarriage with the widow, and if so the above bond is one of mere matter of form." —Signed "E. Waterman, Ordinary G. D." "I hold Mr. Crosland's bond for sixteen thousand dollars, as guardian of Mary Allen." Signed "J. W. Coachman, Commissioner in Equity." McConnell, the executor of the testator, Allen, had, as before stated, died some time before these proceedings were had, having, it is said, paid all the debts of his testator. By his will he had appointed one E. H. Miller his executor, who, after the defendant, Crosland, had been so appointed guardian of the complainant, and administrator de bonis non of the estate of the testator, Allen, transferred and delivered to

him a large amount (say $10,993.55, or thereabouts) of the assets of that estate, consisting of bonds, notes and other securities, for money arising from the sales of the testator's estate, made by McConnell, the executor, in his life time.

In 1836, McConnell, the executor of testator, Allen, supposing that he was authorized by the will, entered into an agreement to sell the Hasty Point plantation, to one Davison McDowell, at $6,500, but on being advised that he had no such power, the testator having acquired the land after the execution of the will, he refused to execute the agreement, and in 1837 McDowell filed a bill for a specific performance, and such proceedings were had thereon, that at January term, 1837, for Georgetown district, an order of the court was made in the said cause, entitled Davison McDowell v. Thomas McConnell, executor of Allen, and Eliza Ann Cook, (the testator's widow,) and Mary Ann Elizabeth Allen, (his daughter,) that the said agreement should be confirmed; and, as the means of carrying it into execution, it was ordered that on the payment by the complainant of the sum of two thousand dollars in cash, and the execution of his bond for the balance contracted to be paid, etc., the commissioner of the court should execute titles to him for the said plantation; and that he should pay to the defendant, Eliza Ann Cook, one-third of the amount, and retain the remaining two thirds, subject to the further order of the court. McDowell, on his part, complied with the terms of the order, and at January term, 1840, an order was made, on the petition of the defendant, Crosland, who had before married the widow, that the commissioner should turn over to him all the funds in his hands belonging to the estate of the testator, Matthew Allen. In pursuance of this order, the commissioner delivered to him McDowell's bond for $4,500, and paid to

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*him $605, the amount of interest which had been received on it, being, as it is represented, all the funds of the estate that were in his hands.

At the March term of the court, for Georgetown district, in 1844, the guardianship of the complainant granted to defendant, Crosland, was on her petition revoked, and her present guardian substituted in his place. And the administration de bonis non, with the will of the testator annexed, was also revoked in the court of ordinary, on the 15th of December, 1844. The fact is not distinctly stated in the bill, but it was admitted on the part of the defendant at the hearing, that Crosland was insolvent, and unable to reimburse the funds of the estate which he had wasted, and the prayer of the bill is, that Crosland may account, and that the defendants may pay what may be found due to the complainants.

The defendant, Crosland, has not answered. The other defendants demurred, on the grounds that they are not liable until the full extent of their principal's defalcation, as guardian, had been ascertained, by the judgment of the court, and that then the complainant's remedy against them was by action at law, on the guardianship bond, and insist that they are improperly joined in this bill; but at the hearing the demurrer was withdrawn, and they went to trial on their answer, on which they insist that they are not liable for the assets which their principal, Crosland, received from E. H. Miller, the executor of McConnell, who was the executor of the testator, Allen, because they were received in his right as administrator de bonis non of that estate, and not in his character as guardian of the complainant.

Several documents were offered in evidence, indicative of the character in which Crosland acted, in receiving the assets of the estate of his testator from Miller, whether as guardian or administrator; but I have not thought it worth while to refer to them, because the act of receiving must be referred to his authority to receive, however he might think proper to characterize himself, whether as guardian or administrator, or any thing else—the case itself depends on a few facts about which there is no controversy.

The counsel for the defendants, Sparks and Bowyer, concedes, and there can be no question about it, that they are liable for the amount which Crosland received for the complainant, his ward, from the commissioner in

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Equity, on account of the sales of Has*ty point, and I shall not again recur to that matter. The only remaining question is, whether they are also liable for the amount received by him from Miller, the executor of McConnell, and that depends on the question whether he was entitled to receive it in the character of guardian.

The whole of the estate of the testator embraced in his will had been sold by the executor, McConnell, and was in his hands in the form of money or bonds and notes payable to himself. The whole body of it had been changed, and there was nothing left of the original corpus. It had assumed entirely the form of a debt due by the executor to the persons entitled to receive it; and if Crosland's ward was entitled to receive it at the time of the payment of the money, or the delivery of the securities to him, the payment was good—no administration de bonis non, was necessary, as he was entitled to receive it in the character of guardian, and of course the sureties to the guardianship bond are liable. Such is, I think, the necessary conclusion from the principle laid down in Burleston v. Brown,(a) decided in the Court of Appeals at the late sittings in Charleston. But if all the trusts confided by

(a) Gray v. Brown, 1 Rich. 351. Qu.?—R.

the testator to his executor had not been executed, no one except he who was duly authorized, could carry them into execution, and until that was done the administration was not complete. Now by the terms of this will, the bequest or devise is to Crosland's ward "at her marriage, or when she shall attain the full age of twenty-one years." She is yet single, and has not attained the age of twenty-one; and if she is not now entitled to receive the legacy, Crosland had no right to receive it as her guardian, and consequently the sureties to his guardianship bond are not liable.

Without entering upon the inquiry whether this is a vested or contingent legacy, it is too clear to admit of any question; the possession and enjoyment was to be postponed until she married, or attained the age of twenty-one years, and I cannot find terms in which to express the idea more clearly than those used in the will. "I give, devise, and bequeath to my beloved daughter, Mary Ann Elizabeth, at her marriage, or when she attains the full age of twenty-one years," &c., indicating, as strongly as language can do, without employing negative words, that she was not to have the legacy until one of these events happened. But it is equally clear that

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this legacy is altogether contingent, and *dependent on the happening of one of the contingencies. The rule is, that if time enters into the substance of the legacy, it is necessarily contingent, and I need not add to what I have already said to show that it does here.

The effect of the memoranda, made on the administration bond, is not involved in this case. They cannot, however, be otherwise regarded than as the extra judicial opinion of the ordinary upon a matter of law, and form no part of the bond itself.

It is ordered and decreed that the defendants do account before the commissioner for the amount received by defendant, Crosland, from the commissioner in equity, for Georgetown district, on account of the sale of Hasty Point, in behalf of the complainant's ward, and that in all other respects the bill be dismissed. The defendants to pay the costs.

The complainant appealed, on the following grounds:

1st. That complainant's interest in the legacy in question, is a vested and not a contingent interest, and its receipt by the defendant, Crosland, was in his capacity as guardian, and not as administrator de bonis non of the testator's estate.

2nd. That if the Court should be of the opinion that complainant's right to the legacy is contingent, still she became entitled to the interest thereon by way of maintenance from the death of her father, so that the defendant, Crosland, ought to be charged as guardian with such interest from the time the fund was transferred to him by McConnell's legal representative.

Munro, for the appellant.

Dargan, contra.

Curia, per DUNKIN, Ch. On the questions discussed in the decree, this Court is satisfied with the judgment of the Chancellor. The matter involved in the 2d ground of appeal was not argued at the circuit, probably because the complainant relied on his claim to the corpus of the legacy.

There is no doubt, however, about the principle. In Lupton v. Lupton, 2 John. Ch. R. 628, Chancellor Kent says: "With respect to the question of interest, it may be proper to observe, that the general rule is, that a legacy payable at a future day, does not carry interest, until after it is payable, unless it be a legacy to a child, payable at a future day, and the child has no other provision, nor any maintenance, in the mean time, allotted by the will. If there be no

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such provision, the legacy carries in*terest immediately, on the presumption that the parent must have intended that the child should, in the mean time, be maintained at his expense." As early as Heath v. Perry, 3 Atk. 101, Lord Hardwicke had held that the case of a child was an exception to the rule that a legacy carries interest only from the time it is payable; "for then," says he, "let a testator give it how he will, either at 21 or at marriage, or payable at 21, or payable at marriage, and the child has no other provision, the court will give interest by way of maintenance, for they will not presume the father inofficious, or so unnatural as to leave a child destitute." Nor, in such case, does it seem to make any difference whether the legacy be vested, or contingent. See Leslie v. Leslie, 10 Eng. Cond. Ch. R. 384.

By the will of Matthew Allen he bequeathed one third of his estate to his wife, and two-thirds to his daughter (the complainant) "at her marriage, or when she attains the full age of twenty-one years." No provision whatever is made for the maintenance of the daughter in the mean time. Under the authority given by the will, the executor, McConnell, soon after the death of the testator, sold the estate and paid the debts, holding the surplus either in money or securities. The complainant was entitled to interest on two-thirds of this surplus, certainly from January, 1835, when the sale was made. The amount of this interest, deducting any sums which McConnell, the executor, may have paid on account of the complainant, must be regarded as included in the sum paid by Miller, the administrator of McConnell,(*b*) to the guardian of complainant, and he is chargeable in that capacity. He is also lia-

(*b*) In the circuit decree Miller is called the executor of McConnell. R.

ble for the subsequently accruing annual interest on the amount of the complainant's legacy thus ascertained, deducting all sums paid to, or for, her, and a reasonable allowance for her maintenance while she was maintained by the guardian.

It is ordered and decreed that the order of reference, made by the circuit court, be enlarged, and that the commissioner, in addition to the directions heretofore given, take an account of the amount due to the complainant, on the principles of this decree. In all other matters the decree of the circuit court is affirmed.

JOHNSTON, C., concurred.

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2 Rich. Eq. *75

*MRS. C. LEWIS, by Her Next Friend, v. CHARLES R. THOMPSON, Executor.

(Columbia. Dec., 1845.)

[*Set-Off and Counterclaim* ⟸41.]

Testator, who was the uncle of Mrs. C. Lewis, bequeathed, in one of the clauses of his will, as follows: "Also, I do direct that after the payment of the aforementioned expenses, debts and legacies, there shall be paid to Mrs. C. Lewis, wife of Dr. John B. Lewis, eight thousand dollars." At the testator's death, Dr. Lewis, the husband, was insolvent and was indebted to the testator in a sum larger than the amount of the legacy to his wife. *Held*, that the executor was not entitled to set off the amount due by Dr. Lewis against the legacy, and that Mrs. Lewis was entitled to have the legacy settled to her sole and separate use, &c.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 79; Dec. Dig. ⟸ 41.]

Before Johnson, Ch., at Chambers, Columbia, December, 1844.

The bill stated that W. S. Thompson, of Orangeburg, the uncle of the complainant, died, leaving a will, which, amongst other provisions, provided as follows, to wit, "Also, I do direct that after the payment of the aforementioned expenses, debts and legacies, there shall be paid to * * * Mrs. C. Lewis, wife of Dr. John B. Lewis, eight thousand dollars." That Dr. Lewis, the husband of complainant, was indebted in a large amount to various creditors, and should the legacy, left to the complainant, be paid to him when it fell due, it would go to his creditors, leaving her and her children destitute. The prayer of the bill was, that the defendant be ordered to pay over the legacy, when it should become payable, to a trustee for the use of complainant, with limitations over. The defendant in his answer stated that he had refused to pay over the legacy to the complainant's next friend, for her sole and separate use, as the will did not bequeath it to her sole and separate use, nor authorize her to give her individual receipt for the same; and further, that Dr. John B. Lewis was indebted to the testator, to a larger amount than the legacy left to Mrs. Lewis, and he submitted whether the debt of Dr. Lewis to the testator ought not to be discounted from the legacy left to Mrs. Lewis, and whether the legacy ought not to be applied to the payment of the same, or whether the debt ought not to operate as a discharge and satisfaction of the legacy.

Per Curiam. Upon reading the bill, answer and papers, in this case, and hearing the solicitors; It is ordered and decreed,

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*that William L. Lewis be appointed a trustee, for the complainant, Caroline Lewis, and that the defendant, Charles R. Thompson, executor of William S. Thompson, deceased, do pay over to the said William L. Lewis, trustee as aforesaid, the legacy bequeathed by his testator to the said Caroline Lewis, as the same may fall due, according to the terms of the will,—exempt from all claim, discount, or offset against her husband, Dr. John B. Lewis—and for her sole and separate use. And it is further ordered, that the said William L. Lewis give bond and security, for the faithful administration of the trust hereby constituted.

The defendant appealed, on the ground that the legacy bequeathed by testator to Mrs. C. Lewis, ought not to have been decreed to be paid to William L. Lewis, her trustee, for her sole and separate use, but ought to have been decreed to be discounted, or set off against the debt due by her husband, Dr. John B. Lewis, to testator; or the said debt ought to have been decreed to be applied to discharge and satisfy the legacy.

Caldwell for the appellant.

Curia, per JOHNSON, Ch. At the hearing in the circuit court I understood the counsel for the appellant to concede the principle on which the order now appealed from proceeds, and did not therefore think it important to sustain it by authority, and I suppose that the appeal is now made, rather to satisfy the wishes of the client, than upon the opinion of his counsel, and he is certainly entitled to the opinion of this court. The question there was the same as that now made, and I decided it upon the authority of Ch. J. Marshall in Gallego v. Gallego's Ex'rs, 2 Brockenb. 285, and it will be sufficient to refer to that high authority, as conclusive of it. There the husband, whose wife was a relation of the testator, and who would at his death become one of his heirs, or distributees, drew bills on the testator, who resided in Baltimore, to the amount of $2000, and at the same time addressed him a letter requesting him to honor them. He did so, by accepting them and making arrangements for paying them in Richmond, and communicated the transaction to his partner there, by letter, and requested him, in the language

of the letter, to debit the husband with the amount "for the sake of form, and that the amount may appear against him, or his heirs, when I am no more, to be deducted out of the share coming to the family." The charge was accordingly made in the books and remained there at the death of the testator.

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The testator died some *years after this transaction, and by his will gave a legacy to the wife, and the husband afterwards assigned and released all his interest in it to the wife. The wife brought a bill, by her next friend, for an account and payment of the legacy, and the defendant, the executor, admitting assets, resisted the payment, on the ground that the debt due by the husband to the testator should be discounted against the legacy. But the defence was not sustained, and it was held that the wife was entitled to the legacy. The ground on which the judgment proceeds is, that a legacy to the wife, until reduced to possession by the husband, is, in equity, the chose in action of the wife, and that when suits are brought by the husband alone, or by the husband and wife jointly, to reduce it to possession, the English courts of equity will not decree payment, without directing a reasonable provision for the wife. The Chief Justice seems to place some reliance on the assignment of the husband to the wife, but that, as I understand it, is on the principle that whilst the court will especially guard the rights of the wife, those of the husband will not be overlooked, and that he also will be provided for out of the choses of the wife, according to the circumstances of the case, and that the assignment operated as an abandonment of any claim on his part, to be provided for out of the fund. He places some reliance too on the circumstance, that the will was executed after the husband became indebted to the testator, and gives the legacy without providing that the debt should be paid out of it, as indicating his intention that the legacy given to the wife was independent of it: and he adds, that had the money been advanced subsequent to the date of the will, there would have been more reason for considering it in part payment of the legacy, but even then it would not necessarily be so considered.

It does not appear here, from the statement made in the brief by the counsel for the appellant, whether the indebtedness of the complainant's husband to the defendant's testator, arose before or after the execution of the will, and it is but a reasonable inference that it was before, as the fact, if important at all, would not have been overlooked; and, adopting the principle of the case referred to, that would be decisive of this. Besides, there is something in the terms of this bequest which strikes me as indicating an intention, on the part of the testator, not only that the legacy should not be burthened with the debt due to him by the complainant's husband, but that he intended it as a separate provision for her. It is not in the usual

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terms "I give and bequeath," *and the like, but—"Also, I do direct that after the payment of the aforementioned expenses, debts, and legacies, there shall be paid to Mrs. C. Lewis wife of Dr. John B. Lewis, eight thousand dollars." And when it is known that the testator died possessed of a large estate, which he devised to his collateral relations, having no wife or lineal descendants—that Mrs. Lewis was his niece—Dr. Lewis living in his immediate neighborhood, and that he, in all probability, knew that he was insolvent—it can hardly be supposed that he intended to mock his niece, by giving her a legacy which he intended to be swallowed up by the debt due to himself, or by the other debts of an improvident husband. In legal strictness, the terms of the bequest could not be interpreted a gift to the separate use of the wife, but they indicate that there was something in the mind of the testator, which would have induced him to direct that the money should be paid to her personally, and that he, or whoever else drafted the will, was ignorant of the terms necessary to carry his intention into effect; and all that I deduce from the circumstances is, that they strengthen the conclusion, that the testator did not intend that the debt of Dr. Lewis to himself should be paid out of the legacy to his wife.

There is no complaint that the whole legacy is more than a reasonable provision for the complainant and her children. The decree of the circuit court is therefore affirmed and the appeal dismissed.

HARPER and DUNKIN, CC., concurred.

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2 Rich. Eq. *79

*THOMAS L. FRASER and Others v. HORATIO McCLENAGHAN.

(Columbia. Dec., 1845.)

[*Gifts* ⇐49.]

A delivery of slaves by a father to his son shortly after the son's marriage, *held*, on the evidence, to be a loan and not a gift, and consequently that the father might dispose of the slaves by will.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. ⇐49.]

[*Specific Performance* ⇐26.]

Where a bill is filed for the specific delivery of a negro, or other chattel, and it perishes before the hearing of the cause, so that the specific delivery cannot be decreed, quære, is the jurisdiction of the court gone?

[Ed. Note.—Cited in Fraser v. McClenaghan, 2 Strob. Eq. 227, 228.

For other cases, see Specific Performance, Cent. Dig. § 59; Dec. Dig. ⇐26.]

[*Specific Performance* ⟸26.]

Is not there a distinction between cases, where the chattel perishes after the conversion and before the filing of the bill, and where it perishes after the filing of the bill and before the hearing of the cause? In the first case is not the court without jurisdiction, and in the second may not the defendant be ordered to account for the value?

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 59; Dec. Dig. ⟸26.]

The above questions considered of importance and directed to be reargued.

Before Johnson, Ch., at Marion, February, 1845.

The Chancellor. The late John Baxter Fraser, who died in 1820, by his last will, dated in 1819, made the following bequests. "Item, I give and bequeath my negro slaves Young Ben, Diana and child Xury, and her future increase, to my said son Samuel, for and during his natural life, and at his death, to the lawful issue of his body; and if he should die without lawful issue living at the time of his death, then, and in that case, remainder to the surviving brothers and sisters or brother and sister of the said Samuel, equally to be divided between them, share and share alike," &c. "Item, I give to my said son Samuel, my negro slaves Toney and Affey, and their increase, and do expressly subject the said negro slaves Toney and Affey with her increase, to the said limitations with those just given to my said son Samuel, in all respects whatever."

In 1827 or '8, Samuel the son, sold the said negroes, Toney and Affey, and Diana and her children, to one Richard Howard, for their full fee simple value, and there is no evidence that he had notice of the limitations of this will, or from whom Samuel Fraser had his title. Samuel Fraser died in the course of the last year, leaving issue, the complainants, his children, all of whom were minors at the

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time of the sale of the negroes to *Howard, the oldest not being then more than fourteen years of age. The defendant married the daughter of Howard, who, in 1829, gave the negroes, including the issue of Diana, to the defendant as an advancement to his wife. The bill is brought for the specific delivery of Toney and Affey, and the issue, children and grand children of Diana, eight in number, named in the pleadings, she herself having died.

The answer raises the question whether the complainants were entitled to take under the limitations of the will, but that was abandoned at the hearing, and the defence was put wholly on the ground that the negroes, Diana and her child Xury, were not the property of the testator, at the time of the execution of the will, and that they had been before given by the testator, to his said son Samuel Fraser.

The evidence on this question may be summed up in a few words, and it is a great relief to the court, that it is derived from witnesses of unquestioned veracity, and that there is no collision between them except as to a point of time dependent on memory, which is not regarded as at all material.

James McPherson, sworn for the defendant, stated that Samuel Fraser, the son, married in 1813, much against the will of the testator, his father, who, on that account, declared he would give him nothing,—in consequence of which the son settled at some distance from him; but that the father at length relented and a reconciliation took place between them. That in the Spring of 1816, (and he states various circumstances which enable him to speak with precision of the time,) he saw the woman Diana, whom he knew to have belonged to the father, at the house of Samuel the son, who retained possession of and used her as his own, from that time to the time of the sale to Howard. The fact of the possession, and the use, is sustained by the evidence of Robert Fraser and W. H. Fraser, two of the testator's sons, sworn for the complainants; according to their recollection, however, the possession did not commence until 1817. This is the case on the part of the defendant. On the part of the complainants, a small memorandum book, found amongst the papers of the testator after his death, which upon examination was found to have been appropriated exclusively to the purpose of keeping accounts of advancements to his children, and his own cash receipts and disbursements, was offered in evidence. In the account with his son Samuel, the first items are for a mare and cash advanced, amounting to $143.19,

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under the date———day *of—181 , and immediately below this is the following entry: "March 15, 1817: Lent to my son Samuel, a negro girl named Diana, and her child Xury, and her future increase—he having agreed to find, clothe, shoe, and pay their taxes, and all future expenses of her increase, if any." Then follow other items under date 8th January, 1817, for cash, &c., advanced, amounting to $196, and the names of two other negroes, Ben and Delia, lent. In the accounts with the testator's sons, Thomas and William H., entered in the same book, all in the hand writing of the testator, they are charged also with negroes lent.

The admission of this book in evidence was objected to by the defendant, on the ground that it amounted only to a declaration of the testator as to the terms of the gift. It was received, however, as proof of the existence of such a book, the entries being worth little, perhaps nothing, unless they should be connected, by other evidence, with the delivery of the negroes by the testator, to his said son, Samuel.

The receipt book of the testator was also given in evidence. This contains a receipt

to the testator for taxes, from the tax-collector, for the year 1816: it is dated 21st May, 1817, and by comparing the amount paid with a list of the testator's negroes, for that year, contained in the same book, it is clearly shown that the testator paid the taxes for Diana and her child Xury, for the year 1816.

Robert Fraser and William H. Fraser, the witnesses before named, both stated that, according to their recollection and belief, the testator delivered, or lent, the negroes Diana and Xury to his son Samuel, in 1817, and that he had lent, instead of given, the negroes charged to his sons Thomas and William H. The latter, William H. Fraser, testified that between 1818 and the time of the death of the testator in 1820, he had frequently heard the said Samuel Fraser speak complainingly of the terms on which the testator had given him the negroes, remarking, that if he had any thing to give his children, he ought to do it at once; and when, after the death of the testator, his will was read to him, he expressed great dissatisfaction with the manner in which the testator had left him the negroes.

If the time of the delivery of the negroes was at all important, I should not hesitate to conclude that it was in 1817, and that the witness, McPherson, was mistaken in supposing that it was in the Spring of 1816. The recollection of Robert and W. H. Fraser, is, that it was in 1817. The tax receipt shows that the testator paid their taxes for

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1816, and he was not liable for them *unless he had possession of them on the 1st of October of that year; and, above all, the entry in the memorandum book proves it. The testator could not then have had any motive to misrepresent the time of the delivery, and the neatness and regularity with which all the entries in it are made, show that it was not the work of a dullard but a man of business. But the time is not material, for the declarations of Samuel Fraser, made not long after the entry, and frequently repeated, show that the terms on which the negroes were delivered, are correctly stated in that entry, and that it was a loan at will and not a gift in fee simple. In answer to a question put to the witness, McPherson, on his cross examination, he stated that he had heard Samuel Fraser say that his father had given him Diana and her child Xury; and that was relied on as proof of an unconditional gift. That there was a gift was true, but the occasion did not appear to call for an exposition of all the terms and qualifications of the gift. Give it the effect contended for, and it is greatly outweighed by the evidence on the other side.

Evidence was introduced to show that Samuel Fraser was an improvident man, and constantly embarrassed with debt, and the evidence very clearly shows that he was always pressed for money, although he was supposed to be well able to pay all his debts, up to the year 1821, and the witness, McPherson, proved that the negroes were sold to pay off a debt which Samuel Fraser had contracted with him, even before he had possession of the negroes, and hence it is attempted to be inferred that the testator had a motive to limit the negroes over in the will, notwithstanding he might have before given them absolutely. Such an inference is clearly rebutted by the facts before stated; and besides the improvidence and embarrassment of the son might have been a motive with the father not to give absolutely.

The defendant states in his answer that two of the descendants of Diana have died since the filing of the bill: and it is insisted for the complainants, that the defendant is liable to account for their value. I think not, —the manner in which the defendant came into their possession, and the circumstances of the case, well warranted him in retaining possession of them, until the right was tried. And if they have died without any neglect or default on his part, he is not answerable.

It is therefore ordered and decreed, that the defendant do deliver to the complainants such of the negroes named in the pleadings as are alive, and in the possession of the defendant, and that he do account before the

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commissioner for the hire of the *said negroes, since the death of the said Samuel Fraser. It is not a case, I think, for costs; each party must pay their own.

The defendant appealed, and now moved this court to reverse the decree of the Chancellor, on the following grounds.

Because it being proved that John B. Fraser, the father, in his life time, put his son Samuel Fraser in possession of the negroes Diana and Xury, unaccompanied with any explanation at the time, the law under the circumstances raised the presumption of a gift—which was not rebutted by any sufficient legal testimony: and, as the defendant claimed under Samuel Fraser, his Honor should have decreed in favor of the gift, and for the defendant.

And failing in the foregoing motion: then the defendant moved the court to direct an issue, to try the fact, whether John B. Fraser, the father, made a gift or not, to his son Samuel Fraser, of the negroes Diana and Xury.

The complainants also appealed, and moved the court to reform the decree so that the complainants recover,

First.—For the negroes that have died in the defendant's possession, since the termination of the life estate of Samuel Fraser.

Second.—For the negroes that have died since the demand made and since the filing of the bill.

Sims and Harllee, for the defendant.

Munro, for the complainants.

Curia, per JOHNSON, Ch. The question made on the circuit, as to the admissibility of John Baxter Fraser's memorandum book in evidence, has not been renewed here. The court, therefore, will not go out of its way to decide it, especially as without it we are of opinion that the evidence sufficiently shews, that Samuel Fraser's possession of the negroes was under a loan from John Baxter Fraser, and not an absolute gift. I thought so at the hearing on the circuit, and my confidence in the conclusion has not been shaken in the least by reviewing it here; and, on carefully looking into the facts proved, it will be found that there is no inconsistency or contradiction between the evidence of James McPherson and the other witnesses, except as to a point of time, about which either might be mistaken, and which was only important as connecting the declarations of Samuel Fraser contemporaneously with the entry in the memorandum book, and that with a view to its admissibility in evidence as a part of the res gestæ. The court concur, therefore, in the opinion, that Samuel Fraser's possession of the negroes was under a loan, and not an absolute gift from John Baxter Fraser, and that he might rightfully dispose of them by will.

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*The grounds of the defendant's appeal do not call in question his liability to account for the hire of the slaves now alive, from the time of the death of Samuel Fraser. But those on the part of the complainants insist, 1st. That defendant is further liable for the value, and consequently the hire, of all the negroes which died in his possession after the termination of Samuel Fraser's life estate: and 2d. If not, then for all that have died since the conversion, (the time of the demand made.) The first of these grounds is distinctly abandoned by the counsel for the complainants in a written argument furnished the court; and the second gives rise to a question which the court regard as of some importance, and which seems to have been entirely overlooked. Until the case of Young v. Burton, McM. Eq. 255, instances were very rare in which the court entertained bills for the specific delivery of negroes or other chattels; and the necessity for a specific delivery, in order to administer ample justice to the party complaining, is the foundation of the jurisdiction, and it becomes a question of some importance, whether, when the negro, or other chattel, has perished before the hearing of the cause, so that the specific delivery cannot be decreed, the jurisdiction of the court is not gone. There may be—and the decided inclination of my mind is that there is—a distinction between cases where the property has perished after conversion and before suit brought, and where it perishes afterwards. In the first case I incline to think the remedy is at law; but, as it is intended to have the whole question reargued, I forbear to express any opinion on it. It does not appear from the evidence, nor was important to the decision of the questions before the circuit court, whether the negroes, referred to in the grounds of appeal, died before the bill was filed and after the conversion, or whether they died after the filing of the bill: that may be important on the final determination, and the commissioner of the court will be directed to ascertain the fact.

It is therefore ordered and decreed, that the commissioner of the circuit court do ascertain and report to this court at its next session, whether any, and how many, of the slaves, named in the bill, died between the conversion by the defendant and the filing of the bill, and whether any, and how many, died afterwards. And the Solicitors of the parties are requested to reargue the questions arising out of the second ground of the complainant's appeal, and also the question of jurisdiction above stated. In all other matters the decree of the circuit court is affirmed.

HARPER, JOHNSTON and DUNKIN, CC., concurred.

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2 Rich. Eq. *85

*JOSEPH H. DOGAN and Others, Executors of Wm. Rice, v. A. W. DUBOIS and Others.

HILL & SCAIFE v. THE EXECUTORS OF WM. RICE.

(Columbia. Dec., 1845.)

[*Bills and Notes* ⇐228.]

The accommodation indorser of a note to be discounted in Bank, may, before the note is discounted, recede from his agreement, and direct the bank not to receive the note; nor will such indorser be liable to a third person who afterwards takes the note with notice that he had receded from his agreement.

[Ed. Note.—Cited in Greenville v. Ormand, 51 S. C. 74, 28 S. E. 50, 39 L. R. A. 847, 64 Am. St. Rep. 663.

For other cases, see Bills and Notes, Cent. Dig. § 602; Dec. Dig. ⇐228.]

[*Judgment* ⇐91.]

Where such an indorser took a mortgage as an indemnity and afterwards receded from his agreement, *held* that, never having been liable on the note, neither himself nor his assignee could enforce the mortgage.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 150; Dec. Dig. ⇐91.]

Before Johnston, Ch., at Union, June, 1844.

The Chancellor. These cases have been taken up together. The contest is in relation to the rights of the plaintiffs in these suits respectively, to be satisfied for certain claims held by them, out of some lots or parcels of land, belonging to A. W. Dubois, one of the defendants in the first case. The plaintiffs in the first case claim relief under a mortgage of the premises, executed by Dubois,

which has been assigned to them, and which they seek to foreclose. The plaintiffs in the second case, claim on two grounds—First, that they are part owners of the said premises, by virtue of their having purchased it jointly with Dubois, and paid part of the purchase money, although the title was made to Dubois alone. Second, that they are creditors of Dubois, (who has absconded from the State) and have levied an attachment on the premises, and obtained a judgment against Dubois, which remains unsatisfied. And, in this connexion, they ask that the incumbrance of the mortgage held by the plaintiffs in the other case, may be removed out of the way, for reasons stated in their bill. The facts necessary to the understanding of this controversy, may briefly be stated thus:

A. W. Dubois, who had been engaged in trade at Union for some time, and who was becoming embarrassed in his circumstances, proceeded to Columbia sometime in February, 1839, intending to procure money from the branch of the Bank of the State of South Carolina, at that place. He applied to the late Wm. Rice, then in the town, for assistance, and exhibited to him a promissory note, bearing date the 8th of Feb., 1839,

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drawn by *himself, to John Gist, or order, and payable at the said Branch Bank, at sixty days, for $2,000. It purported to have been endorsed by the said Gist, but the endorsement was in fact forged by Dubois. Rice, for the accommodation of Dubois, who affected to be, and perhaps was, in a great hurry to leave town, advanced him the money for the note: the note was then offered by Rice, who was ignorant of the forgery, and was discounted by the Bank, and he received the amount which he had, in anticipation, advanced to Dubois.

Dubois returned to Union, and stated to one John F. Glenn, that he had failed to get the money from the Bank in the first instance, but had received it through Mr. Rice, and induced Glenn to endorse another note, to be discounted in Bank as a renewal of the one already discounted there. Accordingly, a note was drawn by Dubois, payable to the order of Glenn, at the said Bank, at 60 days, for $2,000, which was endorsed by Glenn, as first, and the late Gen. Shelton, as second endorser: it was made to bear date the 4th of April, 1839, so as to conform it as near as might be to the maturity of the former note.

To secure the said Glenn against his endorsement, Dubois executed the mortgage of which I have spoken, being a mortgage of that parcel of land, lying in the village of Union, on the South side of Union street, being known and designated in the plan of Union village, by numbers 49, 63, 77; together with the grounds in rear of said lots, to the old race paths, bounded on the North by Union street, South and East by John Joiner, and West by Bachelor street.

This mortgage bears date (for every part of the proceedings abounds in irregularities,) the 6th of Feb., 1839, two days before the date of the first note, and nearly two months before the date of the note which it was intended to secure. It was recorded the 11th of Feb., 1839.

Having thus possessed himself of a renewal note, Dubois inclosed it to Rice, in Columbia. After a very few days, Glenn became alarmed at his situation as endorser. Dubois absconded. The plaintiffs in the 2d bill, (Hill and Scaife) and perhaps others of his creditors, took out attachments. The attachment of Hill and Scaife, among other things, was levied upon the mortgaged premises and some personalties. On the 11th of Feb., 1839, the day on which he recorded his mortgage, Glenn addressed a written communication to Mr. McCord, the president of the Branch Bank, forbidding him to discount the note endorsed by himself and Gen. Shelton, or any other note drawn by Dubois, upon

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*which his (Glenn's) name might be endorsed. This communication was despatched by a special agent, and served on the Bank the next day. Receiving assurances that the note was not in Bank, and being informed that it was in the hands of Mr. Rice, Glenn, on the 16th of the same month, enclosed to Mr. Caldwell, a friend, in Columbia, the following communication to Mr. Rice.

Union Court House, Feb. 16, 1839.

Wm. Rice, Esq.—Dear Sir:—I hereby request you to hand over to Mr. Caldwell, a note signed by A. W. Dubois, and endorsed by myself and Jos. S. Shelton, payable at the Branch Bank at Columbia, for $2,000, which was enclosed to you in a letter by A. W. Dubois. I further notify and request you, if you do not deliver the note agreeable to the above demand, not to part with the possession of the note, nor to deliver it or transfer it to any other person, except by my order, as I do not intend to pay the said note, unless compelled by law. Mr. Caldwell is authorized by me to receive the note, and if you desire, to give you a receipt for it in my name. When the note was signed, it was only intended for the Bank; and I did, before it was accepted there, give notice to the officers of the Bank, not to accept it, and they complied with my request; and I consider myself as having been at no time liable on said note, the same having been never received in Bank. Jno. F. Glenn.

This communication was handed to Mr. Rice by Mr. Caldwell, the 18th of the same month. He refused to give up the note, saying, that it had been left with him to be presented to the Branch Bank for discount, and he should act with it as Dubois had directed. But that he was not an endorser, and that he had no interest in the note or lien on Dubois'

property. It does not appear whether the forgery of Gist's endorsement on the note already discounted in Bank, and on which Rice had received the money, had been then discovered, or that Rice had any reason to suspect there was any liability on his part on that account. Shortly after the note fell due, the Bank brought suits simultaneously against Gist, the endorser, and against Rice, who had discounted the forged paper, unconscious of the forgery, and drawn the money on it. The former suit failed on account of the forgery: the latter was abated by the death of Rice, which took place the 13th of March, 1842. His executors were then sued, pending which suit, the verdict was found exonerating Gist as endorsor. Whereupon the executors, on the 8th of May, 1843, settled with the Bank, by giving their

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bond for the amount claimed, with in*terest. Pending the said suit of the Bank against Rice, he signed a paper, to be used as evidence in that case, in which he admitted that he had presented the note endorsed by Gist, to the Bank for discount. That at the time he so presented it, it was, in fact, his (Rice's) property, he having previously advanced to Dubois the money for the same; that he received the money paid and loaned by said Bank on said note, the same day, being $1,979, after discounting usual charges, and that the money which he received from the Bank, he appropriated to his own individual use.

In a return made by Mr. Rice, as garnishee in the attachment of Hill and Scaife v. Dubois, which return bears date the 23d of March, 1839, he holds the following language:

"That on or about the 4th of February last, A. W. Dubois deposited in his hands a note (describing the note endorsed by Gist,) which note he deposited in said Bank, on or about the 8th of February last, and drew the amount thereof, deducting the discount, and applied the proceeds to the payment of a debt the said A. W. Dubois owed this deponent, by his directions: that on or about the 11th or 12th of February last, this deponent received a letter from said Dubois, enclosing a note, (describing the note endorsed by Glenn and Shelton,) and $20 in money, to pay the discount on said note, with directions to put the same in said Branch Bank, to pay the note first above mentioned, endorsed by the said John Gist, for $2,000, as aforesaid." He further states, that he promised the said A. W. Dubois, that if it should become necessary, in order to get the first mentioned note (endorsed by the said John Gist,) discounted in said Branch Bank, he would endorse the same, and that he had no doubt the said Dubois believed he would have to endorse the same, to get it discounted; "but which this deponent never did, nor was required to do. Which last mentioned note, this deponent intends to dispose of as the said A. W. Dubois directed him, for his own security and protection, and to claim said last mentioned note, (if it should become necessary for his protection,) if he should in any manner be held liable for the amount of the first mentioned note to the Branch Bank at Columbia."

The attaching creditors of Dubois proceeded in their suits. The Sheriff sold the personalties attached, for about the sum of $600. The lots in question were, by him, at the request of Scaife, rented to the defendant, Fallen, for the benefit of the said creditors, and he is now in possession, in virtue of that tenancy. On the 23d of March, 1842, Hill and Scaife obtained judgment on their

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attachment, for *$2,884.25, with interest on $2,325.51, besides costs. Rice, under an apprehension that he might be made liable to the Bank, on account of his agency in discounting the note purporting to be endorsed by Gist, brought suit against Glenn on the note signed by him; the writ was returned to the Spring term, 1840. Declaration was filed, and defences entered, when the suit abated by the death of Rice, in the Spring of 1842. His executors renewed the suit, by writ returnable to fall term, 1842. The suit was defended. While it was pending a compromise was proposed and effected. Glenn (who was examined at the hearing) rather thinks he proposed the compromise, and that Dogan, one of the executors, to whom the proposition was made, did not accede to it at first, but took time to deliberate. The compromise was to the effect that Glenn confessed a judgment upon the suit brought by the executors against him, which judgment was entered up the 24th of February, 1844. The executors were to give, and did give, a receipt to him in full, satisfying the judgment. He, on his part, was to execute an assignment to them of the mortgage and mortgage debt he held on Dubois' lots, which he did by assignment, without recourse on him, bearing date 12th of Feb., 1844. I believe I have stated all the material facts of the case, except that at the hearing Hill and Scaife proved, by the adduction of Dubois' sealed receipt to them of the 7th of Feb., 1838, that they on that day delivered to him $330; "it being in part payment of their half of the house and lot whereon I (the said Dubois,) now live."

I should think that a trust resulted to the parties advancing this money, as to so much of the mortgaged premises as falls within the description given by the receipt. As this is not ascertained by any thing before me, it may be proper to put the whole case upon other points made here:

There are two points made.

1. Was Glenn liable to the executors of Rice on his endorsement of Dubois' note?

2. Are the executors entitled to any advantage under his assignment of the mortgage?

There is no doubt that the parties, whether drawer or endorser, to a negotiable note, once put in circulation, are liable upon it to any person who receives it in the usual course of trade, without notice of fraud or any other circumstance which should (in conscience) restrict their liability. But the material questions here are, whether the note endorsed by Glenn, ever was put in circulation, or had a legal inception, and whether Mr. Rice

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re*ceived it in the usual course of trade, and without the notice spoken of. Glenn was a mere accommodation endorser of a note intended to be used in a particular manner, and discounted at a particular place, and the transaction was arrested by a notice extended by Glenn to the Bank, while the note was still in transitu, and in the hands of the agent of the party to be accommodated.

It will not be pretended, that at the time the note was endorsed and delivered back by Glenn to Dubois, he was indebted, by virtue of his formal endorsement, nor was it intended he should be so considered until the note should be presented and discounted, according to the stipulations under which it was endorsed; in other words, until, under the authority conferred by Glenn upon Dubois, it should be delivered to the Bank as evidence of a subsisting debt to that institution. According to the case of Marvin v. McCullum, (20 Johns. R. 288,) the note had no legal inception until that should be done, and Dubois had no authority to do any thing else with it. I suppose it will not be doubted, that if the note had been presented to the Bank and discounted, after notice from Glenn, that there was no consideration but mere accommodation on his part for his endorsement, the Bank, acting under such notification, could not have made him their debtor. It was very material, therefore, to Glenn, that the note should not be diverted from its destined course, which entitled him to this privilege; and it was an essential wrong to him to change its destination, and put it into general circulation, or give it any other direction than that intended. Then it would be extraordinary, if Dubois could render the endorser, to whom he himself was personally liable, responsible, by mere delivery to his own agent; the delivery being for the purpose of having the note discounted, and no discount having been in fact effected. When I speak of the transaction as between Dubois and Rice in this light, I do it in reference to the only authority Dubois had from Glenn. It may be, that Dubois may have actually transferred the note to Rice, as a security for the money Rice had already advanced to him: though the evidence does not show that this was the case. But if he did, he transgressed the authority conferred on him. But suppose it be true, that Rice received the note as an indemnity for the sum which Dubois owed him, was that in the usual course of trade, in a sense to make Glenn liable to him? "Now," says Ch. J. Spencer, in Coddington v. Bay, (20 Johns. R. 637) "I understand by the usual course of trade, not that the holder shall re-

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ceive the bills or notes thus obtained, *as securities for antecedent debts, but that he shall take them in his business, and as payment for a debt contracted at the time." The evidence shows that Mr. Rice, when he received this note, had notice of the purpose for which it was created and endorsed. Indeed, that was almost evident on its face. Nothing is better established, than that having received it, upon whatever consideration, with this notice, he must hold it subject to the equities between the parties, as between whom there was no liability of Glenn to Dubois, but the other way; and as between whom there was to be no note and no debt against Glenn, except to the Bank, in the regular course of Banking business. At the time Rice received this note, there was in fact no debt due from Dubois to him, that having been paid by the discounting of the other note. At all events, there was no debt known to him at that time; which is conclusive that he could not have taken this note as means of payment, but merely as agent, to effect the purpose for which it was created, and of course with notice of these purposes. This is decisive of the question as to Glenn's liability. But recurring to the supposition that he received it as security for a precedent debt, (the utmost that can be contended for,) the case of Wardell v. Howell, (9 Wendell, 179,) is a conclusive adjudication, that Glenn was never liable to him.

So far, I have no doubt. But it is said that the liability of Glenn is concluded by the judgment confessed by him. I acknowledge that the conclusion which I have come to, is not entirely satisfactory to me; but it is this, that Glenn never was liable, nor was he intended by that transaction to be made liable; that the judgment was given merely to be satisfied; and was taken with the view of sustaining the assignment of the mortgage; and to impart a color of right, on the part of Glenn, to enforce the mortgage. He never was liable; never would have consented, nor did he in truth consent, to be made liable; neither was he, in fact, ever subjected to liability. His defence, and the grounds of it, were known to those with whom he transacted this business. It was a specious transaction, and under the circumstances, and with the notice they had, the assignees took no higher right to enforce the mortgage than Glenn had, which was no right at all.

It is ordered, that the lots be sold towards satisfaction of the attachment debt of Hill and Scaife. That Fallen account for the rents due by him as tenant, according to the terms of his tenancy; that an account be

taken of the sums raised under the attachment applicable to said attachment, with the portion of rents applicable to the same, and of the proceeds of the sale hereby di-

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rected, shewing *what balance may remain due on said attachment, and what excess of funds arising from the aforesaid sources, may remain after the said attachment is satisfied. If any such excess remains, the executors of Rice be at liberty to amend their bill, and apply for it. In the mean time, it is ordered that their bill for foreclosure, under the mortgage, be stayed.

The executors of Rice appealed, on the grounds:

1. Because his Honor, the presiding Chancellor, has decreed that the assignees of the mortgage should be enjoined from foreclosing the same, upon the land described therein, and that the confession of judgment by John F. Glenn, did not made him liable to the said assignees, in such manner as to subject the mortgage premises to a foreclosure under it, notwithstanding they had obtained a judgment against A. W. Dubois, the principal, on the same note.

2. Because the decree is contrary to law and equity, and the evidence.

Herndon, for the motion.
Dawkins, contra.

Curia, per JOHNSTON, Ch. The whole case turns upon the liability of Glenn, as endorser, either independently of the judgment confessed by him, or under that judgment; because, if he was not liable, in one or the other of these ways, he had no right to enforce the mortgage which he had taken for his indemnity; and, of course, could confer no such right by assigning the mortgage. The appeal, therefore, involves but two questions.

1. Was Glenn liable to Rice upon the note endorsed by him for Dubois?

2. Was he made liable by the judgment?

The argument of the appellant's counsel was one of uncommon ability, and, for a time, shook the opinion I formerly entertained; but mature reflection has satisfied me that the decree is right upon both points.

The evidence is, that the note was endorsed by Glenn for the purpose of being used as a renewal of the one already in bank. It cannot be doubted, that if the bank had received it, after the notice given them by Glenn, they could not have held him liable as endorser. His accommodation endorsement was a voluntary contract, from which he was at liberty, as between himself and Dubois, to recede at any moment he pleased; and the note could not be transferred so as to make him liable to third persons, unless they received it in the due course of trade and without notice.

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*It was transmitted by Dubois to Rice, as his agent, to be discounted in bank as a renewal of the former note. As I have said, if it had reached its intended destination, after the notice imparted to the bank by Glenn, he would not have been liable to the bank. But the right is now asserted on the part of the agent of Dubois, to intercept it, and carve out of it an indemnity for a liability previously incurred by Dubois to the agent; which, however, was not known at the time the note came to the agent's hands. The answer to this claim is that, at the time the note came to the hands of Rice, the agent, it had no legal inception; that he received it out of the due course of business and with notice; and that, in fact, the property in the note was never transferred, nor intended to be transferred, to him.

The principle, though not the precise question, is well examined in the case of Coddington v. Bay, 20 Johns. R. 645, referred to in the circuit decree. Most of the cases relating to the right which a holder acquires in negotiable paper, are collected and commented on by Mr. Justice Woodworth. After stating the general rule, that, where such paper is transferred for a valuable consideration, and without notice of any fraud, such transfer is good, he says, "the reason of the rule would seem to be, that the innocent holder, having incurred loss by giving credit to the paper, and having paid a fair equivalent, is entitled to protection. But," continues he, "what superior equity has the holder, who made no advances, nor incurred any responsibility, on the credit of the paper he received?—whose situation will be improved, if he is allowed to retain; but, if not, is in the condition he was before the paper was passed." "Although," says he, "the rule is laid down, generally, that the holder will be protected—where the bill or note is taken in the usual course of trade, for a fair and valuable consideration, and without notice:—in every case I have met with, where" he prevailed, "it appeared that the holder gave credit to the paper, received it in the way of business, and gave money or property in exchange."

It is impossible, from the evidence in this case, to say that Rice incurred the liability, which he did incur for Dubois, with reference to or on the faith of this note. He incurred it upon the faith of the preceding note: nor does it appear that there was any stipulation on his part that that note should be renewed. It is unnecessary to repeat what is said in the decree, that he paid nothing for this note, and that he received it as a mere agent and with full notice of the purpose for which it was created.

A case has been referred to in support of

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this appeal, which, *it appears to me, has been misconceived. It is the case of Powell v. Waters, 17 Johns. R. 176. It is to the effect that where A. made a note payable to B., or order, which was endorsed by B., for

the purpose of being discounted at a bank for the accommodation of A., who, on being refused at the bank, negotiated it to a third person, with a knowledge of the circumstances,—this does not amount to a fraud, which can affect the rights of the holder against the maker or endorser. But that case differs from this in several particulars. The diverting the note from its destination in bank worked no actual injury to the endorser, nor does he appear to have attempted to intercept its negotiation. The note was actually transferred to the third person, instead of being delivered to him as agent, as in this case. And he paid the money for it, (although he received it with notice,) which is not the case here. The case referred to, therefore, if it were of less doubtful authority than it is, could not govern this case.

I am, also, now perfectly satisfied upon the other point in the case. If the judgment had gone against Glenn by default; or even if he had confessed the judgment without more, I concede this would have been evidence of such liability on his part as would have entitled him to enforce the mortgage. But the testimony was, that "he confessed the judgment on the note, on condition that he was to assign over the mortgage and be acquitted." The judgment was clearly colourable. As the stipulation was, that it should be discharged and go for nothing, why was not the mortgage assigned without it? The manifest intent was to create the appearances of a liability, in order to support the assignment, when no real liability was contemplated by either party to the transaction.

It is ordered, that the decree be affirmed, and the appeal dismissed.

HARPER and DUNKIN, CC., concurred.

JOHNSON, Ch., being related to some of the parties, gave no opinion.

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2 Rich. Eq. *95

*FULMORE & MOWZON v. GEORGE S. BURROWS and THOMAS BURROWS.

(Columbia. Dec., 1845.)

[*Fraudulent Conveyances* ⇐271.]

Where a father, being insolvent, sold slaves to his son and continued in possession as visible owner: *held*, that the presumption of fraud arising from the retention of possession, was not rebutted by the testimony of another son that there was an agreement for the hire of the slaves every year, but he could not tell what hire was to be paid, and the production in evidence of notes, receipted in full, purporting to have been given for the hire of the slaves for three successive years,—no evidence being given as to the time the notes were given, or of the actual payment of any hire, or of the time when the receipts were entered on the notes.

[Ed. Note.—Cited in Pringle v. Rhame, 10 Rich. 77, 67 Am. Dec. 569; Nelson & Co. v. Good, 20 S. C. 235.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 821; Dec. Dig. ⇐271.]

[*Fraudulent Conveyances* ⇐184.]

Before the sale, the son had taken up a mortgage which bound one of the slaves; *held* that he was entitled to be reimbursed to the amount of the mortgage.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 583; Dec. Dig. ⇐ 184.]

Before Dunkin, Ch., at Williamsburgh, March, 1844.

The Chancellor. The complainants are execution creditors of Thomas Burrows. The execution was entered on the 28th January, 1842, the cause of action having originated in 1841. The sheriff, being about to levy on three slaves in the possession of the defendant, Thomas Burrows, was forbid by the other defendant, George S. Burrows, on the ground that the slaves were his property, under a bill of sale from Thomas Burrows.

This bill of sale bears date 30th March, 1840, and was recorded in the office of the register of mesne conveyances on the 13th April, following. George S. Burrows is the son of the other defendant, Thomas Burrows, but he has not lived at his father's since 1831 or '32. In 1836 and 1837, he was the overseer of Joseph Scott, Senr. His wages were about one hundred dollars per annum at that time. Mr. Hanna testified, that a year or two after this, he and Capt. Snowden employed George S. Burrows, and paid him two hundred and forty dollars. The consideration mentioned in the bill of sale, is eight hundred dollars. George S. Burrows proved that his father Thomas Burrows, was then indebted to him, in about the sum of sixty-five dollars, which he had paid for him to William Hanna on the 30th December, 1839. This debt to Hanna was secured by a mortgage of Hester, one of the slaves included in the bill of sale. His father was also indebted to him in the sum of fifty-two

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dol*lars and fifty cents which he had paid for him to John C. Fulmore on the 27th February, 1837. On the 12th March, 1840, Thomas Burrows gave his son a receipt for six hundred and seventy-one dollars and sixty cents, expressed to be "the balance due for three negroes, Silvy, Frank and Hester, which I will give a bill of sale for, to him."

At the time of the alleged sale, the negroes were in the possession of Thomas Burrows, and they always so continued. All the rest of his property has been sold to pay his debts.

The complainants insist that, upon general principles, this sale is void as to creditors, and the case of Kennedy v. Ross, 2 Mill. 125, was cited in support of the position. Judge Nott there says, "I have always considered it a settled rule of law, that where the vendor of personal property continues in possession after the sale, as visible owner, the sale is to be considered fraudulent and void against creditors"—"Paying a valuable consideration does not alter the case. The fraud

consists in exhibiting the party to the world, as a man of substance, by permitting him to keep property in his possession which is not his own, and obtaining credit by these false appearances." In this opinion the whole Court, consisting of Justices Colcock, Johnson and Cheves, concurred. In Smith v. Henry, 1 Hill, 16, the Court expressly recognize the cases on which Kennedy and Ross was decided, and especially the case of Edwards v. Harben, 2 T. R. 587. It is there also said that if a person buys the goods of an insolvent, and advances his money at the time, and leaves them in the vendor's possession, that circumstance is only one among the other circumstances of proof by which to determine the fair or fraudulent character of the transaction. "It is not so conclusive as to be incapable of being explained." But if they are given in satisfaction of a previous debt, if the payment of a previous debt constitutes the consideration, either in whole or in part, "that is, of itself, conclusive evidence of fraud." Both in Smith and Henry, and Anderson v. Fuller, M'M. Eq. 27, [36 Am. Dec. 290.] it was distinctly ruled, "to make no difference that, besides the pre-existing debts, additional consideration was advanced at the time of the conveyance." But it is said the negroes remained in the possession of the vendor under a contract of hiring, and that this circumstance repelled the presumption of fraud which would arise even if the entire consideration were money paid, and that it withdrew the case entirely from the operation of the rule laid down in Smith v. Henry, and since recognized in other cases. In this latter class of cases it is said

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that, from *the fact of the debtor retaining possession, the law draws the conclusion of fraud; of a corrupt understanding that the debtor should be allowed to retain and use the property. Is there any thing in this case to negative this conclusion? Any thing to repel the inference of "a tacit confidence that the creditor would shew the indulgence," and that this constitutes part of the real consideration on which the transfer was made?

Three notes of Thomas Burrows were offered in evidence; the first dated 13th April, 1840; the others on the 1st January, '41, and 2nd January, '42, each payable on the 1st January following the date, and purporting to be for the hire of these negroes. The two first were receipted in full on the very days they respectively became due; the third was receipted on the 18th February, '43, the day of filing defendant's answer. No evidence was offered as to the time at which these notes were given, or of the actual payment of any money, or of the time when the indorsements were entered. The notes, although purporting to be paid in full, were admitted never to have been out of the possession of the payee, who produced them at the hearing. Samuel Burrows, another son of Thomas Burrows, said that his father hired the negroes from George: that there was a positive agreement for hire every year; but he could not tell what hire was to be paid.

It is to be premised that from the other circumstances the law has drawn the conclusion of fraud. Adopting this conclusion, would any thing be easier, in the view submitted by the defendant, than to consummate the fraud by manufacturing notes and receipts for hire so soon as the transaction was attacked? Thomas Burrows was notoriously insolvent; yet he, who can pay nobody else, pays his son the hire of the negroes on the very day it is due. And, although he is careful enough to take a receipt on the back of each note, he leaves the notes themselves in the hands of the party who had no right to retain them. His other son, who says there was a positive agreement each year for hire, yet cannot tell what hire was to be paid, proves the payment of no money, or the demand of payment at any time; and the whole testimony repels the presumption of the ability to pay.

If the determination of the cause depended on the inquiry whether there was, in fact, any consideration paid beyond the sums advanced to Hanna and J. C. Fulmore, (some one hundred and thirty dollars,) the Court would, on the testimony, have deemed it expedient to ask the aid of a jury. But, con-

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ceding *that, in addition to the reimbursement of these payments, the balance of the eight hundred dollars was paid by the defendant, the Court is of opinion that the presumption arising from the continued possession of the vendor is not repelled by the circumstances which have been relied on.

It is, therefore, adjudged and declared that the sale, purporting to have been made by Thomas Burrows to George S. Burrows, on the 30th March, 1840, of the slaves Sylvia, Frank and Hester, is null and void; and it is ordered and decreed that the said slaves, with their increase, be delivered up to the sheriff of Williamsburgh district, to be sold under execution in satisfaction of the complainants' demands. Costs to be paid by the defendants.

The defendant, G. S. Burrows, appealed, and now moved that the decision of the Chancellor be reversed, on the grounds:

1. Because the sale of the negroes sought to be set aside by the bill, was bona fide, and on full consideration, and should have been sustained by the Court.

2. Because the Chancellor erred in deciding that the circumstances attending the transaction were in law conclusive of fraud; the appellant respectfully submitting, that the facts proved sustained the bill of sale as valid, and should have been so considered by the Court.

3. That even if the proof had been sufficient to set it aside, his Honor should have

regarded the defendant, George S. Burrows, as standing in the position of a prior mortgagee of the negro Hester, and should have ordered him to be repaid the amount which he advanced on the said mortgage, and should have ordered him to be reimbursed the full amount with interest which he advanced on the purchase of the negroes.

4. Because the costs should not have been decreed against the said appellant.

5. Because the decree is in other respects against equity and justice.

Moses, for appellant.
Harllee, contra.

Curia, per DUNKIN, Ch. On the principal point involved in this appeal, the Court is not disposed to interfere with the conclusions of the Chancellor.

But in Anderson v. Fuller, McM. Eq. 27, [36 Am. Dec. 290.] it was ruled that, where the payments made by the purchaser had re-

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moved exist*ing liens, he should be permitted, on the contract being set aside, to have the benefit of such liens, or be allowed reimbursement of the sums expended in discharging them. On the 30th Dec., 1839, the defendant paid the sum of $65 to Wm. Hanna, for which the slave Hester had been mortgaged. It is proper that this sum, with interest, should be refunded.

It is ordered and decreed, that from the proceeds of sale of the slave Hester, the sheriff pay to the defendant the sum of sixty-five dollars, with interest from the 30th Dec., 1839; and that in all other respects the decree of the circuit court be affirmed.

JOHNSON, HARPER and JOHNSTON, CC., concurred.

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2 Rich. Eq. 99

JEREMIAH WALKER et al. v. JAMES W. FRAZIER et al.

(Columbia, Dec., 1845.)

[*Partition* ⟸9.]

In 1799, R. G. died intestate, leaving a widow and six children, all by her. In 1800, the widow and her brother were appointed to administer the estate, and in 1801 they sold, as his property, certain slaves. In 1802, these slaves were conveyed by the father of the widow to her for life, with remainder to the children which she then had or might thereafter have. In 1803, the administratrix and her second husband (she, in the meantime, having married,) brought trover for the slaves against the purchasers at the administrators' sale. These suits were compromised, the negroes given up, and the notes given by the purchasers for the price surrendered. In 1811, two of the children of R. G. being of age, an irregular and informal partition of the slaves was made, and two were conveyed, by the administratrix and her husband, to each of the six children, and the rest retained by them. In 1812, a female slave, named Isabel, who had been retained by the administratrix and her husband, was sold by the sheriff under an execution against the husband. In 1841, the administratrix died, leaving one child by her second marriage, besides children by her first, surviving her. *Held*, on bill filed, claiming that Isabel and her issue were subject to partition amongst the children of the administratrix, under the deed of 1802, 1st, that, if there had been no evidence of a partition in 1811, the Court would presume, from the lapse of time, that one had been made, and that

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Isabel *had been allotted to the administratrix; and, 2dly, that the validity of the deed of 1802 depended on the consent of the children of R. G., and they having repudiated it, and taken under the partition made in 1811, it could not be now set up, even in favour of the child of the administratrix by her second marriage.

[Ed. Note.—Cited in Jones v. Godwin, 10 Rich. Eq. 231.

For other cases, see Partition, Cent. Dig. § 28; Dec. Dig. ⟸9.]

[*Estoppel* ⟸67.]

[The grantee in a deed cannot claim under it in respect to a part of the things granted, and repudiate it as to the residue.]

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 164; Dec. Dig. ⟸67.]

Before Johnston, Ch., at Abbeville, June, 1843.

The Chancellor. In this case, certain negroes, the descendants of a wench named Daphna, are claimed by the children of Mrs. Amelia Griffin, afterwards Cowan, from Mr. and Mrs. Frazier, who on the other hand lay claim to them under the circumstances which shall hereafter be stated.

As early as 1784 or 5, Mrs. Griffin, then Amelia Sims, the daughter of Nathan Sims, of Abbeville, in this State, was married to Richard Griffin, and removed with him to Lincoln County, in the State of Georgia, where they settled. Shortly after their marriage, they were in possession of the negro Daphna, then a girl, and retained possession of her, she being generally regarded as Griffin's property, until his death, which happened in 1799. In the meantime, she had borne several children, and among the rest a girl called Isabel. It is necessary to attend particularly to this girl Isabel, inasmuch as the bill is to recover her descendants.

On the 19th of February, 1800, Mrs. Griffin and her brother, George Sims, were appointed administrators of the estate of her late husband, Richard Griffin, and on the same day gave bond and sureties to the court of Lincoln County for their administration.

On the 1st of March following, the administrators caused an appraisement of the personal estate of Griffin to be made, in which was included the negro girl Isabel: and shortly afterwards, probably about the beginning of 1801, they sold the said personal estate, at which sale this girl sold for the sum of $300. It is in testimony, that Mrs. Griffin, one of the administrators, objected to the sale of Daphna's children, including Isabel of course.

On the 5th of March, 1802, Nathan Sims executed a deed, witnessed by Leonard Sims, George Sims and William Bond, (the two last subscribing with their marks,) by which, in consideration of love and affection for his daughter, Mrs. Amelia Griffin, he gave and granted "unto the said Amelia Griffin, all the

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use *and labor, profits and benefit, any way appertaining or arising from seven negroes and their increase," consisting of Daphna and her children, including Isabel, "now being in her, the said Amelia Griffin's possession, to have and to hold during her natural life time. And at her death," he proceeds, "I do give the above named negroes, with all their increase, to the said Amelia Griffin's children, that she now has, or hereafter may have, to be equally divided among them."

This deed was proved by the oaths of Leonard and George Sims, the 10th of April following, and was recorded by the clerk of the superior court for Lincoln County, the 18th of October in the same year.

It will be remembered, that George Sims, who attested and proved this deed, was one of the administrators of Richard Griffin, in which capacity he had sold the negroes. It does not appear how, after the sale, they came again to the possession of Mrs. Griffin, if, as is recited in the deed, they were in her possession at the time of its execution.

Sometime between the date of the deed, and the early part of 1803, Mrs. Griffin entered into a second marriage, with one John Cowan, and on the 10th of September, 1803, Cowan and wife brought six several actions of trover in the superior court for Lincoln County, to recover the negroes sold at the administrators' sale, from the purchasers; and one of these actions was brought against George Sims, for the negro girl Isabel. The plaintiffs obtained a verdict at April term, 1804. An appeal was taken, by consent, which was continued from time to time by the appellant Sims, until April term, 1806, when it appeared that it had been settled at his costs, for which judgment was given.

This settlement was effected in the following manner: On the 21st of January, 1806, an agreement was executed between Cowan and Sims, which recited that six suits in trover were pending in Lincoln Superior Court, and stipulated to refer the hire of the negroes sued for to Jeremiah Walker and Stephen Simons, with the power of umpirage. On the same day the arbitrators awarded to Cowan for the hire of the negroes the sum of $125. Whereupon the negroes were delivered up to Cowan and wife.

After this recovery, we hear no more of the negroes covered by the deed of Nathan Sims until 1811. Some of the witnesses have spoken loosely of a partition made of them, probably about that time, between Cowan

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and wife, and the children which she *had borne to Griffin. These are six in number, of whom Buckner Griffin and Nathan Griffin, the two eldest, were just then of age. Of these six, the said George Sims had been appointed guardian for Buckner on the 5th of September, and for Nathan the 13th of December, 1802; and the said John Cowan had been appointed guardian of Lucinda, Jane, Margaret and Agnes, on the 2d of March, 1803. The only evidence, however, which we have of a partition, consists in the following deeds, dated November 16th, 1811:

A deed of gift from Cowan and wife, for two negroes, Clara and Stephen, to Buckner Griffin, in consideration of love and affection.

A similar deed from Cowan and wife, to Jane Griffin, for two negroes, Dilsy and Jemima.

A similar deed from the same parties, to Margaret Griffin, for two negroes, Ailsley and a child that Isabella was then pregnant with.

A similar deed from the same parties, to Agnes Griffin, for two negroes, Dicy and Lavina.

A similar deed from the same parties to Lucinda Walker, (formerly Lucinda Griffin,) for a negro, Patience, for the life of Mrs. Walker, with a limitation over to her children.

And a similar deed from the same parties, to Nathan Griffin, for two negroes, Mary and Henry.

Cowan, also, made a similar deed, dated June 30th, 1813, to Agnes Griffin, for a negro child, Agatha, about 12 months old.

The rest of the negroes remained in the possession of Cowan: but no provision appears to have been made for a son by the name of William S. Cowan, whom he had by his wife, lately Mrs. Griffin.

Cowan became indebted, and about 1812 an execution against him was levied on the negro girl Isabel, who, it appears, was, while in his possession, occasionally, but not often, called Lizzy. The sheriff of Lincoln proceeded to sell her under this execution. In the course of the sale, one Frederick Brown, from a remote part of the county, or from a neighboring county, became a bidder. Owing to something which was said, he stopt his bidding, and did not resume it until he received encouragement and explanations, which induced him to bid again. Eventually the negro was knocked down to him, at a sum which is proved to have been a full price, which he paid, and the negro was delivered to him by the sheriff.

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*It is contended that Brown had notice of the deed of Nathan Sims, or sufficient notice to put him upon the enquiry for it, during the sheriff's sale. The testimony upon this subject is as follows:

Peter Lamar, who was present at the sale, says: "I cannot positively say that Brown

had notice, though I believe he must have known that there was a doubt about the title, as I remember at the time some persons mentioning that the property was the children's (properly of Mrs. Cowan—the negro purchased by Brown, as well as the other negroes in possession of Cowan.) I now believe it was a legatee, or friend to the children, and the subject was mentioned and spoken of in the company, and in a manner that I think probable Brown must have heard it. The statements made, (were) that the property was subject to division at the death of Mrs. Cowan. I cannot state particular words or arguments used."

Being asked if a deed and what deed, was mentioned, he answered: "I cannot state particularly. The deed from Mrs. Cowan's father to her and her children I had previously heard spoken of. I am not certain that the title was publicly mentioned: yet I suppose it must have been done."

He adds, "the situation of the negroes mentioned, who were in possession of John Cowan and wife, was known to a number of persons in Lincoln, and to persons in the company on the day of sale, yet conflicting opinions (existed or were expressed) as to the title. Nor can I say, that on the day of sale the subject was matter of general conversation; yet the subject was spoken of by some in my presence, though I am unable to mention the names of the persons. My memory does not serve me."

He says again, "I have related all I now remember. That on the day of sale, the subject of the title was mentioned, in my presence. I cannot state that the deed was mentioned but I supposed it must have been, as the claim rested on the deed of gift entirely. Nor do I remember the names of persons engaged in the conversation, as I have stated."

William White and his wife on the same subject were examined by the plaintiffs, who, declining to read their depositions, they were read by the defendants. W. White says, "he heard from Frederick Brown that there was, at the time of sale, a statement made by some person in the crowd, that there might be a future difficulty about the property: upon which he quit bidding for it, until he was assured by Jeremiah Walker, one of the com-

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*plainants and two of the Sims, and Peter Gullat, that they assisted in the division of the property, and that Cowan had received it in right of his wife, and that there would be no difficulty about the title: and Brown said that Buckner Griffin made the same statement also."

Mrs. White says, "she heard her father, (Frederick Brown,) say, that at the sale some person remarked that there might be some difficulty about the title of the negro, upon which he quit bidding, but on being assured by Jeremiah Walker that the negroes had been lawfully divided, and the title would be good he bid on and bought the negro."

Brown continued in possession of the negro purchased by him. But while in his possession, she was uniformly called Lizzy, and not Isabel. While in his possession, she bore two children, named Phillis and Milly.

A bill was filed against him by the children of Mrs. Cowan, of which we have no other information than that it prayed a ne exeat, and was dismissed.

He gave Phillis and Milly to his granddaughter, Miss White, now Mrs. Frazier, who, with her husband, is made a defendant to this bill.

John Cowan and wife removed to Missouri many years ago. He died in 1822, and she in February, 1841.

The bill is filed by William S. Cowan, their son, now from 30 to 38 years of age. The other plaintiffs are the four daughters of Richard Griffin, to wit, Lucinda, with her husband, Jeremiah Walker; Jane, now the wife of Stephen Stovall, formerly the wife of Lewis Stovall, her present husband being joined with her: Margaret, with her husband James McMillan: Agnes, formerly the wife of John Calhoun, but now a widow.

The defendants, besides Frazier and wife, are Nathan Griffin, and the distributees of Buckner Griffin, who is dead.

It is easy to see that the title to Daphna and her children, at the date of Nathan Sims' deed, was not in Sims, but in the personal representatives of Richard Griffin. It does not appear from any testimony before me that the possession of any of these slaves was ever in Nathan Sims, even for a moment, or that he ever claimed them, or either of them, until he executed the deed. On the other hand, the possession without question or interruption, is traced, by this evidence, in Richard Griffin, from 1784 or 5, until his death in 1799.

It was not until 1802, after the slaves had

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been sold as the *property of Griffin, that the deed of Sims was fabricated; and it adds no little to the evidences of unfairness in the execution of this instrument, that George Sims, the administrator of Richard Griffin, who, in his official character, made sale of the property, was aiding as an attesting witness to its execution. In short, the circumstances attending this transaction, would most conclusively condemn it, if we were at liberty to carry our investigation back beyond the result of the actions of trover brought for the slaves by Cowan and wife. But the principle is well settled, that Brown, under whom Mrs. Frazier claims, having purchased the title of Cowan, can set up no claim beyond what Cowan could have asserted.

It has been argued, indeed, that Brown, as purchaser, under a creditor's execution, could assert such claim as the creditor could

have asserted; and this is true. But what was the measure of the creditor's rights? A creditor certainly is not restricted to the claims actually set up by the debtor. If the latter should, from collusive or fraudulent motives, give up or deny any right existing in him, to the prejudice of the creditor, undoubtedly the latter would not be concluded. But clearly a creditor can claim no more than his debtor claims or may lawfully claim. Cowan and wife were concluded by their reception of the negroes, under the deed of Sims from the defendants in the actions of trover. A question was raised whether testimony could be received to explain under what claim these actions were brought and sustained. It was said that the records alone should speak. But it is not necessary to look into this record at all. In fact, no judgment was ever entered up for the property. Pending the suits, the cases were compromised. But the testimony is explicit, that the negroes were delivered to Cowan and wife under the deed, and this was sufficient to bind them although there had never been any suits brought for their recovery, to hold for the remaindermen according to the terms of the instrument.

If the creditor's demand reached back to the date of this transaction, I have no doubt he would have been at liberty to show a pre-existing and better right in Mrs. Cowan as a distributee of Richard Griffin, and in such case, would have been allowed to unravel the transaction as a fraud upon his rights. But there is no reason to conclude, from the evidence, that the debt under which Brown purchased, had an existence at the time the negroes were given up by the purchasers at the administrator's sale.

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*But it is argued that, be this as it may, Brown purchased at a fair price, and without notice of the deed, and could not therefore be affected by it. I do not think he had such notice as should affect him. Notice to affect a purchaser should not only be sufficient to advertise him that there may be some difficulty: it should point out the nature of the difficulty. It should be sufficient not only to create an anxiety on his part, but put him on the enquiry. I do not mean that it should suggest a general enquiry; it should indicate the object and ends of the enquiry. It should suggest the enquiry, and the means of making it. Any other doctrine would put it in the power of debtors or their friends, or any by-stander, acting from any imaginable motives, to defeat all sales; for who would venture to become purchaser if liable to be deprived of his purchases, by proof that some indefinite doubt had been suggested as to the title?

But then it was argued, that although Brown had not actual notice of the deed, it was duly registered, and that affected him with constructive notice. This registration was in Georgia, and must be governed by the laws of that State. My attention was not directed to any law of Georgia, declaring what shall amount to due registration of deeds for personalty, or the effect thereof, but consulting a digest of the statutes, which has accidentally fallen into my way, I do not find any thing bearing upon the subject but the following clause of an act approved the 21st December, 1819. (Prince's Dig., 215:) viz, "all conveyances of personal property, duly executed, and bearing date after the passing of this act, may be recorded, and shall be admitted as evidence, under the same rules and regulations as govern in cases of real property." This does not embrace the deed before us—nor does it declare that any effect as regards notice of it should have followed from its registration even if it had been of a date posterior to the statute.

I am free, therefore, to declare my conviction, that Brown was a purchaser without notice of this deed. But it does not follow that his purchase is exempt from its operation. A purchaser, without notice of an outstanding equity, is protected against it. (Rice Eq., 330) But it was determined in Donald v. McCord, that this doctrine does not apply to an outstanding legal title. Innocence of purchase is defensive equity, and may be successfully opposed to another equity, but not to a legal right. The purchaser of the legal title, who has bought without notice of an outstanding equity, cannot be affected

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with a trust. But in this *ease, Brown did not acquire a title beyond what was in Cowan, which extended only to the life interest of Mrs. Cowan. It has been repeatedly decided in this State, that such a remainder as was created in this deed in favor of the children of Mrs. Cowan, is a good legal title, and as such, Brown's purchase was not exempt from its operation; and if this could ever have been doubted it can be questioned no longer, since one of the peculiar grounds of jurisdiction in this court has lately been held to be the delivery of slaves to those legally entitled to them, an equity springing out of the mere consideration of title in law. The title of the remainder-men did not accrue until the death of Mrs. Cowan in February, 1841, and is not barred by the statute of limitation. It may have been that the court of equity in Georgia, upon some ground not disclosed by the evidence, refused to interpose for the preservation of the property, but that was no decision of the legal claim now set up by the remainder-men.

Mr. Frazier, who is a volunteer under Brown, must be liable exactly as he was while he retained the property.

So far, I see no way of escape for this defendant. But it is argued, that the distribution of some of the slaves by Cowan amongst the Griffins, by his voluntary deeds, mentioned in the statement of this case, may be

seized upon as a means of doing what justice plainly requires. I can hardly feel authorized to regard that transaction in the light of a regular partition. That it was so intended and so regarded, I confidently believe. But it seems to have been done without authority, and without the formal concurrence of any one authorized to act for the minors. There was no counter deed to Cowan and wife. I suppose I must, therefore, take it for a voluntary relinquishment on Cowan's part of his wife's interest in the slaves conveyed to the children of Griffin, made in advance of the accrual of their rights in remainder. But viewed in this light, it was justly insisted that Cowan went further than he was authorized to do. He should have stopped at the conveyance of the life interest; he had no right to convey in fee, by which he intermeddled with and partitioned the remainder. Then it is argued, that those who received slaves by the deeds of Cowan, must hold them as much subject to partition among the remainder-men as the slaves retained by Cowan, and which form the subject of this suit, and that no equitable partition can be made until they are accounted for with their increase.

It was argued also, that there is another

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ground of just ob*jection to partitioning the slaves sued for, without bringing in those already distributed. Those who received the latter retained them after coming of age, and some of them sold them, and may be regarded as approving the informal petition.

It would be extremely gratifying to me, if I could so mould these transactions as to reach what I think is the justice of the case, which I am convinced is with Mr. Frazier. Although I am not allowed to act upon it, it is impossible to dismiss from the mind the fact that the slaves, of whom those sued for are a part, were not the property of him under whose deed the present claim is set up, and equally impossible is it to force the mind from the conviction that every child of Mrs. Cowan, except Wm. S. Cowan, has already received his full share of them.

But I must, as well as I can, divest myself of these impressions, and decide this case, not according to my convictions of justice, but in strict conformity to law.

How far, then, has Mrs. Frazier a right to object to the partition prayed for? She is not entitled to any thing beyond the life of Mrs. Cowan. It is the remainder, in which she has no interest, that is now to be partitioned. If the remainder-men are willing to divide that unequally, without requiring the negroes already apportioned by some of them to be brought into the account or division, how is she prejudiced by that?

That she is prejudiced by it, is a supposition, having for its ground, (it appears to me,) the gratuitous assumption that the children of Griffin, by some concession, in what has been called the partition of 1811, granted to Mrs. Cowan something beyond her life estate in the negroes then retained by her. But there is no evidence of any such thing. From the minority of the parties, it was impossible to be done.

Another ground is taken. It is said, that Jeremiah Walker and two of the Griffins, by their representations made to Brown, were guilty of such fraud as to deprive themselves of all right to participation in this partition, and that their shares should be left in the hands of Mrs. Frazier, in conformity to the assurances that the title was good. Here again, I feel constrained to overrule an argument which I believe to be founded in the right of the case. I cannot regard the facts alluded to, as established by competent evidence. If publication had been ordered, I suppose the declarations of Brown, taken under the commission of the plaintiffs, would have been competent evidence in the case, but it was the defendants Mr. and Mrs. Fra-

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zier, who moved to pub*lish the evidence as their own, and I must consider it be subject to the objection taken to it by the other side.

Were it otherwise, I should have great difficulty in declaring, that as to Mrs. Walker, one of these parties, her interests should be destroyed by the declarations of her husband, however mistaken he may have been in making them.

On the whole, I must sustain the bill; but I cannot order the defendants, Mr. and Mrs. Frazier, to pay costs, in such a case.

It is ordered, that the defendants just named, do deliver up to the commissioner of this court, the slaves referred to in the pleadings, and their issue, in their possession, for partition; and that a writ do issue for the partition of them as prayed for.

It is ordered, that the other parties to the suit, pay the costs thereof.

The defendants, Frazier and wife, appealed, and now moved this court to reverse the decree, on the following grounds:

1. Because the deed of Nathan Sims to Mrs. Griffin, being made by one having no right, title or interest, in the property therein described and conveyed, and being intended by the parties to it, to defraud the estate of his deceased son-in-law, Richard Griffin, cannot now be set up, and upheld by this court, to the prejudice of rights created, and now existing in the defendants in opposition to the provisions of that deed.

2. The estate of Richard Griffin, to whom the property described in said deed, did belong, at the time of his death, having been, upwards of thirty years ago, settled in full, and the complainants having received their full share of that estate, and of the identical property contained in said deed, the complainants are not only barred by the lapse of time, but have received their full shares of

the property, and therefore their bill should be dismissed.

3. If the complainants have any right at all, it is an equity springing out of a fraudulent deed, and although it might be set up against the parties to the deed and volunteers under them, yet it cannot prevail against an innocent purchaser. Therefore, and for other reasons, the defendant's plea of being an innocent purchaser, was a good bar to the relief sought in the complainants' bill.

4. Frederick Brown, having been encouraged and even beguiled into the purchase of Isabel at the sheriff's sale, by representations made by the complainants, or some of

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them, in confor*mity to the truth, that partition had been made of the property, and that Cowan's title was good; he, Brown, and those claiming under him, should be protected as against those claiming under the said deed; otherwise, the truth itself, and the publication thereof, was a fraud upon the bidders, and upon Brown the purchaser.

5. The rights of minors and married women are protected in this court against fraud; but an illegal or fraudulent transaction confers no better right upon a minor or feme covert, than upon persons under no legal disability; therefore, the partition of the negroes in 1811 as the property of Richard Griffin's estate, was valid, notwithstanding the deed from Nathan Sims to Mrs. Griffin.

6. The possession of Cowan and wife of the negroes in question, with an assertion of their right or claim, under the deed of Sims, though binding on themselves as to the other beneficiaries under that deed, is not conclusive upon strangers; but creditors and purchasers may refer that possession to, and connect it with the true title.

7. It is submitted, that the testimony of Mr. and Mrs. White was, under the circumstances, competent evidence in the cause, even for the defendants.

Bauskett, for the appellant, contended that the complainants were barred by lapse of time, and cited Lewin on Trusts, 615; 4 Bro. Ch. C. 125; 2 Sch. and Lef. 624, 640; 2 Ves. 272; Amb. 645; 3 Bro. Ch. C. 633; 1 Hill Ch. 376; 1 Hill, 222; Harp. 1; 2 Story Eq. 736.

If complainants ever had any rights at all under the deed from Nathan Sims, by taking under the partition of 1811 they waived their rights.

But if lapse of time is not sufficient to raise the presumption of a partition, and the testimony does not establish one, then the legal title remained in the administrators. It never has passed to the complainants, and they, therefore, are not properly in court.

Perrin and Wardlaw contra.

Curia, per DUNKIN, Ch. The defendant, Mrs. Frazier, is in possession of certain slaves under a gift from her grand-father, Frederick Brown. Isabel, the mother of the slaves in controversy, was purchased by Brown at sheriff's sales in 1812. She and her progeny have been in the undisturbed possession of Brown, or the defendant, from that time until the filing of this bill.

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*The sale at which Brown became the purchaser, in 1812, was under an execution against one John Cowan, who had married the widow of Richard Griffin, deceased. Griffin had died, intestate, in 1799, leaving a widow and six children. We agree with the Chancellor, that "the possession, without question or interruption, is traced by the evidence in Richard Griffin, from 1784 or '5, until his death in 1799, and that on his decease, the title to the negroes was in his personal representatives." In fact, there is not a particle of testimony indicating either title or possession in any other person anterior to the death of Richard Griffin.

It is hardly necessary to say, that in order to protect the defendant, after this lapse of time, it would be presumed that partition was made of Griffin's estate, and that Isabel had been allotted to his widow, who afterwards intermarried with Cowan. But, as it appears to the court, this is not left to presumption. Peter Gullat proved that a division of the negroes took place in 1811, between Cowan and wife, and the children of Richard Griffin, deceased,—that, on that occasion, Cowan and wife executed a deed to each of the children for two negroes by name, and that he, Gullat, with Leonard Sims, were subscribing witnesses to the deeds. These deeds were given in evidence at the hearing of the cause. Jincey Newman also proved that there was a division,—that "Mrs. Cowan's (Griffin) children had two negroes each given off to them, and that Cowan and wife kept five negroes, among whom was Isabel." William H. Newman proved the same.

The Chancellor reports, that at that time (November, 1811), Buckner and Nathan Griffin, the two eldest children, were just of age, and that John Cowan had been appointed guardian of the four minors,—that, in 1813, he executed a deed for another negro child named Agatha, to Agnes Griffin,—and that the negroes not set off to the Griffins, remained in the possession of Cowan.

Now it may be, that this partition was irregular, informal, and without any legal authority; but when it is recollected, that the youngest of the distributees is now more than 40 years of age, and that they took and kept possession of the negroes allotted to them severally, they would not now be heard to question its validity, much less to impeach the title of a bona fide purchaser from one of the parties. If there had been nothing more to consider, the Chancellor would have

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felt no difficulty in yielding to *his strong conviction of the justice of the case, by dismissing the complainants' bill.

In February, 1800, Mrs. Griffin, with her brother, George Sims, was appointed to administer the estate of Richard Griffin, deceased. Isabel was appraised by them as part of his estate; and in March, 1801, she, Isabel, and her children, were sold by the administrators.

On the 5th March, 1802, Nathan Sims, the father of Mrs. Griffin, executed a deed, by which he conveyed, in consideration of natural love and affection, seven negroes, including Daphna, and Isabel and her children, to his daughter, Mrs. Griffin, for life, and after her decease to be equally divided between the children she then had, or might have. The deed recites, that the negroes were then in her possession.

On the 10th September, 1803, six suits were brought by Cowan and wife (he having, in the meantime, married Mrs. Griffin,) to recover the negroes from those who had purchased at the administrators' sales. One of the suits was against George Sims to recover Isabel. At April term, 1804, a verdict was rendered for the plaintiffs. The other negroes, it seems, were given up, and the notes of the purchasers to the administrators for the price were surrendered.

We agree with the Chancellor, that the deed of Nathan Sims was manifestly fabricated to answer a purpose. He never had possession of the negroes or any title to them. The administrator, George Sims, who had made the sale, was one of the witnesses to the deed, and he was the only defendant in the suit in trover which was prosecuted to a termination. There are many other circumstances, detailed in the decree, indicating the unreal character of the whole transaction. But what were the motives of the parties, it is entirely impossible, at this distance of time, and after the death of all the actors in it, to determine, or even surmise, with any confidence. It may be, that the object was to defraud the creditors of Cowan, as is suggested by one of the witnesses, although it was a very awkward and ineffectual mode to effect such object. The more probable conjecture is, that the parties intended (as the deed provides) to secure the enjoyment of the entire property to Mrs. Griffin during her life, thereby postponing the claims of the children of Griffin to two-thirds, and, as a compensation, giving to them, with her other children, (if she should have others,) all the negroes on the determination of her life interest.

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*But whatever was the motive of the parties, the success of the arrangement depended on the consent of others, who had not the power then to signify their assent, and who might, or might not, be thereafter willing to acquiesce in the arrangement. The children of Griffin were entitled to two-thirds of the negroes. When they became of age, they might concur in the arrangement, either as more advantageous to them, or from regard to their mother, or they might repudiate the arrangement, and insist on a partition of their negroes. If they had recognized the arrangement, either by any positive act of concurrence, or by waiting until their right of possession would accrue under the deed of Nathan Sims, it would not have been competent for Cowan, or any one claiming under him, to gainsay or impeach that deed, or resist the exclusive right of the children of Mrs. Cowan to the negroes included in it.

But so far as the court can judge from the testimony, the children of Richard Griffin never acquiesced in this arrangement, or recognized this variation of their rights. So soon as the two elder children became of age, a partition was made among them all, without any reference to the deed of Nathan Sims, and precisely in the same manner as if no such instrument had ever been in existence. It is suggested, that this was by a surrender of Mrs. Cowan's life estate. But the deeds made by Cowan and wife do not purport to be a surrender of her life estate; nor is there any thing in the testimony which would lead to the conclusion that any thing was contemplated but a partition of Richard Griffin's estate among his distributees.

The deed of Nathan Sims was, then, of no force, because its validity depended on the consent or approval of those who never gave it their assent; but on the contrary, by their acts, indicated their disposition not to be bound by it, and procured partition of the negroes as if the deed had never been made. It appears to the court, that those of the children of R. Griffin who are complainants in this suit, have no color of right for the claim now interposed by them.

But it is said, that though the Griffins have no right, the child of Mrs. Cowan by her last husband stands on a different footing—that, by bringing the actions of trover, Cowan and wife are estopped from denying the validity of Nathan Sims' deed, and Wm. S. Cowan, their son, derives rights under that deed.

From the view taken by the court, the deed was valid, at least so far as Cowan and

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wife were concerned, when those suits *were instituted, and so continued, until, in 1811, the children of Griffin, by interposing their paramount claims, defeated the arrangement proposed to be effected by the deed. From that time all the parties acted as if the deed of Sims was, as the decree has termed it, 'a fabrication.' William S. Cowan is now 38 or 40 years of age. If he had any rights under Sims' deed, he had an interest in all the negroes—those in possession of the Griffins, as well as those left with his mother. Yet no attempt has been made by him to

secure the property, although two-thirds of it was absolutely conveyed by the tenant for life more than thirty years before the filing of this bill. The construction thus given by the court to the deed of Sims, and the conduct of the parties in reference to it, seems more consistent with reason than has been suggested; and it is consistent, too, with the supposition that no fraud was intended by those concerned in it.

The Chancellor, who heard the cause, while he sustained the bill, ordered the complainants to pay the costs, onerous as they were, of the proceedings, from a thorough conviction that the defence was meritorious. A majority of the court are of opinion that it was also well founded in law, and that the bill should have been dismissed.

It is ordered and decreed, that the decree of the circuit court be reversed, and that the bill be dismissed.

JOHNSON and HARPER, CC., concurred.

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2 Rich. Eq. *115

*ANN A. DANIEL, by Her Next Friend, v. SETH DANIEL and JOSEPH ALLEN.

(Columbia. Dec., 1845.)

[*Guardian and Ward* ⇐58; *Husband and Wife* ⇐10.]

The marital rights of the husband will attach on money arising from the sale of personalty in the hands of the guardian of his wife; and the guardian will be discharged from liability to account to her, if, by the direction of the husband, he apply the money to a debt of the husband.

[Ed. Note.—Cited in Ex parte Geddes, 4 Rich. Eq. 304, 57 Am. Dec. 730.

For other cases, see Guardian and Ward, Cent. Dig. § 278; Dec. Dig. ⇐58; Husband and Wife, Cent. Dig. § 23; Dec. Dig. ⇐10.]

[*Guardian and Ward* ⇐33, 114.]

The proceeds of a ward's real estate, sold by order of the court, cannot properly be paid by the commissioner, either to her guardian or her husband, without leave of the court.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 144, 399; Dec. Dig. ⇐33, 114.]

[*Husband and Wife* ⇐12.]

The right of a husband's assignee for valuable consideration to the proceeds of the wife's real estate in the custody of the court, is subordinate to the right of the wife to a settlement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 58–67, 396; Dec. Dig. ⇐12.]

Before Harper, Ch., at Beaufort, February, 1845.

Bill for account of the estate of the complainant, with a prayer that the same be settled to her sole and separate use.

On the 30th November, 1838, the complainant, who was then a minor, intermarried with the defendant, Seth Daniel, who was then notoriously insolvent, and whose property was shortly afterwards sold by the Sheriff under executions. The defendant, Joseph Allen, had been appointed guardian of the complainant several years before, and had received her share of the proceeds of the personal estate of her father, Josiah G. Allen, deceased. In September, 1832, certain real estate of complainant's father was sold for the purpose of partition, under a decree of the court of Equity for Barnwell district, and her share of the proceeds remained in the hands of the commissioner of the court. At the time of complainant's marriage, Seth Daniel was indebted to one Fogler in the sum of $1400, besides interest, on a promissory note, to which Joseph Allen was surety. On the 7th January, 1839, Allen, as guardian of complainant, settled with his co-defendant, Daniel, and gave him a sealed note for $1517.99, that being the amount which he then had in his hands as guardian. At the same time Daniel gave Allen a receipt discharging him from all liability to account as guardian of complainant; and two days after gave him another receipt as follows:

"Received, January 9th, 1839, from Joseph Allen, guardian of my wife, Ann A. Allen, three hundred and fifty dollars, in full, for my claim to the real estate of Josiah G. Allen, deceased. Seth Daniel."

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*Before these transactions took place Allen had been sued on the note to Fogler, and judgment thereon had been recovered against him. At the time the note for $1517.99 was given, it was delivered to one John M. Allen, to make Joseph Allen safe in his suretyship for Daniel to Fogler, and to be returned to Joseph Allen when directed by Daniel. Some time afterwards the note was returned to Joseph Allen by the direction of Daniel, and on the 20th January, 1839, Allen gave Daniel a receipt in full for the Fogler debt. This debt, amounting with interest to $1749.96, was paid by Allen in June, 1839.

It did not appear that the amount of complainant's share of the proceeds of the real estate sold for partition had been ascertained, or that the court of equity had made any order that it be paid to her guardian or her husband. But on the 4th January, 1841, the administrator of the commissioner in whose hands the proceeds were, paid to Allen $260, and Allen gave him a receipt therefor as follows:

"Estate of Josiah Allen, January 4th, 1841.

Received from B. S. Sweat, administrator of G. J. Trotti, two hundred and sixty dollars, in part of the balance due the said estate. Joseph Allen."

On hearing the cause on bill, answers, evidence and argument, his Honor, the chancellor, ordered that the bill be dismissed; from which order the complainant appealed, on the following grounds:

1. Because the funds of the ward, in the

hands of the guardian, were, in the contemplation of law, in court, and, in fact, within the control of the court; and the wife, being an infant, and the ward of the court, the funds in question could not be rightfully paid to the husband, except by the order of the court, or on terms of which the court would approve.

2. Because the marital rights of the husband did not attach on the funds of the wife, in the hands of her guardian; and if they did, the right of the complainant to a settlement was not thereby barred, or the obligation of the guardian to have a settlement executed, removed.

3. Because the court itself would not, under the circumstances of the case, have ordered the funds in question to be paid to the husband, except on the execution of an adequate settlement, and cannot, therefore, consistently, sustain such payment by the guard-

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*ian, who was merely a trustee, the agent of the court, and acting under its authority.

4. Because if, in this instance, the payment of the wife's fortune, by her guardian, to her husband, is sustained, that protection which the court has ever extended to its wards, may, in every instance, be defeated by the combination of an interested and selfish guardian with an insolvent husband.

5. Because the payment of the wife's fortune, by the guardian, to the husband, without a settlement, was, under the circumstances of the case, substantially a disposition of the funds, by the guardian, for his own benefit, to the irreparable injury of the ward: which the law will not permit.

6. Because the payment of the wife's fortune by the guardian to the husband, without an adequate settlement, was, under the circumstances of the case, a contempt of the court, and a breach of trust, for which the guardian is responsible, in the event of the inability of the husband to make such settlement.

7. Because, on general principles of equity, the complainant is entitled to relief.

Patterson, for the motion.
Bellinger, contra.

Curia, per DUNKIN, Ch. The complainant, then a minor, became the wife of the defendant, Seth Daniel, in the latter part of November, 1838. On the 7th January, 1839, a settlement was made between Daniel and his co-defendant Joseph Allen, who had been for several years the guardian of the complainant. It was ascertained that the guardian had received certain sums of money on account of the complainant's share of her father's personal estate. He gave his note for the amount, and took the husband's receipt and discharge. The note was placed in the hands of a third person, and was settled by Allen's paying a debt, in June following, which Daniel owed to one Fogler, and for which Allen was surety.

The real estate of the complainant's father had been sold, since his death, by the order of this court, and the fund was in the hands of the commissioner. On the 9th January, 1839, Daniel gave Allen a receipt for three hundred and fifty dollars, purporting to be in full of his wife's share of her father's real estate. In January, 1841, Allen received from the administrator of the commissioner two hundred and sixty dollars, in part of the real estate.

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*The bill was filed for an account, and was dismissed by the Chancellor.

The grounds of appeal, as well as the argument offered in support of them, assume a very wide range; but it is deemed better in this, as in most other cases, to confine the judgment of the court to the questions presented by the pleadings and the proof. The only point is whether the defendant, Allen, has violated his duty as guardian, has been guilty of a breach of trust, on the ground that the complainant was under age when she married Daniel, and when he, the defendant, made the settlement with the husband.

In respect to the personalty, it seems to the court that, without more, this transaction cannot be impeached. It has been repeatedly held that the possession of the guardian was sufficient to vest the marital right. Davis v. Rhame, 1 McC. Eq. 191.

Allen was in possession of the wife's money, or he was indebted to her in that amount. If the husband had sued him in his own name, the demand could not be resisted. If the guardian had actually paid the money to the husband, it is difficult then to perceive on what principle he should be afterwards accountable, although the wife was a minor at the time of the marriage. The validity of that ceremony not being impeached, its incidents necessarily attach. But the defendant has paid the money in discharge of the husband's debt, and with his consent. As to the personal estate, the court is of opinion that the bill was properly dismissed.

But at the time of the marriage, the defendant, Allen, had received no part of the proceeds of his ward's real estate. Having been sold under proceedings of this court, the fund was still in the custody of the court. It could not properly be paid over, either to him, or to the husband, without an order of the court.

Allen received the money from the administrator of the former commissioner in January, 1841, more than two years after his guardianship was at an end. It was the duty of the administrator to have paid over the funds in his hands to the successor in office of his intestate. This court cannot

permit this irregular proceeding to vary the rights of the parties. The subject is fully discussed, and the duty of the court in regard to the interests of femes covert indicated, in Wardlaw v. Gray, 2 Hill Eq. 652. The receipt given by the husband on the 9th January, 1839, can have no greater effect than to place the defendant, (Allen) in the

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*condition of the husband's assignee for valuable consideration, and this claim is subordinate to that of the wife.

It is ordered and decreed that the defendant, Joseph Allen, pay over to the commissioner the sum of two hundred and sixty dollars, with interest from the 4th of January, 1841; that the commissioner ascertain and report the whole amount due to the complainant on account of the proceeds of her real estate, and that he also report the terms of a settlement, and a fit and proper person to be appointed a trustee for the complainant.

It is further ordered that the defendant, Joseph Allen, pay the costs of the proceedings, except those of his co-defendant, Seth Daniel, who is to pay his own costs, and that the decree of the circuit court be reformed accordingly.

JOHNSON, Ch., concurred.

JOHNSTON, Ch. I concur in the judgment of this court so far as it goes; but I am of opinion it should have extended to the whole fund, personal as well as real.

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2 Rich. Eq. *120

*JOHN W. HALL v. JOHN M. TIMMONS.

(Columbia. Dec., 1845.)

[*Infants* ⇐29.]

Where a minor knows of his title to property and permits another to purchase it without stating his title, he will be barred by the fraud from recovering the property from the purchaser; semble.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 38; Dec. Dig. ⇐29.]

[*Limitation of Actions* ⇐193.]

A party who claims that he is exempt from the operation of the statute of limitations by reason of his disability, is bound to prove it strictly.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 710; Dec. Dig. ⇐193.]

[*Limitation of Actions* ⇐197.]

Bill for the specific delivery of a slave, filed on the 26th April, 1842. Defendant had had adverse possession of the slave for ten years. Plaintiff's father testified that plaintiff was about fifteen years of age in February, 1832. *Held*, that the bill was barred by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 722–726; Dec. Dig. ⇐197.]

Before Dunkin, Ch., at Darlington, February, 1844.

The Chancellor. This was a bill for the specific delivery of a slave named Friday, and an account of his hire.

On the 20th of June, 1818, William Hall, of Duplin county, North Carolina, executed a deed of gift of Friday, described as "aged about one year," to his grand-son, the complainant, and all the parties live in Duplin county.

In February, 1832, when the complainant, according to his father's testimony, was about fifteen years of age, Thomas P. Hall employed the witness, McGowen, to carry Friday into South Carolina and sell him. He furnished him with a bill of sale, and the complainant accompanied him to Darlington village. Friday was sold to Pleasant R. Gee. The complainant was either present at the sale, or was in the village. McGowen paid the proceeds to Thomas P. Hall. On the 14th March, 1832, Gee sold Friday to William Timmons, defendant's intestate; and the possession was not interrupted until the 26th April, 1842.

On the part of the complainant, it was insisted, that his right was clearly established, and that he was a minor until within four years of the time of filing his bill. How far the non-age of the complainant would entitle him to the protection of the court, under the circumstances of this case, might present a question sufficiently embarrassing.

At the July term, 1818, the deed of gift to the complainant was acknowledged in court, and was recorded, in the proper office of Duplin county, on the 15th February, 1819. The complainant and the negro were brought up

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together. When they were both *about fifteen years of age, complainant accompanied the agent of his father to Darlington, in South Carolina, where the negro was sold. There can be no doubt that he was aware of the sale, and as little that he did not object to it. If the complainant was then aware of his title, his minority would not protect him from preclusion to interpose any claim to the property in the possession of the vendee. Mr. Sugden says, (Sug. on Vend. 522) "if a person having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although covert or under age." Among the authorities cited is Watts v. Creswell, 9 Vin. 415, where a tenant for life borrowed money, and his son, who was next in remainder, and an infant, was a witness to the mortgage deed, and the court relied on the ground of the fraud of the infant, by not giving notice to the mortgagee of his title. "That certainly" (says Sir Thomas Plumer in Cory v. Gertcken, 2 Mad. R. 367) "was a very strong case; for the young man did not know, but had only heard, of the settlement under which his title arose." In Cecil v. Lord Salisbury, 2 Vern.

224, an infant was held bound by an offer made by him in his answer, whereby the other side were delayed, the infant not having immediately after his coming of age, applied to the court to retract his offer and amend his answer.

It is not averred in the bill that the complainant had recently come to a knowledge of his title, or that he did not know of it at the time of the sale to P. R. Gee. He does aver "that for several years, he was in ignorance as to where the said negro was taken, but eventually found out, accidentally, where the negro was, when he immediately proceeded to Darlington district, in the State of South Carolina, and demanded the negro."

This narration appears to the court entirely inconsistent with the facts proved. The negro remained in the same district and neighborhood to which he had accompanied him, and where he had left him.

On the merits, the court would feel great difficulty in giving the complainant any aid. But the defendant has been for ten years in possession of the negro. The suit was instituted on the 26th of April, 1842. It is said that until within four years of that date, the complainant was a minor. The party insisting upon a disability or exemption, is bound to prove it strictly. The complainant's father testified that at the time of the sale, in February, 1832, the complainant "was

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about fifteen years of age." *According to this, in February, 1838, he was about twenty-one years of age, and the complainant was barred in February, 1842. Some testimony was offered as to the contents of a family record, by which it would seem that the complainant was not of age till July, 1838; but this was objected to, as not the best evidence, and the court so ruled.

It is ordered and decreed that the bill be dismissed.

The complainant appealed, and now moved that the decree be reversed, on the grounds:

1. Because the title of the complainant to the slave in question was clearly proved, and there was no such evidence of fraud on his part, in the sale to P. R. Gee, as would prevent his recovery.

2. Because it was in evidence that complainant demanded the slave in 1841, and then had temporary possession of him; and there was no such acquiescence in the sale as should prevent the recovery.

3. Because complainant proved, by competent and sufficient evidence, that he was not twenty-one years old four years before this suit was instituted, and therefore his right to recover was not barred by the statute of limitations, and the evidence relied on to prove that he was so barred, was insufficient for that purpose.

Harllee, for the motion.

Dargan, contra.

Curia, per DUNKIN, Ch. This court is satisfied with the decree, and it might be sufficient to affirm it. But it was argued in this Court that the plea of the statute had not been formally interposed. No such suggestion was made in the circuit court. The principal part of the testimony, as well as the argument, was in reference to the bar of the statute. There is, besides, not only no such ground of appeal from the decree, but the third ground of appeal assumes that the statute was well pleaded, and avers that the testimony on the part of the complainant withdrew the case from the bar of the statute; and the parties are not now agreed whether the statute was or was not formally pleaded.

The appeal is dismissed.

JOHNSON, HARPER and JOHNSTON, CC., concurred.

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2 Rich. Eq. *123

*JOHN TAYLOR et al. v. JOHN TAYLOR, Admin'r et al.

(Columbia. Dec., 1845.)

[*Executors and Administrators* ⟸453.]

A decree by an ordinary against an administrator is no bar to a bill founded on the after-misconduct of the administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1903; Dec. Dig. ⟸453.]

[*Executors and Administrators* ⟸473, 474.]

To a bill against an administrator for an account, his sureties may properly be made parties.

[Ed. Note.—Cited in Crane, Boylston & Co. v. Moses, 13 S. C. 581; Fellers v. Davis, 22 S. C. 429; Burnside v. Robertson, 28 S. C. 586, 6 S. E. 843; Kennedy v. Adickes, 37 S. C. 177, 15 S. E. 922.

For other cases, see Executors and Administrators, Cent. Dig. § 2042; Dec. Dig. ⟸473, 474.]

Before Johnston, Ch., at Laurens, June, 1843.

The Chancellor. The bill is brought by the distributees of the late William Taylor, to charge the defendant, John Taylor, who is his administrator, and the defendants, McCarley and Parks, as sureties for his administration, with the amount of certain debts due by one Richard Cottrel to said deceased; 1st, upon the ground of fraudulent connivance on the part of the administrator with the debtor, by which he escaped from the process of law, and eluded the payment of said demands; and 2d, upon the ground that the administrator was guilty of gross neglect, in consequence of which, the said debts were lost to the estate of the intestate.

The case will be better understood from the pleadings, and the evidence taken at the hearing; but I shall briefly state what was charged and made out.

1. The bill states, that the administrator, after he came into office, (which was in March, 1833), assisted the debtor to escape from the State, carrying with him a considerable amount of property, sufficient to have satisfied the debts he owed to the intestate; and that although the plaintiffs subsequently obtained a decree from the ordinary(*a*) on account of the administration, and recovered the amount of said decree, in an action brought upon the administration bond, this

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did not include the sums *now claimed, because they were not able to bring before the ordinary as clear evidence as they now possess of the combination charged between the administrator and the debtor, by which the latter was enabled to defeat the just claims of the estate.

Upon this part of the case, the proof is, that the defendant, Taylor, did connive at the escape of Cottrel, by concealing his property for him until he was enabled to carry it off; and that Cottrel was thus enabled to withdraw from the State two or three negroes, of which, it seems from parts of the testimony, he retained possession as late as the Spring of 1841. But the proof is clear, that this took place probably before the death of the intestate, and certainly before the defendant, Taylor, was, by the grant of letters of administration, clothed with the authority, or subjected to the duty of arresting him. Taylor is now insolvent; and if he could be made liable here for this misconduct, his liability would attach to him personally, and not officially; so that his sureties could not be charged on that account.

I do not think, however, he can be made amenable in this forum for what he is proved to have done. If, as in the case of Pickett v. Pickett, 2 Hill Eq. 470, he had obtained any advantage by his fraudulent combination with the absconding debtor, and had come here insisting upon the advantage thus obtained, I suppose this court might deny his claim, and do justice by restoring matters to their proper posture. But, regarding the wrong done by him in the light of personal, and not of official misconduct, it does not belong to this tribunal to decree retribution by way of damages. This view renders it unnecessary to consider the conclusiveness of the ordinary's decree upon this matter—I mean, if this be taken as a merely personal wrong done by Taylor.

If we regard it in a different light, and suppose, that as administrator, he might be charged with his previous misconduct; in that aspect, I suppose the decision of the ordinary is conclusive. The case is not of a demand merely left out of the account, and which may be stirred again, but of a demand brought up, adjudicated upon proof produced, and rejected. Such a decision, if erroneous, might have been corrected by appeal; and if not erroneous, should stand; and, therefore, I regard it as conclusive as to the absence of liability on the part of the administrator, up to the time of its being made.

But such a decree cannot have the effect to discharge the administrator from duties aft-

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erwards arising in relation to the sub*ject matter. The administrator may have become chargeable by afterwards receiving the money due on the notes; or he may afterwards have rendered himself liable by neglecting fit opportunities to collect them. This is the principle upon which the next charge in the bill is founded.

2. The charge is, that in December, 1840, Cottrel clandestinely returned to this State, and that Taylor, at the instance of the guardian of one of the plaintiffs, who agreed to become responsible for the costs of the proceeding, caused him to be arrested by a bail writ; that Cottrel was, at the time, in possession of three or four negroes in the Western States, whom he might have been compelled to surrender and assign; but that Taylor, without the knowledge or consent of the guardian, released the order for bail, and caused him to be set at liberty; and he left the State a second time.

It appears from the evidence, that Taylor did cause him to be arrested, as stated, and that he did cause him to be released, without the knowledge or concurrence of the guardian.

It is proved also, that this arrest was made at the instance of the guardian, who offered to stand good for the costs of the proceeding; and it further appears, that in the Spring of 1841, Cottrel was seen in Georgia, in possession of three or four negroes, one of whom was a wench he had taken from this State when he first absconded.

On the other hand, it is established, that Taylor had taken all reasonable pains after his appointment, to recover the money from him in the State to which he fled, but without effect; that he was not apprised that Cottrel had any property at the time he was under arrest, and that the circumstances under which he appeared when he was arrested, forbade the supposition that he had any.

A trustee is bound to the exercise of that degree of diligence which a prudent man would employ about his own affairs; and if, notwithstanding such diligence, he should

(*a*) The following is a copy of the ordinary's decree: "John Fleming, Guardian, v. John Taylor, administrator of William Taylor, dec'd. The administrator, John Taylor, on being summoned to account on the first of October, 1837, did appear and exhibit his accounts.

"On due examination had of all the papers relative to said estate, I find the sum of two hundred and thirty dollars and sixteen cents, with interest from the first of January, 1835, due to each of the legatees of William Taylor, dec'd. W. D. Watts, O. L. D."

fail to secure the trust property committed to him, he is certainly not chargeable for the loss. The question is, whether Taylor, in this instance, came up to his duty under this rule; and, in my opinion, he did not. It is no excuse for him, that he had already distributed the assets which he had actually received, and had none in his hands to defray the expenses of the suit he had brought. He had brought the suit at the solicitation and risk of the guardian, as to whose ability to meet the expenses of it, no suspicion has

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*been intimated. Nor is it any excuse, that he knew of no property belonging to Cottrel, and from appearances, had reason to doubt whether he had any. Why did he not allow Cottrel to speak for himself? Why not wait until he filed and swore to his schedule? The suit was a senseless act, unless he intended to let it take its natural course. The suit, in substance, was not his, but the guardian's, and he had no right to obstruct it as he did; and, as the event shews, to the prejudice of the estate. If we can suppose that any prudent man, desirous of recovering money for himself, would, under the circumstances, have remitted a suit brought at the risk if a third person, thereby depriving himself of even the chance of a recovery, then Taylor is not chargeable here: but I think no man of ordinary prudence would have done so.

It is decreed, that the defendant, John Taylor, and his sureties, come to an account before the commissioner, touching the debts referred to in the pleadings, in which he shall be charged with so much, on account of said debts, as it shall be proved was the value of the property belonging to Cottrel at the time he was released by said Taylor; and that the said Taylor pay the costs of this suit.

Upon the coming in of the report, a final decree will be given for the amount which may be settled to be due upon said report.

The sureties appealed, and now moved that the decree be reversed, so far as they are concerned, on the grounds:—

1. Because the decree of the ordinary, and the verdict on the bond for the amount of the decree, constitute a bar to the plaintiffs' right of recovery.

2. Because the sureties were improperly made parties to the bill.

Irby, for the motion.
Young, contra.

Curia, per JOHNSTON, Ch. We are entirely satisfied that the decree of the ordinary was no bar to the plaintiffs' right of recovery founded on the after-misconduct and neglect of the administrator, and deem it unnecessary to add any thing to the remarks of the Chancellor on that point.

The remaining question presented by the appeal is, whether the sureties were properly made parties to this suit. It is contended that they were not liable to be brought in until an action shall have been brought against him and prosecuted to judgment.

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*By an action brought against him, I suppose, is meant an action upon his administration bond; and as no such action can be effectually prosecuted, until the amount chargeable to him upon the account of his administration is settled,—the substance of the proposition is, that the sureties are not liable to be called on, until the tedious process is gone through of first taking the account here, and then resorting to a suit at law upon the bond. But surely the delays and expenses of litigation are sufficient, without adding to them by such a proceeding, unless some valuable purpose is subserved by it.

If sureties are sureties at all, they must be eventually liable for whatever is justly chargeable to their principal: and if they are to be made liable for this, the shortest and least expensive process by which it is done is best for them; provided it does not exclude them from any means of defence to which they are entitled.

The course of proceeding indicated by this ground of appeal, involves, first, an account, and then an action on the bond for the amount found to be due on the accounting. It must be recollected, that according to the objection now urged, this account is to be taken against the administrator alone. When the bond is sued on, the account thus taken, must either be conclusive, on the sureties, or they must be let in to objections, which, in substance, require it to be taken over again. It may be asked, how would the sureties be benefitted, under either of these rules? If the account were held conclusive on them, they might complain, with apparent justice, that they were made responsible for what they were never allowed an opportunity to contest. If they were allowed to contest the account, in what respect would their advantages be superior to what they would have been, if they had been allowed to participate originally in the accounting? Manifestly their condition would be just the same; except that, in the one case, they would be subjected to delays and expenses, from which, in the other, they would be exempt.

It is positively for the benefit of the sureties that they should be brought in, in the first instance, along with their principal, especially in a case like the present, where the principal is insolvent. To him it may be immaterial to what extent the account is swelled. He may be careless and indifferent in his defence; and without exhibiting palpable evidences of collusion, he may, in a variety of ways, advance the interest of the adverse party. If he should fold his arms, or if he should fail to come up to the just measure

of his defence; is it no privilege to the sure-
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ties to *be allowed to defend themselves, by supplying his deficiencies? And is it no advantage that all this may be done under the costs of one suit instead of many?

I know that the rule in this State was formerly different. The earlier cases mentioned in McBee v. Crocker, (M'M. Eq. 488,) and which governed me in that case, shew this. I conformed to them, when I said (1b. 486,) that "sureties to an administration bond, are, in no respect, to be considered as trustees, or accountable in this court as such. They are only parties to a law-undertaking, and to be held responsible in damages for the defaults of their principal. They can be sued only at law, and there only after the default of their principal has been established." But I was overruled in that case: and an exception was established to the general rule, to the effect that where the principal is out of the State, or insolvent, the sureties may be brought in to render the account: and the reasoning of the Appeal Court shewed a repugnance to the general rule bordering on a disposition to set it aside, and to recur to a practice more convenient, and more calculated to prevent circuity of litigation. This was as early as 1831.

In the recent case of Gayden v. Gayden, (McMul. Eq. 444–5–6,) it was held that co-administrators are regarded in equity as sureties for each other, although at law they stand differently: and it is said, that when such sureties are before the court, "it would be in contradiction to all the maxims of the court to refuse full relief (which will put an end to litigation,) and send the complainants to litigate in another jurisdiction, where less ample justice can be done." "It is true," says the court, "that in the case of Glenn v. Conner, (Harp. Eq. 267,) followed by that of Teague v. Dendy, (2 McC. Eq. 209, [16 Am. Dec. 643,]) where a bill was filed against the principal, to which the sureties were made parties, the bill was dismissed as against the sureties. But in McBee v. Crocker, where one administrator was absent from the State, and only made a party by advertisement, it was held that the sureties were properly made parties, along with the other administrator, and a decree was made against them. It is said, in that case, by the Judge who delivered the opinion of the court, 'in equity, the court possesses all the powers to do exact justice between the parties. It can examine the accounts, fix the administrator's liability, and direct him to be pursued to insolvency, before the sureties shall be liable to process to enforce the decree.' To this," continues the court, "may be added, that, if the surety
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*should be compelled to pay the money, it can afford him the process of the court to reimburse himself, at any time there should appear to be a chance of his doing so. The Judge" (continues the Chancellor in Gayden v. Gayden,) "expresses his dissatisfaction with Glenn v. Conner, and Teague v. Dendy, and I concur in his dissatisfaction. They are opposed to the general maxim of equity, that all persons having material interests must be made parties to the suit. Can it be doubted that the sureties have a most material interest in the subject of the suit against their principal? Great injustice might be done to sureties by failing to make them parties to a suit against an insolvent principal, who might feel little interest in defending himself."

It is ordered, that the decree be affirmed, and the appeal dismissed.

JOHNSON, HARPER and DUNKIN, CC., concurred.

CHARLESTON, JANUARY, 1846.

CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
" JOB JOHNSTON,
" B. F. DUNKIN.
HARPER, CH., absent from indisposition.

2 Rich. Eq. *131

*CATHARINE GIBBES v. WILLIAM J. SMITH.

(Charleston. Jan., 1846.)

[*Trusts* ⇐166.]

Where the management of the trust property is committed, by the instrument creating the trust, to the trustee, the court will not remove him, without his consent, merely because he and the cestui que trust disagree as to the management of the property.

[Ed. Note.—Cited in Ex parte Trustees of Greenville Academies, 7 Rich. Eq. 481.

For other cases, see Trusts, Cent. Dig. § 217; Dec. Dig. ⇐166.]

Before Dunkin, Ch., Charleston, February, 1845.

George Gibbes and James Gibbes were owners of Gibbes' wharf, and in February, 1835, George Gibbes conveyed his undivided moiety of the same to M. P. Walsh in fee "in trust for the lawful children of Paul C. Gibbes, now living, to be equally divided among the said children at the period hereafter mentioned, subject, until the said period, to the conditions and charges upon the said property, which are hereinafter declared." Then follows a long recital of the intention, that M. P. Walsh should have power to manage the property, to make leases, direct repairs, receive rents, defray expenses, and of an intention to provide for the widow and children of Paul C. Gibbes; and reciting also, that it was deemed expedient for Catharine Gibbes, the widow, to release her dower, the deed goes on to set forth the trusts in this wise, viz: "that if Catharine Gibbes shall, within one year, release her dower, the trustee shall semi-

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annually pay over to the *said Catharine Gibbes, as long as she should continue a widow, and until all the children should die, or the youngest attain twenty-one years, the whole net income of the property, to be applied by her to the support of herself and children, as she may deem expedient;" and in case all the children, or the youngest of them, should attain twenty-one years or should die during her widowhood, then to pay her an annuity of 780 dollars out of the rents, during her widowhood; and in case she should marry again, to pay her 780 dollars per annum during life to her sole and separate use; the surplus to be applied to the minor children as the trustee may deem fit, or invested for the benefit of the parties interested; with many verbose limitations for the benefit of the "parties interested;" and a power for the trustee to resign his trust and appoint another, with the consent of Catharine Gibbes.

On the 31st December, 1835, M. P. Walsh substituted William Smith in his place by deed: and on the 6th October, 1841, William Smith substituted the defendant William J. Smith. On the 1st January, 1844, William J. Smith and James Gibbes united in a lease to George W. Brown, of Gibbes' Wharf, for one year, at 5000 dollars, payable on the first days of July and January, to each of them in moieties: and before the end of the year, James Gibbes renewed the lease of his moiety for five years, on the same terms. William J. Smith, though requested by complainant to renew the lease of the other moiety, refused to do so, and endeavored to get possession of an undivided moiety by a forcible entry and detainer, and to take the management of the property into his own hands.

On the application for a certiorari to remove the proceedings in forcible entry and detainer from the magistrates to the Court of Sessions, the tenant produced a letter from the plaintiff, acknowledging that he had paid her the rent, and that the proceeding was against her opinion: this occasioned a rupture, on which the defendant refused to have any intercourse with plaintiff, or pay her any money, unless on condition of her disavowing the tenant in possession. He also commenced an action against the tenant for the rent which plaintiff had received, and refused to resign his trust, or to authorize

the plaintiff to receive the rents of the wharf; whereupon this bill was filed, which prays that the defendant may be removed from his trust, may be enjoined from suing for the rent which she has received, and for general relief.

The defendant by his answer insisted, that

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he assumed the *trust at request of plaintiff: that G. W. Brown had leased from the prior trustee, and, in despite of his opposition, laid out large sums in repairs, which, if charged on the owners, would absorb the rent, and having laid out so much in improvements, ought to pay a higher rent: instead of which, he obtained from James Gibbes a renewal, and insisted on an abatement. That his accounts, which had never been allowed, showed that he had expended $8,057 dollars in four years for repairs, which would leave only a small balance. That understanding that the said George W. Brown had made large sums by the wharf, he intended to take the management of the undivided moiety, and place the son of the plaintiff, as an assistant wharfinger to a chief wharfinger, to be employed, and thereby furnish the son with employment, and advance the interest of the mother and children. That Brown refused to concur in appointing a wharfinger, and he endeavored to turn him out by a forcible entry and detainer, and failing therein, had commenced his action for rent. That the complainant is inexperienced in business, and blinded by the policy of the tenant, and he conceives it his duty to retain his trust.

At the hearing, February, 1845, the correspondence between plaintiff and defendant, also a letter from one of the children of plaintiff, expressing his confidence in defendant, and his desire that he should continue trustee, were read.

The Chancellor. By the deed of February, 1835, it is provided that the trustee, "shall have full power and authority to manage the trust property, to lease the same, or any part thereof, and to undertake and direct all such repairs and improvements as he shall deem expedient; also to have and receive, from time to time, the income, rents, issues, and profits thereof, and for these purposes, to appoint and employ all necessary agents, and to sign, seal and execute, all necessary and proper instruments of writing; and after payment of all expenses, incident to the said purposes, and to the management of the said trust, that he should apply the surplus of the said income, rents and profits, in the manner thereinafter provided;" and among others, that the trustee "shall, semi-annually, and as the rents, issues, and profits of the said property shall be received, pay over to the complainant, as long as she shall continue a widow, and until all the said children shall depart this life, or until the youngest living shall attain the age of twenty-one years, the whole nett income (after deducting all charges and expenses incurred in the management of the trust) to be applied by her toward the maintenance and

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support of her*self, and the maintenance and education of her children aforesaid, in such way and manner as she shall deem expedient."

The bill charges that the defendant refuses to recognise one George W. Brown, as a tenant of the premises, and has sued him for the last year's rent, although he has fully accounted to the complainant for the same, and that the defendant insists on taking possession of the premises, and keeping the complainant out of the enjoyment of the rents.

The scope and object of the proceedings, and the prayer of the bill is, that "the defendant may be removed from the trust, and restrained and enjoined from suing for the rents of the said wharf."

To remove a trustee, without his consent, is an undoubted power of this court, but it is rarely exercised. As was justly remarked on one occasion by Lord Hardwicke, "a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, and it is an act of great kindness in any one to accept of it." He further remarks, that "if there is no mala fides, nothing wilful in the conduct of the trustee, the court regards his acts with a favorable eye." This was said in reference to the accountability of the trustee; but the observations are at least as pertinent when it is sought to remove him altogether from the trust.

All the material evidence in this cause is incorporated in the pleadings. By the provisions of the deed, the management of the trust property is committed solely to the trustee; he is to receive the rents, and after the necessary deductions, to pay the surplus to the complainant for the purposes specified. The court is not prepared to say that he has erred in judgment, in refusing to renew the lease to Mr. Brown, or that the trust estate has been prejudiced by the refusal. But this is not the inquiry. The trustee was to manage the property, lease the same, or any part thereof, and direct such repairs and improvements, as he shall deem expedient. All this is left to his discretion, and not to that of the cestui que trust. He is to receive the rents, or profits, and to pay the same semi-annually to the complainant. She, the complainant, has no authority to interfere in the management of the property, or to receive the rents from the tenants, but as derived from the trustee. Certainly, then, it is no ground for removing the trustee, that he and the cestui que trust cannot agree as to the management. If it were otherwise, the principal object of cre-

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a*ting the trust, would, in a majority of cases, be substantially defeated.

It is not suggested, that the defendant has failed in accounting to the complainant for moneys received by him. The bill is not framed with that aspect. In the judgment of the court, no ground has been presented for removing the trustee, or for granting the injunction, and the bill must, therefore, be dismissed; and it is so ordered and decreed.

The complainant appealed from the foregoing decree, on the grounds,

1. That the evidence discloses acts on the part of the trustee, inconsistent with the duty which a trustee owes to the party whose interests are placed under his protection, particularly in bringing an action at law against her tenant, to recover money paid to her; and that the plaintiff was, at all events, entitled to the aid of the court in directing the trustee to execute his duty.

2. That in this case Mrs. Gibbes is equitable tenant for life, and the trustee has no authority to interfere with her management of that which is her own, except for the benefit of the remaindermen, and cannot interfere for them without good cause: and the defendant's interference is the more indefensible, because he has shown no cause, not even a title to the legal estate.

Petigru & Lesesne, for the motion.

——— contra.

PER CURIAM. We concur in the decree of the circuit court. The appeal is therefore dismissed.

JOHNSON, JOHNSTON and DUNKIN, CC., concurring.

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2 Rich. Eq. *136

*BENJAMIN CHAPLIN and Others v. DAVID TURNER.

(Charleston, Jan., 1846.)

[*Life Estates* ⇐6.]

Can a party having a contingent remainder in slaves, file a bill to compel the tenant for life to give security for their forthcoming at the termination of the life estate? Quære.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 18, 23; Dec. Dig. ⇐6.]

[*Wills* ⇐545.]

Testator, by one clause of his will, directed that "my estate, real and personal, should be kept together, and not divided, until my grandson, Thomas, attain the age of twenty-one," &c. By another clause he bequeathed to his three grand-sons, William, Anthony and Thomas, three-fifths of his personal estate, "to be equally divided between them, share and share alike, and to the heirs of their body, lawfully begotten, from thenceforth and forever: and should William die leaving no issue, then in that case to be equally divided between Anthony and Thomas; and should Anthony die leaving no issue, then in that case to be divided between William and Thomas; and should Thomas die leaving no issue, then in that case to be divided between William and Anthony." When Thomas arrived at twenty-one years of age the property was divided. *Held*, that the contingency contemplated by the testator was the death of either of the grand-sons before the period of division, and that, after that period, each, who survived it, took his share absolutely.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1175; Dec. Dig. ⇐545.]

[*Wills* ⇐545.]

Testator, by the second clause of his will, devised real property to A. "and to the heirs of his body, lawfully begotten, from thenceforth and forever: and should he die leaving no issue, then in that case" over. By the third clause he bequeathed to A. personal property, "in the same manner and form, and with the same restrictions, as is mentioned respecting my real estate." *Held* that, in inquiring whether the limitation over as to the personalty was good, the true way to construe the will was, to apply the words employed in relation to the realty, just as if they had been repeated in the clause relating to the personalty, and not to construe it as if the testator meant that the same estate should be taken in the personalty that he had given in the realty.

[Ed. Note.—Cited in Markley v. Singletary, 11 Rich. Eq. 396.

For other cases, see Wills, Cent. Dig. §§ 1171–1176, 1310–1318; Dec. Dig. ⇐545.]

Before Harper, Ch., at Beaufort, February, 1844.

The Chancellor. Anthony Albergottie, by his will, executed in 1815, devised as follows: "I give, devise, and bequeath, to my three grandsons, William J. Albergottie, Anthony Albergottie, and Thomas Albergottie, my two plantations, Mount Pleasant and Mulberry Hill, share and share alike, and to the heirs of their body, lawfully begotten, from thenceforth and forever; and should my grandson, William J. Albergottie, die, leaving no issue, then and in that case, to be divided between Anthony Albergottie and Thomas Albergottie." The testator makes

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similar provis*ions in the case of the death of the other two grandsons, and then the will goes on—"I give and bequeath three-fifths of all my personal property to my grandsons, William J. Albergottie, Anthony Albergottie, and Thomas Albergottie, to be equally divided between them, share and share alike, in the same manner and form, and with the same restrictions, as is mentioned respecting my real estate."

The bill is filed by the two children of William J. Albergottie, the devisee, charging, that under the terms of their great-grandfather's will, their father takes only a life estate in the personal estate bequeathed to him, and that at the termination of that estate they will be entitled to take, as purchasers, in remainder. They charge, that several slaves, which were allotted to their father, as part of the personal estate, have been purchased by the defendant, and are in his possession; that some of them have been removed from the State, or otherwise dispos-

ed of, and they pray that defendant may be compelled to give security for the forthcoming of the slaves, at the termination of the life estate.

Various matters of defence are stated in the answer, which, from the view I shall take, I do not think it necessary to inquire into. Indeed, it was agreed at the hearing, that the effect of the limitations of the will only should be determined, and that the matters of fact should, if necessary, be made the subject of reference. It was agreed, however, that defendant had purchased some of the slaves which were allotted to William J. Albergottie, on the division of the personal estate.

The question is one of some novelty, but I think that under the terms of the will, the grandsons took an absolute estate in the personalty. If the testator had repeated the words which he has used in disposing of his real estate, and applied them to the personal estate, I should have thought, under the authority of the cases of Talbird v. Archer, Bail. Eq. 535, and Henry v. Means, 2 Hill, 328, cited in argument, that, the limitation over being good from the effect of the word, "leaving," the "heirs of the body" of the legatees would take as purchasers. But the testator does not say that the personal estate shall be disposed of by the same words as the real estate; but that the legatees shall take in the same manner and form, and with the same restrictions, as are applied to the real estate.

This does not mean a verbal, but an actual identity of disposition—the same limitations shall apply to the personal, as to the real estate—not in words and in form, but in sub-

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stance and ef*fect—they shall take the same estate in the personalty that he has given them in the realty.

Then what is the disposition of the real estate? There is no doubt that the devise to grandsons, and the heirs of their bodies, gives them a fee conditional, as it would give an estate tail in England. In the case of Mazyck v. Vanderhorst, Bail. Eq. 48, which has been followed in other cases, when the terms, "leaving issue," are applied to real estate, this imports an indefinite failure of issue. The grandsons, then, take a fee conditional in the real estate, with a limitation over, on the determination of that estate. The testator gives them the same estate in the personalty; but this the law will not allow them to take, as creating a perpetuity, and the legatee must take an absolute estate. If the limitation over of the real estate, had been on the event of dying without issue, generally, there would have been no question; but according to the decisions I have referred to, the present limitation is the same substantially and in effect.

It is ordered and decreed, that the bill be dismissed.

The complainants appealed, on the ground:

Because his Honor decreed that the complainants took nothing by way of executory devise in the personalty bequeathed by the testator, Anthony Albergottie, to their father, William J. Albergottie. Whereas, it is respectfully submitted, that they take the same as purchasers on the death of the said William J. Albergottie.

E. Rhett, for the appellants.

——— contra.

Curia, per JOHNSTON, Ch. This court is unanimously of opinion that this case cannot be put upon the nice distinction taken by the Chancellor. If the words employed, instead of controlling the division to be made among the legatees, be regarded as modifying the interests to be taken by them, (which was the Chancellor's view) our opinion is, that the construction in relation to the personalty is not to be drawn from the effect which the words employed in relation to the realty has upon that, but from the application of the same words to the personalty, just as if they had been repeated in the clause relating to it. The testator evidently refers to the disposition he had made of the realty, not with a view to alter the terms he had used, but to avoid the repetition of them. We would therefore read the will as if the first clause, recited in the decree, were

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amended by *inserting "three-fifths of all my personal property," after the "two plantations, Mount Pleasant and Mulberry Hill." The effect of this construction would probably be, to let in, as purchasers, the issue of the grandson, William J. Albergottie, who may happen to survive him, upon the authority of the cases cited in the decree. But their interest being contingent and not vested, it might be doubted whether they could sustain their bill for the security they ask. According to the construction of which we are now speaking, the property is to go over, upon the death of William J. Albergottie, whenever that may happen, to his issue then alive, or, if there be no such issue, then to Anthony and Thomas. The contingency of his leaving issue is to determine which of these alternative limitations is to take effect. The same contingency is to determine them; and they are therefore equally contingent, and Anthony and Thomas would be just as much entitled to a bill for security as the plaintiffs. The doubt is whether either is entitled to it while William J. Albergottie is alive; and as yet, the right of neither has attached. There would, perhaps, have been less doubt, if both classes had united in the bill.

But the ground on which we shall determine the cause is, that the context of the will shews, that the contingency contemplated by the testator, was the death of William J. Albergottie before the period of division,

and not afterwards; so that the other words employed by him were not intended to limit the estate after the division, but to direct among whom the division was to be made, according to the state of affairs which might then exist.

After directing the payment of his debts by the first clause, the testator by the second clause of his will required, "that my estate, real and personal, should be kept together and not divided until my grandson, Thomas Albergottie, attain the age of twenty-one (except the six negroes left to my daughter, Mary Carney,) and the income thereof, (after paying an annuity to my daughter-in-law, Rebecca Albergottie) should be equally divided between my grand-children, William J. Albergottie, Anthony Albergottie, Mary Ann Slawson and Thomas Albergottie, or to the heirs of their body."

Then follow the third and fourth clauses, imperfectly set out in the decree.

"Thirdly, I give, devise and bequeath to my three grandsons, William J. Albergottie,

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Anthony Albergottie and Thomas *Albergottie, my two plantations, Mount Pleasant and Mulberry Hill, share and share alike, and to the heirs of their body lawfully begotten, from thenceforth and forever; and should my grandson, William J. Albergottie, die, leaving no issue, then in that case to be divided between Anthony Albergottie and Thomas Albergottie; and should my grandson, Anthony Albergottie, die, leaving no issue, then in that case to be divided between William J. Albergottie and Thomas Albergottie; and should my grandson, Thomas Albergottie, die, leaving no issue, then in that case to be divided between William J. Albergottie and Anthony Albergottie."

"Fourthly, I give and bequeath three-fifths of all my personal estate," &c. as recited in the decree.

It seems to me very plain that the testator's intention was that, when the period of division arrived, the property should be divided between the three grand-sons, if all were then alive; that the issue of any of them who might have previously died should stand in his place; but if either of them were dead leaving no issue, then the property was "to be divided" between the other two.

The division relates to the whole property. It is not a limitation over of the share of William J. &c.—the share to be divided between the survivors—but a direction to divide the whole property according to the circumstances described in the will. After the division the property is to go absolutely to those to whom it is to be allotted. The case shews that the youngest grandson, Thomas, attained majority—the property was divided, and William J., being alive, received his proportion: and we think he took it absolutely.

It has been argued against this view of the case, that this interpretation does not satisfy the terms of the fourth clause, which directs that the personalty shall be divided not only "in the manner and form," but "with the same restrictions" as are "mentioned respecting my real estate." From the word "restrictions" it is inferred that some modification must have been intended of the interests or estates which were to pass under the division. But the restrictions were upon the mode of division. This clause (the 4th) directs the three-fifths of the personalty to be divided among the three grandsons; but as the previous clause had, in certain contingencies, directed that the realty, which was also given to the three, should be divided between two; it was thought necessary to declare, that the division of the personalty al-

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so, should, under the *same circumstances, be restricted to the two. The fifth clause has also been commented on as opposed to the construction we have adopted. In this clause the testator says, "I leave to my daughter, Mary Carney (in lieu of her share of the income of my plantations) the use of the following negroes, viz: Titus," &c., "and at the division of my personal property as aforesaid, the use of one-fifth of all my personal property during her natural life; and after her death to return back and be divided between my four grandchildren, in the same manner and form, and with the same restrictions as the personal property before recited."

I perceive nothing in this justly calculated to affect our construction. The period of ultimate division as to this fifth is different from that appointed as to the three fifths given by the third and fourth clauses. It may admit of a doubt, which it would be improper to determine now, whether the ultimate division of this fifth is to be made according to the condition of the legatees at the death of Mary Carney, or at the period of the first division. But in either case the restriction is upon the mode of division. We concur, therefore, with the chancellor in the result of his decree, and it is ordered that the appeal be dismissed.

JOHNSON and DUNKIN, CC., concurred.

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2 Rich. Eq. *142

*JOHN SHEPHARD and Others v. SUSAN SHEPHARD and Others.

(Charleston. Jan., 1846.)

[*Perpetuities* ⊂⊃4.]

A mother, by instrument in the nature of a will, gave certain slaves to her three children. The gift to A. was to him, "his lawful heirs, executors and administrators;" and the instrument further provided that "in case of the death of either of my children herein mentioned, without lawful issue, their part to descend to

the others, to be equally divided between them." *Held*, that A. took an absolute estate, and consequently, that the limitation over, on his dying without issue, was too remote.

[Ed. Note.—Cited in Cox v. Buck, 5 Rich. 607; Lyon v. Walker, 8 Rich. 309; Presley v. Davis, 7 Rich. Eq. 108, 62 Am. Dec. 396; Seabrook v. Seabrook, 10 Rich. Eq. 513.

For other cases, see Perpetuities, Cent. Dig. § 25; Dec. Dig. ⇐4.]

Before Harper, Ch., at Beaufort, February, 1844.

The Chancellor. In 1816, Mrs. Eve Stirble, by an instrument expressed in the formal words as a deed, but which being intended for no other purpose than to make a disposition of her property after her death, I regard as a will, gave certain portions of her estate to her three children, Elizabeth Zahler, Martha Shephard, and Martin Shephard, consisting of two female slaves, land, &c. The gift to Martin Shephard is to him, "his lawful heirs, executors, and administrators;" and the instrument provides that "in case of the death of either of my children, herein mentioned, without lawful issue, their part to descend to the others, to be equally divided between them."

Martin Shephard died in 1842, leaving a wife, the defendant, Susan Shephard. She was the mother of a son, the defendant, called by her John David Shephard, born during the life-time of Martin Shephard, but whom the complainants allege to be illegitimate, and not the son of Martin Shephard, who had separated from his wife some years before the birth of the child.

The bill is filed by Elizabeth Zahler, the daughter of the testatrix, and the husband and children of Martha Shephard, the other daughter, who is dead. They claim, that under the limitation of the instrument referred to, they are entitled to the property given to Martin Shephard, he having died without issue. The slaves have been increased to nine; four of whom are in the possession of the defendant, Thomas M'Teer, and five in that of the defendant, Benjamin Heape. The bill prays for the delivery of the slaves.

I think the limitation over, on the event of either of the children dying without issue,

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too remote. There is no doubt, with *respect to the words, "dying without issue," meaning the indefinite failure of issue. A distinction is made when the limitation is to survivors; because the word indicates that the parties to take shall be personally living, and take a personal benefit. The case of Massey v. Hudson, 2 Mer. 135, quoted in argument, together with that of Nicholls v. Skinner, Pre. Ch. 528, (which is commented on, and the report of it corrected by Sir William Grant,) illustrates this matter. In the latter case, the gift was to three children, and if either should die without issue, to the survivors and their heirs. This was held too remote. The limitation being to survivors and their heirs, shewed that not a mere personal benefit was intended, but that the heirs of the survivors might take whenever the issue should fail. The doctrine is explained in the principal case. If there be a limitation to A, and if he die without issue, to B, this does not mean that B is to take personally during his life; but if the limitation was good, the representative of B would take on the failure of issue, however remote. This limitation is, in effect, the same as if the gift had been to Martin, and if he should die without issue, to Elizabeth Zahler and Martha Shephard. Martin Shephard took the property given to him therefore absolutely.

Whether the complainants are entitled to any portion of this property as next of kin, must depend on the fact of the legitimacy of John David Shephard. This question, I think a proper one for a jury, and I shall send it to a jury.

It is ordered, that an issue be made up to the next sitting of the Court of Common Pleas for Beaufort district, to try and determine whether the defendant, called John David Shephard, is the son of the deceased Martin Shephard, born in lawful wedlock. The question of costs is reserved.

The complainants appealed, on the ground that the limitation over was not too remote.

E. & H. Rhett, for the motion.

——— ———, contra.

PER CURIAM. We concur in the decree of the circuit court. The appeal is, therefore, dismissed.

JOHNSON, JOHNSTON and DUNKIN, CC., concurring.

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2 Rich. Eq. *144

*JOSEPH JENKINS v. JOHN BELL.

(Charleston, Jan., 1846.)

[*Equity* ⇐359.]

Though the dismissal of a bill may not abrogate or set aside matters finally adjudicated and determined in the progress of the cause, yet all matters merely interlocutory and unexecuted, certainly go with it when it is dismissed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 755; Dec. Dig. ⇐359.]

[*Limitation of Actions* ⇐130.]

A party conveyed certain slaves, and, after his death, his administrator, being in possession of the slaves, filed his bill to avoid the conveyance, on the ground of fraud. The conveyance was declared valid, and the administrator delivered up the slaves, and was ordered to account for their hire. On the report for the hire coming in, his bill was, on his own motion, dismissed; whereupon, the defendant filed this bill for an account of the hire. The administrator pleaded the statute of limitations, and more than four years having elapsed since his possession ceased, *held*, that he could avail himself of it,

and that the proceedings in the first suit did not suspend its operation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 557; Dec. Dig. ⟸130.]

Before Johnston, Ch., at Beaufort, May, 1842.

The Chancellor. The bill in this case is brought to reinstate the plaintiff in the condition in which he stood in a former suit between the same parties.

In August, 1831, Thomas R. Bell, the intestate of the defendant, executed a deed, by which he conveyed the bulk of his estate, including several slaves, to the plaintiff, in trust for his, the plaintiff's, children. The circumstances under which this conveyance was made, induced the defendant, upon the death of his intestate, (which shortly ensued the deed,) to file his bill in this court, to avoid the instrument, upon the ground of fraud and imposition. The bill in that case was filed the 24th of December, 1831. In the course of the litigation, an issue at law was ordered, which resulted in a verdict, rendered at Fall term, 1833, establishing the deed; upon which, the defendant, Bell, delivered up the slaves to the plaintiff, Jenkins; and on the 28th of January, 1835, an order was made in the cause, by the late Chancellor DeSaussure, directing the commissioner to inquire for how long a period the negroes, the subject of the suit in this cause, were in the possession of the complainant, John Bell; what was the value of their labor during that period; and also, for what portion of that period the complainant is, in his opinion, chargeable with the hire of the said negroes; and that he report the evidence, upon which he rests his opinion, to this honorable court.

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On *the 26th of January, 1839, the commissioner filed his report; in which he stated, upon the evidence submitted to him, and which he also reported, that the defendant came to the possession of twelve of the slaves in February, 1832, of whom five were sold by the sheriff, under executions against the intestate, on the 13th of May, 1833, and the remaining seven were delivered up in December, 1834.

That, as to two other slaves, it did not appear when Bell's possession began; but the sheriff sold one of them the 14th of August, 1831, and the other in the sale of the 13th of May, 1833.

He stated an account for hire of the said slaves, according to the time Mr. Bell had been in possession of them, respectively, and the value of their labor; and charged Mr. Bell the sum of $609.10, for hire as aforesaid.

On the coming in of the report, Bell moved for leave to dismiss his bill; and Chancellor Dunkin, before whom the motion was made, notwithstanding the opposition of the defendant in the cause, felt bound, upon the authority of Bossard v. Lester,(a) (which had not then been overruled,) to grant the motion, and passed an order accordingly, at January term, 1839.

The present bill was filed the 8th of November following; in which the plaintiff seeks to have the benefit of the order in the former cause, of the 28th of January, 1835; and has introduced evidence of the value of the services of the slaves, during the time the defendant held possession of them.

The defendant relies upon the fact, that whatever sum was chargeable to him for hire, was due in December, 1834, when his possession ceased; insists that there was no trust in the case; and if there was, it was terminated; and pleads the statute of limitations.

There are some other circumstances on my notes, but they are immaterial to the question presented by this plea.

I thought this point doubtful, when the case of Hanks, Chev. Eq. 203, was decided; but it is unnecessary to say, that decision must govern me on the circuit.

It is ordered, that the bill be dismissed.

From this decree the complainant appealed, on the following grounds:

1. Because his Honor sustained the plea of

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the statute of lim*itations; whereas, it is respectfully submitted, that said plea, on the case made, ought to have been overruled.

2. Because the decree is, in other respects, contrary to equity.

Edmund Rhett, for complainant.

———— ————, contra.

Curia, per JOHNSTON, Ch. We are not at liberty to enquire whether the order of January, 1839, dismissing Bell's bill, was properly granted. If it was not, it would have been set aside on appeal. The party who, instead of appealing, acquiesced in it, is precluded from complaining of its irregularity.

We are of opinion, that the order of reference of January, 1835, fell with the bill. We are not to be understood as deciding that the dismissal of a bill abrogates or sets aside matters finally adjudicated and determined in the progress of the cause; as in Bond v. Hopkins, (1 Sch. and Lef. 413,) referred to in the argument. But all matters merely interlocutory, and unexecuted, certainly go with the bill, when that is dismissed.

But it is argued, that the statute was suspended during the existence of this order of reference. The case of Hanks, [Cheves, Eq. 203,] referred to in the decree, is conclusive upon this point; and the case is to be regarded as if no such order had ever existed.

It has been said, that the pendency of the

(a) 2 McC. Eq. 419, overruled by Bethia v. McKay, Chev. Eq. 93. Vide also Bank v. Rose, 1 Rich. Eq. 292.

suit of Bell against Jenkins, prevented the latter from asserting his claim by independent proceedings; and that it would be unjust to allow his opponent to keep him suspended in this court until the statute had barred him, and then to take advantage of this delay. But there was nothing in Bell's bill to prevent the assertion of Jenkins' claim, either in law or equity. There was an order restraining the latter from selling or removing the slaves in his possession; but nothing to preclude him from suing for those in Bell's possession, or their hire.

These latter slaves were delivered up in 1834. Whatever hire was due on their account, was due then. There was no trust, whatever, in the case. The demand was purely legal; and we do not perceive upon what principle it can be contended that the statute did not run from that time.

There is another ground upon which the bill should have been dismissed. Pending the suit of Bell v. Jenkins, the creditors of Bell's intestate filed a bill against both parties, to set aside the deed as fraudulent and voluntary. An account was taken of the administration of the estate in Bell's possession, and resulted in a balance of $50.27 in his favour.

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*It was the interest of Jenkins, who was entitled to the residue after satisfying the creditors, to make Bell liable for a larger sum. But he took no exception to the report; and is, therefore, bound by it. What a party may contest and does not contest, he is barred from afterwards litigating.

It is ordered, that the decree be affirmed, and the appeal dismissed.

JOHNSON and DUNKIN, CC., concurred.

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2 Rich. Eq. 147

WILLIAM SWIFT and BENJAMIN F. HUNT v. EXECUTRIX OF MILES, EXECUTORS OF BALL, SAUNDERS GLOVER and WILLIAM T. RAYNAL.

(Charleston. Jan., 1846.)

[*Executors and Administrators* ⟸281.]

Where an administrator misapplied the funds of his intestate by applying them to the payment of simple contract debts, when there were specialty debts unpaid, and afterwards, on a bill for partition of the realty, to which the administrator was a party, a part of the proceeds of the realty was reserved, in the hands of the master, for the payment of the specialty debts; *held*, on the fund thus reserved, falling short of paying the specialty debts, that the administrator was guilty of a devastavit, and that his sureties were liable, although the sum reserved out of the proceeds of the realty was larger than the sum misapplied by the administrator.

[Ed. Note.—Cited in Hull v. Hull, 3 Rich. Eq. 93.

For other cases, see Executors and Administrators, Cent. Dig. § 1109; Dec. Dig. ⟸281.]

[*Executors and Administrators* ⟸289.]

In a suit by distributees against an administrator for partition and account, it is the duty of the administrator to represent the creditors, and see that their debts are provided for; and the court will never order distribution when it is brought to their notice that the fund is necessary for the payment of debts.

[Ed. Note.—Cited in Fewell v. Fewell, 6 Rich. Eq. 139; Hinton v. Kennedy, 3 S. C. 488.

For other cases, see Executors and Administrators, Cent. Dig. § 1150; Dec. Dig. ⟸289.]

Before Johnson, Ch., at Charleston, June, 1844.

The Chancellor. The late William Rouse died in 1829, intestate, and administration of his estate was granted to the defendant, Raynal, and the complainants were sureties to his administration bond. The whole personal estate was sold, and netted about $4230. The expenses of the last sickness, &c., and the cost of administration, including the ad-

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ministrator's com*missions, amounted to about $497, leaving a balance of $3733, applicable to the payment of debts. The defendants, the executors of Miles, the executors of Ball, Saunders Glover, and the Bank of South Carolina, were, severally, bond creditors of the intestate, to the amount of $5333, but their demands were resisted, and suits were brought against the administrator, which ended, after a tedious and expensive litigation, in 1832, by judgments against the administrator. The simple contract debts, exclusive of those before mentioned, amount to about the sum of $3682, which were paid by the administrator, pending the suits on the bonds, leaving in his hands a balance of about $51 of the proceeds of the personal estate.

In 1830, a bill was filed by the heirs of the intestate, for partition of his real estate, and on the 22d of May of that year, an order was made, that, for the purpose of making partition, the estate should be sold by the commissioner of the court, and that he should take an account of the personal estate which had come to the hands of the administrator, and of his disbursements. And it was further ordered, that he should also take an account of the debts of the intestate, which should be rendered within the period of one year, as prescribed by law, and after making due provision for the payment of the same, he should report the amount remaining in the hands of the administrator, liable to distribution.

On the 21st May, 1831, the commissioner reported, that he had sold the real estate, the net proceeds of which amounted to $12,660.28; that there remained in the hands of the administrator a balance of $51.75, derived from the personal estate; that he had been unable to obtain an accurate statement of the debts against the estate, as they were chiefly in suit, and the subject of much litigation. But that he had retained in his hands, from

the sales of the real estate $3766.67, that being regarded by the administrator and the other distributees as fully sufficient to pay the debts; and the balance of the proceeds of the real estate have been distributed amongst the next of kin of the intestate.

The whole of the sum reserved has been paid out by the commissioner, rateably, amongst the bond creditors; and it will be observed, by referring to the statements before made, that it fell considerably short of paying them in full, and the defendants severally brought actions at law against the complainants, the sureties to the administration bond, to recover the balance remaining due to them, the administrator himself having become insolvent, and removed out of

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the State. Defendant, Glover, has *obtained a judgment, and the amount was paid by the complainants, on a ca. sa. issued against them, and the other suits are still pending. The bill prays, that Glover may be decreed to refund the money he has received, and that the other defendants may be restrained from the further prosecution of their suits at law.

The defence rests on the ground, that the defendants, as preferred creditors, were entitled to be paid out of the personalty, and the administrator having applied these to the payment of simple contract debts, he and his sureties are responsible, and that, therefore, the defendants are not bound to look to any other source for payment. To this, it is replied, that the bond creditors (the defendants,) have received out of the sales of the realty, by the procurement of the administrator, a sum greater than the amount of the personalty, and, therefore, the defendants are not liable.

James W. Gray, then the commissioner of the court, who made the report before referred to, and who retained the money, on his examination in this cause before the master, testified that complainant, Hunt, was present when the account, on which that report was made up, was stated, and that in ascertaining the shares of the distributees, the personal and real estates were united, and that the administrator was charged with the whole amount of the personalty, ($4230.50,) and credited with the amount disbursed, in full, thus balancing the amount of the personalty; that the sum retained by the witness to pay debts, was at the instance of the administrator, and the amount predicated on calculations made by the administrator and the complainant, Hunt.

The disbursement of the proceeds of the personalty, in payment of simple contract debts before the bond debts were paid, was clearly a misapplication of them, which rendered the administrator and his sureties liable for the amount so misapplied; but I apprehend, that it is equally clear that that liability is fully discharged, if the administrator has provided and applied to the bond debts a sum equal in amount, without reference to the source from whence it was derived; and the case resolves itself into the question, whether the sum reserved by the commissioner is to be regarded as a sum set apart to reimburse the administrator for the money advanced in the payment of simple contract debts; or, as is insisted by the defendants, was intended, in aid of the personal assets, to pay their demands.

The defendants were not parties in the

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proceedings in parti*tion, nor were they present or represented at the time the calculations were made, on which the amount reserved was ascertained. The administrator had not, in that character, any thing to do with the proceeds of the real estate, and was not authorized to represent the defendants, but he was entitled to be reimbursed out of it the amount which he had disbursed in payment of simple contract debts, because he was liable for it to the specialty creditors, and it will not be supposed that he volunteered to protect the defendants, and leave himself and his sureties to suffer loss. It may well be supposed, however, that he said to the distributees, "I have misapplied the funds to the payment of simple contract debts, and am personally liable to the bond creditors. The real estates are equally liable to both. I, therefore, desire that you will consent that the commissioner shall retain in his hands a sum sufficient to cover my responsibility." Such a proposition could not have been resisted, and judging from all the circumstances, this, I think, is the necessary and inevitable conclusion. But the evidence of Mr. Gray is conclusive. He says, positively, that the reservation was made at the instance of the administrator. I have no doubt that it was intended to reserve a sufficient sum to pay all the debts, as the estate was ample; and it was stated at the bar, and will probably be found true, that the amount was, at the time, sufficient to pay all the debts, and that the excess of the debts is the consequence of the accumulating interest and costs. But if the administrator was mistaken in his estimate of the amount of the bond debts, that cannot charge him, because he was not bound to provide for them.

The argument for the defendants, that they are entitled to the fund because it is the proceeds of the real estate, over which the administrator had no control, cannot be sustained. The simple contract debts, which he had paid, were equally a charge on the real estate, and if he, by his greater diligence, has saved his debt, leaving an ample fund for the payment of their demands, and they have lost by their negligence, he ought not to be charged. But the defendants all obtained judgments at law against the administrator for the amount of their several demands, and it is insisted that the complainants are con-

cluded by these judgments. This argument presents the question, whether the complainants, the sureties, can look behind these judgments, and shew that their principal was not liable.

In the earlier cases involving this question, our courts were reluctant to let in the evi-

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dence, and in the case of Cureton v. *Shelton, 3 M'Cord, 412, which was a suit at law against the sureties of an administration bond, after a decree in the court of equity against their principal, the court held that the defendants were only entitled to look into the decree for the purpose of ascertaining whether he had been charged with any thing for which they were responsible. The Ordinary v. Condy, 2 Hill, 313, was also an action against the surety of an administration bond, and it was held that he had the right to offer evidence to shew that the decree against his principal, on a bill for an account, was in part for his personal debt. All the authorities on the question, as well the English, and other American cases, as our own, are ably reviewed by Mr. Justice Harper, (the present Chancellor,) and from them he deduces the conclusion, that a judgment against the principal, in a cause to which the surety is not a party, is not conclusive, but prima facie evidence only against the surety, and that he will be let in to prove any thing to shew that he ought not to be charged; and that I now regard as the settled decision of the court.

The defendant, Glover, pleads his recovery at law against the complainants, in bar to this bill, so far as regards himself, and that defence, I think, must prevail. By referring to that case, as reported in 1 M'M. 380, under title of Hunt and Skift ads. The Ordinary of Charleston District, it will be found that the matters in issue in this case were directly involved in that, and that the parties were substantially the same. The subject matter was properly cognizable in that court, and all the facts adduced here were within the knowledge of the complainants, and then as much under their control as they are now. The rule clearly is, that this court will never examine into a judgment at law when the party has omitted or neglected to avail himself of a defence which might have protected him then.

The other defendants rely on the judgment of the law court in that case, as conclusive authority on their behalf, and if the cases were the same, I should certainly feel bound by it. In their general features they are very much the same; but the important fact proved by the witness, Gray, that the fund reserved was at the instance of the administrator, did not enter into that case, and I have already shown that the inevitable deduction from that, and the other circumstances of the case, is, that it was intended to reimburse the administrator for the funds misapplied to the payment of the simple contract debts. They differ in another respect. In the opinion of the Court of Appeals, it

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*is stated that the bond creditors were parties to the proceeding in partition, and "were seeking to obtain payment of their debts out of the real estate, as the personal estate was exhausted;" from whence it might be inferred that the money was reserved at their instance, and in aid of the personal estate. No such fact appears here. On the contrary, the evidence shews that they were not parties, nor is it now insisted on. I cannot, therefore, regard that judgment as authority in the case of these defendants, in opposition to very strong convictions as to the correctness of the conclusion at which I have arrived.

It is ordered and decreed, that the bill be dismissed as to the defendant, Saunders Glover, and that complainants pay his costs. And it is further ordered and decreed, that a writ of injunction do issue perpetually to restrain the defendants, the executors of Miles, and the executors of Ball, from the further prosecution of their actions at law against the complainants, referred to in the pleadings, and that they pay the complainants' costs out of the funds of the estates of their testators in their hands.

The defendants, the executors of Ball and the executors of Miles, appealed, giving notice of appeal as follows:

It is respectfully submitted, that the decree of the Chancellor is erroneous, inasmuch as it rests on a supposed difference in the cases of the executors of Ball and the executors of Miles, and the cases of Hunt and Swift ads. The Ordinary, and states as the difference, 1st. That Mr. Gray proved that the $3766.67, which he retained for the payment of debts, was retained by him, not under the order of Court, but at the instance, and by the orders of Raynal, the administrator. And, 2dly. That the said cases differ in another respect, viz., that in the opinion of the Court of Appeals in Hunt and Swift ads. The Ordinary, it is stated that the bond creditors were parties to the proceedings in partition, and the evidence in this case shews they were not parties. Now it is submitted,—

1. That it is immaterial what directions the administrator may have given Mr. Gray; his only authority for retaining any sum for the payment of the debts of Col. Rouse, was the order of Chancellor Harper, made 22d May, 1830, directing him to sell the real estate of Rouse, and to make provision for the payment of the debts rendered to the administrator within a year; and the evidence of Mr. Gray, according to its true interpretation, is simply that the amount to be

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retained, under the order of court *aforesaid, was fixed at the instance of the admin-

istrator, and predicated on the statements and calculations made by himself and Col. Hunt, his counsel.

2. That it is immaterial whether the present defendants, executors of Ball and executors of Miles, were or were not parties to the proceedings in partition. They, however, were parties in the only way in which it was proper or necessary to make them parties, viz., by giving the court to understand that they were bond creditors of Col. Rouse at that time, suing in the court of law, and seeing that an order was made that their debts should be provided for.

3. That the amount retained by Mr. Gray, under the order of court, was $3766.67, and the amount of the personalty, after paying preferred debts, according to the decree of Chancellor Johnson, was $3733, making $7499, clearly applicable to the payment of the bond debts, which amounted only to $5,333, in preference to the simple contract debts; and as it is clearly proved that the fund retained by the court has been properly applied to the payment of the bond debts, and as it is equally clear, from the evidence in the case, that the personal estate, to the amount of $3733, has been misapplied by the administrator to the payment of the simple contract debts, it follows, as a necessary consequence, that the fund misapplied by the administrator was the personalty, and constituted a devastavit by the administrator, which fixes his sureties.

4. That the fact stated by the Chancellor, as proved, viz., "that Raynal advanced the amount for the payment of the simple contract debts, and was, therefore, entitled to be reimbursed out of the fund in the hands of the master," was not, and never could be proved, for Raynal never had the means to make the supposed advance, but as his administration account shews, he received the net proceeds of the personal estate, and after notice of these very bond debts, paid to the simple contracts $2773.21, of the said proceeds of the personalty in his hands as administrator.

5. That the debts of Glover, of Miles, and of Ball, having been established by the judgments at law as bond debts against the estate of Col. Rouse, and assets sufficient having come to the hands of the administrator, which he wasted or misapplied, fixed him with a devastavit, and is conclusive against his sureties.

6. That the case made by the present pro-

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ceedings is identi*cally the same as that made in the cases of Swift and Hunt ads. The Ordinary, decided by a full bench of the Law Court of Appeals in 1841, and is conclusive of this case.

7. That the Chancellor rests his decree, 1st. Upon the fact that Mr. Gray, the master, retained not under the order of Court of 22d May, 1830, but by the order of Raynal, the administrator. 2dly. That Raynal advanced the money to pay the simple contracts out of his own pocket; neither of which allegations were true, and never could be established by competent evidence.

Grimke, for the appellant.
Hunt, contra.

Curia, per DUNKIN, Ch. The court is of opinion that this case cannot be distinguished in principle from the Ordinary v. Hunt and Swift, 1 M'M. 380.

It was held by the Court of Appeals, in the Ordinary v. Cole, Mss. Charleston, February, 1830, that in a suit by the distributees against the administrator for partition and account, the creditors of the estate are represented by the administrator; that he is bound by law to see that they are paid; and that a court of equity would never order distribution, when it was brought to their notice by the administrator, that the fund was necessary for the payment of debts.

In the case now under adjudication, the bill was filed by the distributees within the year from the death of the intestate. In the order for the sale of the real estate, made by Chancellor Harper in May, 1830, it is said to be an amicable suit. The commissioner was directed to take an account (among other things) of "the debts which should be rendered within the period prescribed by law, and that after making provision for the payment of the same, he report the amount remaining in the hands of the administrator, for distribution." The law required the creditors to render statements to the administrator; and they were accordingly rendered. Under information derived from him, the commissioner reported that $3766.67, was sufficient to discharge them, and that from the proceeds of the real estate he had retained that sum to discharge those debts. This report was made and confirmed in May, 1831. The administrator had already misapplied the proceeds of the personalty towards the satisfaction of simple contract creditors, with notice to him, at the same time, of the existence of these specialty debts. The Chancellor places his decree on the ground that "the sum thus reserved by

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the *commissioner must be regarded as set apart to reimburse the administrator for the money advanced in the payment of simple contract debts;" that "the reservation was made at the instance of the administrator, and that as he had thus provided and applied to the bond debts a sum equal in amount to that appropriated by him in discharge of the simple contract debts, his liability was fully discharged."

We cannot regard the transaction in this light. The fund was neither provided nor reserved by the administrator. As is said in the Ordinary v. Cole, it was his duty to represent the creditors and take care that

their debts were paid. The commissioner was ordered to take an account of the debts as they should be rendered to the administrator, and to report the provision to be made for their payment prior to a distribution. The report was made on the testimony derived from the administrator, and this sum was accordingly reserved, as the report recommended, for the payment of these debts, and not to reimburse the administrator for a misapplication, as manifest when the order was passed as it is now. The effect of sustaining the decree, would be to send the specialty creditors for payment of their demands to insolvent distributees, who have been enabled to receive their funds from the custody of the court, in consequence of the neglect of duty on the part of the administrator. The sureties to the administration bond have no cause of complaint; for, as is said by the court, in the Ordinary v. Hunt, "whatever was received by the creditors out of the sales of the land, diminished their liability to that extent."

But there is another view of the testimony, which seems to place the liability of the administrator, and his sureties beyond doubt. It is not pretended that the administrator disbursed any more than the fund arising from the sales of the personal estate, amounting to about $4000. But the sales of the real estate exceeded $12000. There were three distributees, the share of each amounting to $5558.21, after deducting his proportion of the amount retained for debts. But two of the distributees were indebted to the estate, J. W. Rouse $1220.61 and C. E. Rouse $6557.89. By the decretal order of the court, their share of the realty was appropriated to the extinguishment of their debts. Raynal, the administrator, was the purchaser of the realty, to an amount exceeding ten thousand dollars; and in settlement with the master he received from him $4055.59, over

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and above his *distributive share, thus placing in his hands that sum as applicable to the payment of the debts of the estate, in addition to the amount reserved by the master. In other words, the amount of the personalty, actually received by him, exceeded eight thousand dollars, out of which he has disbursed less than four thousand dollars.

It is ordered, that the decree of the circuit court be reversed as to the executors of Ball and the executors of Miles, and that the master take an account of the amount due on their judgments respectively, and report thereon, and that as to the defendant, W. T. Raynal, the cause be remanded to the circuit court.

JOHNSTON, Ch., concurred.

JOHNSON, Ch. The fact that J. W. and C. E. Rouse were indebted to the intestate, and that these debts constituted a part of the personalty, was not brought to the notice of the circuit court at the hearing. In not applying that fund to the payment of debts, the administrator was guilty of a devastavit for which his sureties are liable.

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2 Rich. Eq. *157

*MITCHELL KING v. JOHN ROBINSON et al.

ANNA MARIA RUGELEY v. ALEXANDER F. GREGORIE et al.

(Charleston. Jan., 1846.)

[*Assignments for Benefit of Creditors* ⟹363.]

Lands were conveyed by a debtor to trustees for the benefit of creditors, and were sold, but doubts being entertained as to the validity of the sale, some of the representatives of the debtor, for valuable consideration paid by the trustees out of the proceeds of the sale, and other representatives without any consideration at all, released, in order to perfect the title of the purchasers, all their interest in the lands. The debts being satisfied and a fund remaining undisposed of, *held*, on bill filed for distribution of the fund among the representatives of the debtor, that the parties who had been paid for the release of their right, must bring the amount received by them into the account.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 1101; Dec. Dig. ⟹363.]

Before Dunkin, Ch., at Charleston, February, 1845.

The Chancellor. The bill filed in the case first stated, presents a very full history of the complicated transactions which have given rise to these proceedings.

The fund in the custody of the court is from the sales of lands, which, prior to the Revolution, belonged to Rowland Rugeley. By his will, dated in December, 1775, a moiety of these lands was devised to his brother, Henry Rugeley, and the other moiety to his other brothers and sisters. The lands had been purchased with funds alleged to have belonged to the copartnership estate of Rowland and Henry Rugeley. In 1790, Henry Rugeley conveyed the lands to trustees for the purpose of being sold, and of paying the debts of Rowland and Henry Rugeley. In 1810, Susan Rugeley, of Potten in England, in whom the rights of the other devisees of Rowland Rugeley had, in the mean time, vested, released all her interest in the premises to the then acting trustee, under the deed of 1790, for the purpose of enabling him to carry into effect the objects of the trust.

Many difficulties were still encountered by the trustees in completing the sales of the lands, in consequence of supposed outstanding titles in the representatives of Rowland, or Henry, Rugeley. In 1818, the heirs of Henry Rugeley, through their agent, John Robinson, agreed with the trustees to release all their claim or interest, in order to remove

any doubt as to the title of the trustees, and, with that view, conveyed all their interest to

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*John Robinson, in trust to execute all necessary assurances to the purchasers from the trustees, in consideration of receiving from the trustees a stipulated sum from the sales of the said lands.

Soon after the execution of this deed, a litigation commenced between the trustees and the various purchasers, which was certainly not terminated until 1831.

In August, 1842, Anna Maria Rugeley and others preferred their bill in this court, insisting that they and other persons, claiming, with them, under Susan Rugeley of Potten, (who died in 1824.) are entitled to the whole of the fund proceeding from the sales of the lands which is now in Court, on the ground that the trusts under the deeds of 1790 and 1810 have been fulfilled and satisfied, and that any right in the heirs of Henry Rugeley was extinguished by the deed of 1818.

In what has been said, it was not intended to present a minute, or even very accurate, history of the facts. For that, reference must be had to the pleadings. Much less would it be proper, or even practicable, to attempt, advantageously, any abridgment of the evidence in relation to that portion of the case which is the most difficult and embarrassing.

In 1822, M. King, Esq. was appointed, by the proper parties in England, to represent and prosecute the rights of the creditors. The narrative, presented by him, affords another lamentable illustration of the law's delays, delays too, which it is often much easier to deplore than to obviate; and when, at length, his exertions in behalf of his clients had been partially crowned with success, the result of his efforts to reach them is painfully interesting. It shews how unequal are human hopes, or human life, to contend with protracted litigation. While he was still pursuing their claims in the tribunals of justice, his clients had all died, and it is much to be feared that their rights have died with them. When he sought to discharge his trust by paying over the fund, he could find no one to receive it. Death and bankruptcy, and vicissitudes in human affairs, had, long since, destroyed every memorial of those, in whose names, or for whose benefit, the litigation had been conducted. By the orders already made in this court, Mr. King has been discharged from all further responsibility, (having paid the funds into the hands of the master) and all parties have been enjoined from any proceedings against him.

The lands from which the fund arises, belonged, both before and after the execution of the trust deeds, to the representatives

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*of debtors, subject only to the claims of the creditors. The same character attaches to the fund. No one interposes any claim on behalf of the creditors. After the most diligent inquiry, no one can be found who is willing to represent a creditor, or assume his rights. After the lapse of time which has intervened and the other facts which have been established, it seems the duty of the court to recognize the rights of the complainants, and to direct the fund to be paid over in the same manner as if the satisfaction of the trusts had been fully established. Whether they have been satisfied, or have become impossible, or the claims of the creditors have been abandoned, the result is the same.

It remains to consider the effect of the deed of 1818, on the rights of the heirs of Henry Rugeley.

From the history of the case, it is manifest that, even after the confirmatory deed of 1810, by Susan Rugeley of Potten, the trustees had much difficulty in making title to the lands—what was the character of the obstacle interposed by the heirs of Henry Rugeley, or under what right, or supposed right, they interfered, cannot now be ascertained. It is clear, however, from the recitals in the deed of 1818, that their claims embarrassed the sale, and it is not less clear that, through their agent, John Robinson, they had agreed to relinquish their claim. In consideration of receiving a stipulated sum from the sales, they, accordingly, released their interest to Robinson, in trust, as has been stated, to execute the necessary deeds to the purchasers from the trustees. In the opinion of the court, this must be viewed as part of that transaction. The release was not to the other devisees of Rowland Rugeley, nor for their benefit. Nor could the trustees of course take any beneficial interest, either under the agreement or the deed. The heirs of Henry Rugeley were paid, too, from their own funds, which the court has declared to belong to them, subject only to the payment of the creditors. It is insisted, on the part of the complainants, that the trustees acted for them as well as for the creditors. But they, the trustees, stood in the same fiduciary relation to the heirs of Henry Rugeley, and any contract, made with them, to the disadvantage of the cestuis que trust, would be permitted to stand only as a security for the money paid. But suppose the representatives of Susan Rugeley of Potten, had also interposed a claim, or were supposed to have some rights, notwithstanding the deed of 1810, which threw a cloud on the title of the trustees, and they, (being the present complainants) had also released their right in the same way, in consideration of one hundred, or one thousand

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*pounds, paid from the sales of the lands; would such release now bar the claim of the

complainants? And, if so, to whom would the fund now belong?

In the judgment of the court this was a common fund, placed in the hands of the trustees for a specific purpose. The object having been accomplished, or having become impracticable, the fund belongs to the original owners. The heirs of Henry Rugeley having already received a share of the fund, and asking a further participation, must account for what has been already paid, on a principle analogous to that recognized by the court of appeals in Pedrrieau v. Hunt, Riley's Eq. 88.

It is ordered and decreed that it be referred to the Master to state an account between the parties in relation to the fund on the principles herein indicated, and that he report thereon, with leave to report any special matter preparatory to a final decree.

The defendant, John Rugeley, appealed from so much of the foregoing decree as directs the heirs of Henry Rugeley to bring into account the money received from the trustees in 1818, on the ground:

That the heirs of Henry Rugeley are not accountable to the heirs of Susan Rugeley, for the money which they received for joining in the deed of 1818.

Petigru, for the motion.
————, contra.

Curia, per DUNKIN, Ch. In the argument at the hearing in the circuit court, it was insisted, on the part of the devisees of Rowland Rugeley, that, as the heirs of Henry Rugeley had refused to concur in carrying the trust into effect, and had exacted from the trustees a valuable consideration for the release of their right, every possible or contingent claim on their part was thereby extinguished—that their ancestor, Henry Rugeley, had conveyed the lands to trustees for the purpose of being sold, and of paying the debts of Rowland and Henry Rugeley;—that the heirs could, therefore, have no other claim but their right to the residue, and this contingent right was released by the deed of 1818, in favor of the other parties interested in the fund. There was much to sustain this view of the transaction. But the court regarded it as a contract between trustee and cestui que trust, and which could not be insisted on to the disadvantage of the latter —that the trustee stood in a fiduciary relation, both to the heirs of Henry Rugeley and

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the devisees of *Rowland Rugeley, and could make no bargains to the prejudice of either. But, if the contract is to be opened, it is quite clear that the consideration money must be brought into the account.

A testator devises his estate to his executors for the payment of his debts, who accordingly sell the estate for thirty thousand dollars. One of the heirs suggests some real or imaginary doubt as to the authority of the executors, which is sufficient, however, to interrupt the completion of the contract. He, in consideration of receiving ten thousand dollars of the purchase money from the executors, withdraws his objection, or releases his interest. His co-heir does the same gratuitously. The supposed debts of the testator are proved to have been paid, or are abandoned. The twenty thousand dollars, which remain in the hands of the executors, are now to be apportioned.

In such case, it would be difficult to maintain that the heir, who had already received one-third of his father's estate, should divide the residue equally with his co-heir, who had received nothing. Whether, if the twenty thousand dollars had been exhausted in payment of debts, the co-heir could call for an account of the ten thousand dollars is not now the inquiry. But he who asks the aid of this court, must conform to its principles.

There was no evidence before the court as to the amount of funds received by the former trustee, or of his disbursements. It was only in evidence, that the amount paid to the heirs of Henry Rugeley, was part of the fund received for the sales of the lands. This was a common fund, to which the devisees of Rowland Rugeley were equally entitled, and, in distributing the surplus, they should first be placed on an equality with the heirs of Henry Rugeley.

The appeal is dismissed.

JOHNSON, Ch., concurred.

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2 Rich. Eq. *162

*JOHN W. SCHMIDT v. WILLIAM C. GATEWOOD, SOPHIA C. MESSERVEY, ELIZABETH MESSERVEY and PHILIP J. MESSERVEY.

(Charleston. Jan., 1846.)

[*Liens* ⇐16.]

The Act of 1791 gives a lien, to secure the purchase money, on property sold, under the provisions of the Act, for distribution. But where a sale is made under the lien which the Act gives, the lien is divested, as in the case of a sale under an ordinary mortgage.

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 12; Dec. Dig. ⇐16.]

[*Descent and Distribution* ⇐87.]

Real property was sold by the commissioner for distribution. One of the distributees purchased the property, and, under a power of attorney from some of the distributees, gave receipts to the commissioner for their shares. He procured himself to be appointed guardian of one of the distributees who was a minor, giving A as security to his guardianship bond, and then gave the commissioner a receipt for the minor's share. He was at the time largely indebted to A. who knew of these proceedings, and that he was unable to pay either the purchase money of the property or the debt to A.

Titles were made to him by the commissioner, and he immediately mortgaged, and afterwards conveyed the property to A, the consideration being his indebtedness to A. *Held* that the transaction was fraudulent, and the property was subjected in the possession of A to the claims of the distributees, (for whom receipts had been given) for the amount of their shares.

[Ed. Note.—Cited in Kinard v. Hiers, 3 Rich. Eq. 428, 55 Am. Dec. 643; Johnston v. LaMotte, 6 Rich. Eq. 355; Coney v. Timmons, 16 S. C. 385; DuPont v. DuBos, 52 S. C. Append. 601; Fairy v. Kennedy, 68 S. C. 256, 47 S. E. 138.

For other cases, see Descent and Distribution, Cent. Dig. § 330; Dec. Dig. ⟸87.]

[*Descent and Distribution* ⟸87.]

In deciding upon the bona or mala fides of such a transaction, much importance is always attached to the fact, that the security was taken, not as a pledge for money borrowed at the time, but for an antecedent debt.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 330–336; Dec. Dig. ⟸87.]

[*Trusts* ⟸17, 18.]

A verbal agreement to purchase land at sheriff's sale for the benefit of another, is void under the statute of frauds, and cannot be enforced against the purchaser.

[Ed. Note.—Cited in Johnston v. LaMotte, 6 Rich. Eq. 356; Lamar v. Wright, 31 S. C. 75, 9 S. E. 736.

For other cases, see Trusts, Cent. Dig. § 22; Dec. Dig. ⟸17, 18.]

Before Johnson, Ch., at Charleston, June, 1844.

The Chancellor. The late Phillip Messervey died in 1828, intestate. He left surviving him a widow, Sophia, and six children, viz: the defendants, Sophia C., Elizabeth and Phillip J., and Catharine, Lawrence, and George, who were entitled to distribution of his estate. Besides a considerable personal estate, administration of which was committed to his widow, he was, at the time of his death, seized and possessed of five houses and lots in the city of Charleston, and a farm on the Neck, all of which are described in the pleadings. At the May Term of the court of equity in 1829, an order was obtain-

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ed, on proceedings before *had, which directed the sale of the whole estate, real and personal; and at the sale made by the commissioner, in pursuance thereof, the widow (Sophia Messervey,) purchased all the real, and the greater part of the personal estate. The terms of the sale were for one-third cash, the balance on bond and mortgage, payable in one and two years. It does not appear that she ever gave the bond and mortgage, or made the cash payment to the commissioner, except in the manner hereinafter stated. The children, except Sophia C., were then minors, and the widow was, by an order of the court, appointed their guardian, on the usual condition of her entering into bond, with sufficient surety, for the faithful discharge of her duties. She entered into the bond herself, and representing herself as the attorney of her sister Susannah Gleize, appointed for that purpose, subscribed her name as surety to the bond. But this authority was disavowed by Mrs. Gleize, and has never been established. The commissioner of the court, who has since died insolvent, notwithstanding accepted the release of the widow of her own interest, and, as guardian of the minor children, of theirs; also of their distributive shares in the whole estate sold, and executed to her titles to all the property bid off by her at the sale, reporting to the court that he had paid Sophia C. her her share. The widow having thus become possessed of the legal estate in the property, and having become largely indebted, on her own account, to one Joseph A. Barelli, mortgaged a portion of the real estate to him, to secure the payment, and also confessed a judgment for the amount, and the debt being unpaid, Barelli seized upon the real estate, with the intention of selling it to satisfy his demand.

This proceeding put in peril the entire interest of the children in the estate; and the complainant states in his bill, that as their friend, he employed counsel, and caused proceedings to be instituted for the purpose of ascertaining and establishing their rights. The judgment of the court in that cause will be found in 2 Hill's Eq. Rep. 567, in the case of Sophia C. Messervey et al. v. Joseph A. Barelli et al., in which it was held, that notwithstanding the circumstances before stated, the children had a lien on the real estate for the amount of their distributive interests in the proceeds of the sales, and it was, among other things, ordered that the Master should ascertain and report the amount due to them respectively. That Sophia Messervey (the widow,) should pay them the amount, and on her failure to do so, the master should first sell all the real property

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purchased by the widow, *then remaining in her possession, if so much should be necessary, to pay the children, and if that should prove insufficient, he should then proceed to sell so much of the property mortgaged by her to Barelli, as would be sufficient for that purpose. This was at February Term, 1837.

The complainant further states in his bill, that the widow, Sophia Messervey, with her children, had removed to Philadelphia, and before and pending the proceedings before referred to, were in great want and distress, and he was induced to lend and advance to the defendants, Sophia C. and Elizabeth, who had attained full age, the sum of two thousand dollars, and that they, on the 15th June, 1833, gave him their bond for the amount; and to secure the payment, mortgaged and assigned all their interest in the real estates inherited from their father; which was recorded in the proper office, within the time limited by law. And that as a further security, they, some time afterwards, con-

fessed a judgment for the amount; and that on the 11th January, 1838, and before the execution of the order of sale of February Term, 1837, he gave notice to Mr. Gray, the commissioner of the court, of the existence of his mortgage, and that he should claim their interests in the proceeds of the sales. The money due to the children not having been paid, conformably to the order of February Term, 1837, the property was sold by Mr. Gray, the commissioner, on the 15th January, 1838. And the complainant states in his bill, that anticipating that there would be no sufficient bidder at the sale, it was understood that the property should be knocked down to the defendant, Phillip J., the eldest brother, for the benefit of all concerned, and should stand in his name until he could be appointed guardian of the minor children, and settle with the complainant and the adult children. That the matter, with his consent, remained in this unsettled state for a long time, and until he understood that the said Phillip J. had receipted to Mr. Gray for the interest of the minor children, to whom he had been appointed guardian, and as the attorney in fact of defendants, Sophia C. and Elizabeth, for their entire interest in the estates; and that Mr. Gray had executed titles to him for the property, and the deed had been recorded. That he thereupon called upon Mr. Gray, who immediately summoned the defendant, Phillip J. before him, who admitted the justice of complainant's claim, and consented that the receipts which he had executed, as the attorney of Sophia C. and

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Elizabeth, should be *rescinded, as made by mistake. That he also agreed to give bond, with personal security and mortgage, to the commissioner, for the amount to which defendants, Sophia C. and Elizabeth, were entitled, representing that defendant, Gatewood, would be his security. He, himself, gave the bond and mortgage, but never gave any personal security. Complainant was informed, and believed, that the said defendant, Gatewood, had undertaken to be his security, but subsequently refused to do so. The bond and mortgage, so executed, were assigned by the commissioner to the complainant. The times at which these circumstances transpired are not stated in the bill.

The complainant further states in his bill, that the defendant, Phillip J., was a clerk in the office of the defendant, Gatewood, and had become indebted to him in a considerable amount, and that he procured the said Phillip J. to execute titles to him for the property he had purchased at the sale, in which $13,000 is stated as the consideration. The complainant charges, that no consideration whatever was paid for the said conveyance; that Gatewood took it with full knowledge of his liens on the property. That he well knew that Phillip J. had not the means of paying for the property, and that he had never paid for it. That his object was to indemnify himself against the losses which he had sustained by the defalcation of defendant, Phillip J., at the expense of his family, &c., &c. The bill goes on to charge, in various ways, that defendant, Phillip J., had no authority from the defendants, Sophia C. and Elizabeth, to vacate their interests in the estate. That the said Phillip J. paid nothing on account of his purchase at the sale by the commissioner; and that these facts were known to the defendant, Gatewood, and that to secure himself against the defalcations of the said Phillip J. as his clerk, he has aided him in imposing on the commissioner, to obtain the titles to the property, well knowing of the liens which complainant had on it under the mortgage from Sophia C. and Elizabeth.

Such are the substantial allegations found in the bill, and the prayer is, that the bond and mortgage executed by defendants, Sophia C. and Elizabeth, to complainant, shall be decreed to be a lien on their interest in the estate, and a charge upon it, taking precedence of the conveyance from defendant, Phillip J., to defendant Gatewood; and that unless the money shall be paid at a short day, the property should be sold to satisfy the same.

The defendant, Phillip J., has not answered, and as the defence of the defendant,

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Gatewood, and that of Sophia C. and Eli*zabeth, rests on entirely different grounds, I shall consider, first, that of Gatewood. He denies, minutely and fully, all knowledge of the complainant's interest in the property in controversy, and all the allegations of fraud charged against him in the bill; and he states, that in the year 1839, and for two or three years before, defendant, Phillip J., was and had been his clerk, and had his entire confidence, until September, 1839, when it was discovered that he had abused his confidence, and was largely indebted to him for his defalcations. At first, it was not supposed to exceed $5000, and as an indemnity, the said Phillip J. proposed to mortgage to him a house and lot in Meeting street, and another in Tradd street, two of the houses and lots mentioned in the bill, of which he represented himself as the owner, having purchased them at the sale of the commissioner, but stated at the time, that to enable him to procure the title deeds, it would be necessary for him to give a bond to the commissioner, with security, as guardian of his minor brother, and proposed to this defendant to join him in the said bond as surety, to which he assented, and did so, and that he has since paid to the said minor, on his coming of age the sum of $————, being all that he is ascertained to be entitled to, and is ready and willing to pay any balance that may be found due to him. That the defendant Phillip J. having settled with the commissioner, and obtained from him titles

to the said houses and lots, and this defendant believing him to be the absolute and bona fide owner, accepted from him a bond, conditioned for the payment of the said sum of $5000, and by way of security for the payment, accepted a mortgage of the house and lot in Tradd street. The bond and mortgage bears date the 26th September, 1839, and defendant states, that before he accepted this security, he employed counsel to investigate the title, who represented it as good, and the property unincumbered. This defendant states, that on a further examination of defendant, Phillip J.'s administration of his affairs, as clerk, it was discovered that he was a defaulter in the further sum of $5000, in addition to that before disclosed, and to secure the payment of this sum, he accepted a bond for the amount, and a mortgage on the house in Meeting street. They bear date the 14th November, 1839. It was, upon further investigation, also afterwards discovered that the said Phillip J. was a defaulter with this defendant, as clerk, in the further sum of $3000, and to secure the payment of this last sum, gave to this defendant another mortgage on the said

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house, to*wit, in Meeting street. This bears date the 25th January, 1840. That having dissolved all connection with the said Phillip J., this defendant, as the most simple and direct way of foreclosing his mortgages, obtained from him a conveyance, in fee, of the houses and lots mortgaged, in which the consideration of 13,000, the aggregate of the three bonds, is expressed. This conveyance was executed and bears date the 17th September, 1840. He supposes that the counsel employed by him, informed himself of the proceedings under which Phillip J. purchased the property, and of the existence of the mortgage or assignment from Sophia C. and Elizabeth, to the complainant. This defendant had, before he obtained an absolute conveyance from Phillip J., heard that complainant had some claim on the shares of Sophia C. and Elizabeth, but had never heard of the existence of their mortgage or assignment. He knew that Phillip J. had purchased at the sale of the Commissioner, and believed that he paid no money, but supposed that he had paid, or made satisfactory arrangements with the parties really interested, and by that means acquired the title.

This defendant states, in his answer, that he has been informed that at the sale of another house and lot in Meeting-street, by the sheriff, belonging to the estate of the intestate, under execution, acting as the friend, and for the benefit of the family, the complainant became the purchaser at $70, with the understanding that he was to reimburse himself out of the same, for any sums he had or might advance them: and he believes it would appear, from a full exposition of the transactions and accounts between Sophia C. and Elizabeth and the complainant, that his claim against them had been fully satisfied; and if not entirely secure, that he was fully secured by the purchase of the said house and lot. And he further states his belief, that if complainant has obtained from Sophia C. and Elizabeth the mortgage or assignment stated in the bill, it was long after Philip J. had mortgaged and conveyed to this defendant. But it is best to state here, that this last statement of the answer is not sustained by any proof.

In the statement of the case, as derived from the bill and answer, I have intentionally omitted many charges and allegations, which struck me as wholly immaterial, as well as many that are retained, to the questions involved in the case, which, from the view I have taken of them, arose out of a

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few well ascertained *facts, except as to the infancy of defendant, Elizabeth, which I shall more particularly notice.

Mr. Gray, the commissioner, who sold the property, under the order of the court, testified that he offered it for sale, for cash, on the 15th February, 1838, and that it was bid off by the defendant, Philip J., at $7400. On the 27th of May following, he paid on account of the purchase, $519, which was applied to the payment of the expenses. He paid no more money. It was understood that he represented all the parties, but the execution of the conveyance to him was delayed until he could obtain the necessary authority to receive the shares of the other children, amounting to $1146.73, each. Laurens Messervy, one of the children, admitted to witness, that he had received his share. On the 1st October, 1838, Philip J. gave witness a receipt for his own share, and the share of his minor brother, George, to whom he had been appointed guardian. He also presented a paper writing, purporting to be an authority from Sophia C. and Elizabeth, to receive their shares, and acting on the faith that it was authentic, he accepted his receipts for their shares also, and executed titles to him for the property sold. Witness admits, that notice had been given him of the complainant's claim before the sale, but that he had forgotten it when he settled with Philip J. His attention was some time after called to it by Mr. Memminger, the solicitor of the complainant. He, thereupon, called on Philip J. to account for the shares of Sophia C. and Elizabeth. He, Philip J., then proposed that the former settlement should go for nothing, and that he would give a bond and mortgage of the property to secure their shares. Witness knew that he had before given a mortgage to defendant, Gatewood, and he then proposed to give Gatewood as surety to the bond. Witness took the bond and mortgage from Philip J., but Gatewood declined joining in the bond. He never told witness that he would. Gatewood was surety to the bond given by Philip J. for the faithful dis-

charge of his duty as guardian of his brother, George, and paid the amount of his share.

Col. Hunt, sworn for defendant, stated that a small wooden house in Meeting-street, which had belonged to the estate of the intestate, was sold by the sheriff, under an execution against the widow, and purchased by the complainant, at a very low price, but don't think it was worth more than eight hundred or one thousand dollars. Complain-

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ant told him at the time, that he was *acting as the friend of the family, and did not wish or intend to make money by it.

In the absence of any proof that defendant, Gatewood, had actual notice of the mortgage from Sophia C. and Elizabeth to the complainant, at the time he accepted the mortgages from Philip J. to himself, his answer must be regarded as conclusive; and in the argument at the bar, the case was put principally on the ground, that the recording of the mortgage was itself notice. Conceding the truth of the proposition, that the recording of a mortgage on property is, in legal effect, notice to subsequent purchasers and mortgagees, its application to the case is denied on the other side, on the ground, that all the interest which Sophia C. and Elizabeth had, was a lien on the property for their distributive shares of the first sales, at which the widow, Sophia Messervey, was the purchaser. That their mortgage to the complainant conferred no interest in the property itself, and could only operate as an assignment of their lien; or, to express it in the language of the counsel, as the mortgage of a mortgage; the recording of which could not operate as notice, because there is no law requiring it to be recorded.

The Acts of the Legislature regulating the recording of mortgages, apply only to mortgages of visible tangible property, and not to mortgages, so to express it, of choses in action, which are not technically the subject of mortgage, but may be transferred from one person to another by assignment or delivery; and such I take to be the character of the interest which Sophia C. and Elizabeth had in the property at the time they mortgaged or assigned to complainant.

The Act of 1791, regulating the distribution of the estates of persons dying intestate, provides, in certain cases, for the sale of real estates for distribution amongst the heirs, and as a security, gives a lien on the land for the purchase money; and if this proves insufficient to pay it, the parties have a remedy against the purchaser for what might remain due. The judgment of the court in Messervey et al. v. Barelli, puts the rights of Sophia C. and Elizabeth on the footing of a lien merely. Their right to the property was gone, and that lien was all that remained to them. The recording of their assignment or mortgage, as it is called, of that lien to the complainant, could not operate as notice to defendant, Gatewood, because, as said in the argument, no one would ever think of resort-

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ing to the Register's office to ob*tain knowledge of a deed which was not required by law to be recorded.

The counsel for complainant has referred to M'Leod v. Drummond, 14 Ves. 361–2, to shew that he who actually pays money on the faith of a security, is more favored than a subsequent purchaser, who accepted a conveyance in satisfaction of an antecedent debt; and there seems to be much reason in the distinction; but neither this, nor the question of notice, necessarily enter into the determination of this case. Both will be superseded by the inquiry, whether the defendants, Sophia C. and Elizabeth, have been divested of their lien on the property by the sale by the commissioner, and his conveyance to Philip J. If not, it follows that it was not divested by his conveyance to the defendant, Gatewood.

In making the sale and the conveyance to Philip J., the commissioner acted in a ministerial capacity, and the order of the court under which he acted, was his warrant of attorney, and like all other special agents he was bound to conform strictly to it. All limited powers are to be strictly construed, and if the agent do any act not expressly authorized, or necessarily implied, the principal is not bound by it; and this more forcibly applies to ministerial officers, because they are agents appointed under the authority of the general law, in the selection of whom the party has no immediate agency. He cannot confer the power on another, whom he might esteem more worthy of confidence, but must abide the act of the agent of the law.

By the order under which the commissioner sold this property, he was directed to sell it for cash, and out of the proceeds to pay the children of the intestate their distributive shares. The power to make the conveyance to the purchaser is necessarily implied in the power to sell, but the right to exercise it was dependent on the previous payment of the money by the purchaser. The purchaser here never paid to the commissioner a dollar beyond what was necessary to defray the expenses of the suit. As said, in the case of Messervey v. Barelli, if the purchaser himself was entitled to receive the money, his acknowledging it would have been a substantial compliance with the terms of the sale, but it is not now even pretended that the defendant, Philip J., had any authority to receive the shares of Sophia C. and Elizabeth. The pretence that he had, was a fraud, which he but too successfully practiced on the commissioner.

Suppose that the defendant, Sophia C. and

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Elizabeth, on the *one part, and defendant, Gatewood, on the other, have no other security than the property itself, which of the

two ought to bear the loss? They, as before remarked, had no control over the subject. They had surrendered their rights to the care of the court, and were not called on to do more than await the execution of its decree. Gatewood, on the contrary, was at liberty to act for himself; he had the right to examine the title through all its ramifications, and to be satisfied that Philip J. had paid the purchase money required by the order for the sale, and to accept or reject the conveyance, as he might think fit; and having trusted to his own judgment, as between himself and these parties, he ought to bear the loss. But there is another consideration growing out of the principle inculcated by the case of M'Leod v. Drummond. Gatewood paid no money in consideration of the conveyance from Philip J., but accepted it in satisfaction of a precedent debt, and it cannot comport with equity, that the money of the defendants, Sophia C. and Elizabeth, should be taken to pay that debt.

The defence set up by Gatewood, that the complainant had been satisfied the debt due to him by Sophia C. and Elizabeth, in the purchase of the house in Broad-street, cannot avail any thing, if, indeed, there is any justice in the allegation. As between Gatewood and Sophia C. and Elizabeth, they would not only be entitled to an account from complainant, but to their shares of the proceeds of the sales by the commissioner of the property conveyed to him by Philip J.

Having thus disposed of the defence of Gatewood, I will proceed to consider that of Sophia C. and Elizabeth.

They, in effect, admit in their answers, that they executed the bond, and what is called a mortgage, set out in the complainant's bill. They deny, however, that they received themselves any consideration, or that complainant ever advanced any money to either, except a very small amount to Elizabeth, for which she gave him a receipt, but admit that they were made in consideration of a debt due by their mother to complainant, or a liability incurred for her, and that they were induced to enter into them by the entreaties of their mother; so that no question remains about the sufficiency and bona fide consideration of the bond and mortgage.

They state, in their answer, that before the execution of the bond and mortgage, a wooden building in Broad-street, (the same referred to in the answer of Gatewood,) was

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sold by the city *sheriff, under legal proceedings against their mother, and that by an arrangement between the complainant and their mother, and the family, he bought it in, at the sum of $, for the family; and at the time of the execution of the bond and mortgage, it was agreed between Dr. W. Schmidt, junior, the son of the complainant, who acted as his agent in taking the bond and mortgage, that the complainant should hold the house and lot, and receive the rents and apply them to the payment of the debt due him by their mother. They deny all recollection of having confessed a judgment to the complainant for the amount of the bond, and that they ever authorized Philip J. to receive their shares of the property sold by the commissioner, Gray, and purchased by the said Philip J. They deny, also, that they were parties to the agreement set out in the bill, that Phillip J. was to bid off the property at the commissioner's sale for the benefit of all concerned, or were ever consulted about it.

The infancy of defendant, Elizabeth, at the time of the execution of the bond and mortgage is relied on in bar of the relief sought against her.

The evidence of Col. Hunt, before referred to, establishes very clearly, that there was some agreement or understanding between the complainant, and at least the defendant, Sophia, the widow, that he was to bid off the wooden house in Meeting street, and that after indemnifying him for what he might pay for it, either by leasing or selling, the balance of the value if any, should go to the use of the family, in proportion I suppose to the interests which they severally inherited from the intestate; and the probability is, that that was the reason why it sold so much under its value; and the complainant is bound by it. I shall, therefore, order that it shall be taken into the account in the settlement between him, Sophia C. and Elizabeth.

The evidence as to the infancy of Elizabeth, at the time of the execution of the bond and mortgage, is involved in some doubt. On this subject, Col. Hunt stated that he had been employed to file a bill to settle the estate of the intestate, and produced a memorandum made upon the authority of Sophia, the mother, and her children, in which, amongst other things, the ages of the children were stated; and from this, it appears that Elizabeth was of full age at the time of the execution of the bond and mortgage. A letter from Sophia C. to complainant, dated 24th March, 1833, was also given in evidence, in which she states that defendant, Elizabeth was then of age,

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and proposing that if he would *prevent the sale of the property at the instance of Barelli, they would indemnify him.

Opposed to this, an old paper, represented as a leaf from the family Bible, and containing the family register, was produced, in which the birth of defendant, Elizabeth, is set down as on the 22d January 1813; (the bond and mortgage are dated 15th June, 1833.) This entry, and two others, which immediately follow, are said to be in the handwriting of one Peigne, a friend, or perhaps a relation of the family. They appear, from

inspection, evidently of modern date, and were obviously written with the same pen, and the same ink, and there is no evidence when they were made, or upon what authority or information.

Mrs. Shirer, sworn for defendants, testified, positively, that she was born on the 22d January, 1813. She is the sister of Sophia, the widow, and states that she waited on her during her confinement, and recollects the time of the birth, from the fact that she herself was married in May afterwards.

I attach no importance at all to the evidence furnished by the family register, as to the age of Elizabeth, because it is not known upon what authority, or on what information, it was made: and, for any thing that appears, might have been made for the occasion. This defence, therefore, rests entirely on the evidence of Mrs. Shirer, but that is opposed by the evidence of Col. Hunt, on information derived from the mother, at a time when there was no motive to misrepresent her age, and who, of all others, would be supposed to be most accurate, and by the letter of Sophia C. I have known a few persons whose memory of the precise dates of events might be depended on, but they are very few; and when Mrs. Shirer undertakes to speak with perfect confidence of the day of the birth—a matter in which she was not particularly interested—a doubt would naturally arise as to the accuracy of her memory; and when it is recollected that Elizabeth, in joining in the bond, assumed the character of an adult, it cannot but be reasonably supposed that Mrs. Shirer was mistaken.

It is ordered and decreed that the master do ascertain and report what amount is due to complainant on the bond and mortgage of the defendants, Sophia C. and Elizabeth, including interest; and also the value of the wooden house and lot in Meeting-street, purchased by the complainant at the sheriff's sale, and the amount of the interest of the said Sophia C. and Elizabeth therein, including interest.

It is also further ordered, that the said

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master do also ascer*tain and report what is the amount of the distributive shares of the said Sophia C. and Elizabeth, of the sum bid by Philip J. Messervey, at the sale of the houses and lots in Tradd and Meeting-streets, described in the pleadings, made by the commissioner, Gray, including interest; and that unless the defendant, William C. Gatewood, pay to the complainant the amount thereof, within two months after notice of the said report, that the said master do proceed to sell the said premises, or so much thereof as may be necessary, for cash; and from the proceeds he pay to the complainant the amount of the debt due to him from the defendants, Sophia C. and Elizabeth, and if the amount of the said sales shall exceed the amount to which the said Sophia C. and Elizabeth may be entitled on account of the purchase by Philip J. Messervey, that he do pay the surplus to the defendant, William C. Gatewood.

And it is further ordered and decreed, that the said master do state an account between the complainant and the defendants, Sophia C. and Elizabeth, in which he shall charge the said Sophia C. and Elizabeth with the amount of the debt due on their bond and mortgage, and credit them with the amount which he may recover under this decree, and the amount of the interest of the said Sophia C. and Elizabeth in the said wooden house and lot in Meeting-street.

I do not think it a case for costs—each party must pay their own.

The defendant, William C. Gatewood, appealed from the foregoing decree, and now moved that the same be reformed, on the following grounds, viz.

1. That the deed of conveyance from the master in equity was an acknowledgment that he had received the purchase money in conformity with the decree under which the property was sold, and he (Gatewood,) was not bound to inquire further into the truth of that acknowledgment, and cannot be made to suffer for not having done what he was not bound to do.

2. That if Phillip J. Messervey was authorized to receive his sisters's shares of the purchase money, the exchange of receipts which took place between him and the master was substantially a payment of the purchase money to the master, and of their shares to them; and since it was the duty of the master to judge of the sufficiency of Phillip's authority to receive their shares, as between the master and all other persons, ex-

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cept Phillip himself, *he, Phillip, must be taken to have had authority. And if he was not authorized to receive their shares, and practiced a fraud upon the master, he, the master, is responsible to them, and there is no question between them and Gatewood, as the decree supposes, whether the loss shall be borne by them or him, but it must be borne by the master himself, by whose want of care and vigilance in the discharge of an official duty, it was occasioned.

3. That it was neither proved nor admitted that Phillip J. Messervey had not authority to receive the shares of his sisters, their denial of his authority, contained in their answer, not being evidence against their co-defendants.

The defendant Elizabeth C. Messervey, also appealed from so much of the decree as directs an account to be taken between the complainant and her, in which she shall be charged with the amount due on the bond of the said Sophia and Elizabeth, mentioned in the bill, because she insists that it was sufficiently proved that, at the date of the

bond, and of the alleged confession of judgment thereon, she was under the age of twenty-one years.

And all the said defendants appealed, and insisted that the bond of the defendants, Sophia C. and Elizabeth, to the complainant, should be credited with the whole value of the house and lot in Meeting street purchased by complainant at the sale by the city sheriff.

Mazyck, for the appellant.
————, contra.

Curia, per JOHNSTON, Ch. We perceive no sufficient ground to distrust the chancellor's judgment, touching the infancy of Elizabeth Messervey, and, therefore, his decree upon that point is affirmed.

We also concur in his conclusion, that the premises are liable in the hands of Gatewood to the plaintiff's demand. But we do not put the decree on this point upon any such ground as was intimated in argument. The remedy is not administered under the idea that the statutory mortgage or lien which attached upon the property when purchased by Mrs. Messervey, attended it into the hands of Phillip J. Messervey. The sale at which he purchased was made under that lien; and divested the lien as in case of a sale under an ordinary mortgage.

Nor do we wish to be understood as putting the decree upon the ground indicated by the chancellor; that the purchase was void for mere non-compliance with the terms

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of the sale. It is *not deemed necessary to determine that point; because there are stronger and better grounds for sustaining the decree.

We sustain the decision upon the ground substantiated by Gatewood's answer, that the title was obtained from the commissioner for his benefit and with his privity by one whom he knew to be incapable of paying the purchase money; having tested that fact in his incapacity to satisfy the demands which he, himself, held on him. While we take pleasure in stating that there is no reason to suppose that this defendant had the slightest suspicion that the authority under which Phillip undertook to receipt for the shares of his sisters was not genuine, we cannot shut our eyes to the plain fact that the effort was to obtain satisfaction of his demands by a merely formal proceeding; in which the property of others was to be applied to his debt, while they receive nothing and were expected to receive nothing for it. So far as the knowledge of the agent to whom he confided the investigation of the title was concerned, he had notice of the anterior proceedings before he took his first mortgage; and he, himself, admits that before he took his title, he had such notice of the plaintiff's claim as should have put him on his guard.

In deciding this case upon the bona or mala fides of the transaction we attach much importance to the fact that the mortgages and conveyance were not taken by Gatewood for money advanced upon the faith of them; but as a security or satisfaction for an antecedent debt or liability. The case is substantially analogous to that of a person dealing with an executor for the assets of his testator's estate. In McLeod v. Drummond, (14 Ves. 362) referred to in the circuit decree, Lord Eldon said: "The circumstance that the assignment is made, not as a pledge for money about to be borrowed, but for an antecedent debt, seems to me extremely material. Lord Thurlow, in Scott v. Tyler, seems to have conceived that much depended upon that circumstance; observing that three years after the death of the testator, the bankers took these effects, which they must know had been the testator's, from her, whom they also knew to be his executrix, not for money then advanced, but as a pledge for a debt contracted with them before, on her own account. Indeed, when the enquiry is, whether the party taking the assets of the testator by means of such a pledge, is, or is not, guilty of fraud, is seems very material whether he is endeavoring to procure to himself payment of a debt already due, and which the executor has no means of paying with his own money, or is exercising a

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choice, whether *he will or will not lend his money upon the pledge then offered to him. Undoubtedly, suspicion of fraud must always arise, where a party, having a debt due to him by the executor, takes in satisfaction of that debt, the assets which he knows belong to the executor only in that character. But where a man is applied to for a loan of money, there is no motive for fraud. He may keep his money if not satisfied with the security. He has no interest in advancing his money upon a doubtful security, and taking his chance of getting it back by means of rendering that security available." This whole passage is pregnant with arguments against the transaction now under investigation. Can it be believed that Mr. Gatewood would have advanced money for these premises? or that he would have accepted them either as a security or as a satisfaction of his demands if his debtor had possessed other property sufficient to have indemnified him? He was driven by the necessities of his position to suffer loss or to indemnify himself at the expense of others, and, fully aware of the injury he was inflicting on them, he accepted mortgages and a conveyance from one who took a title for the mere purpose of transferring it to him. He therefore in justice and in equity occupies the position of Phillip J. Messervey under whom he holds and must be subject to the same risks and conditions. Indeed Phillip may be substantially regarded as his agent to procure the title for him from the master, and the principal,

by well recognized principles of law, is chargeable with the acts of him whom he employs.

We turn now to the remaining ground of appeal, relating to the premises purchased by the plaintiff under executions against Mrs. Messervey.

It is alleged that this purchase was made at a sacrifice, under an agreement on the part of the plaintiff that the family should have the benefit of it. The evidence rests in parol. It is argued that the family, trusting to the agreement, permitted the plaintiff to purchase at a sacrifice; that to allow him to retain the property under such circumstances would encourage fraud, and that, upon this distinct ground, independently of the statute of frauds, a trust should be decreed. Undoubtedly there are cases (such as McDonald v. May, 1 Rich. Eq. 91) where a party, who enables himself to purchase at an under rate by representing that he is buying for another, is liable to have his purchase set aside for fraud. These are cases where com-

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petition is fraudulently re*duced or destroyed. In such cases, it matters not whether there was an agreement or not.

Indeed, in the latter case, where of course the representation is wholly false, that circumstance serves only to enhance the fraud complained of. Such cases as these steer entirely clear of the statute of frauds. The evidence of the purchaser's representations is received not for the purpose of substantiating the supposed agreement, but for the purpose of shewing the means by which he effected his fraudulent design, and when received it is employed not for the purpose of enforcing the contract but for that of setting it aside.

But no such circumstances have been developed in this case. The fraud insisted on consists merely in the non-fulfilment of the alleged agreement, and depends, of course, entirely upon the question whether there was in fact an agreement to be performed, and that preliminary fact the statute will not allow to be established by parol.

But these premises were purchased by Mrs. Messervey at the partition sale, and were subject in her hands to the statutory mortgage in such cases. That lien still attaches upon the property in the hands of the plaintiff; who purchased her property, and must take it subject to the incumbrances upon it at the time he bought. Upon this ground we think it liable to the extent of the interests of Sophia and Elizabeth in whatever balance of Mrs. Messervey's purchase may remain unpaid.

It has been insisted that the interests of the whole family in this balance should be credited upon the plaintiff's demand against Sophia and Elizabeth. But very clearly Mrs. Messervey, being by her purchase both debtor and creditor to the extent of her own share, that must be considered as paid and the plaintiff holds the property discharged from it. Then as to the shares of the children; but three of them are parties to this suit. It would be improper to apply the shares of the absentees for the benefit of the parties before us; especially when it is clear that upon no principle can such an application be sustained. But it does appear to us that the share of Phillip J. Messervey, by whom the sisters and Gatewood have suffered, should be taken into account; in order to save to these defendants (the sisters in the first instance) as much as possible of the wreck which he has left; and it is ordered accordingly.

If after taking the account, it shall be necessary to sell the premises bought by the plaintiff under execution, by way of enforc-

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ing *the lien of the defendants, Sophia and Elizabeth, an order to that effect may be moved for.

In all respects except as modified by this opinion the decree is affirmed and the appeal dismissed.

JOHNSON, Ch., concurred.

DUNKIN, Ch. I concur in the result.

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2 Rich. Eq. 179

THE BANK OF THE STATE OF SOUTH CAROLINA v. JAMES B. CAMPBELL, JAMES ROSE and Others.

JAMES ROSE and Others v. THE BANK OF THE STATE OF SOUTH CAROLINA, JAMES B. CAMPBELL and Others.

(Charleston. Jan., 1846.)

[*Mortgages* ⇐274.]

By the terms of the Fire Loan Act, 7 Stat. 157, the Bank, before lending, must be satisfied that the property proposed to be mortgaged to secure the loan, "is free from incumbrances." Application was made for a loan under this Act, on a pledge of property already incumbered by a mortgage to the Bank, and it was verbally stipulated between the parties, that the mortgage for the fire loan should have precedence of the prior mortgage, and be regarded as the first lien. *Held*, that the stipulation was binding on the mortgagors; and that a subsequent purchaser at sheriff's sale of the equity of redemption took subject to both mortgages.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 718; Dec. Dig. ⇐274.]

[*Joint Tenancy* ⇐12; *Mortgages* ⇐275.]

Joint tenants, five in number, borrowed money on their joint note, and, to secure its payment, a mortgage, purporting to convey the whole estate in the joint property to secure the sum borrowed and any sums which might thereafter be borrowed, was drawn in the name of the five joint tenants, but was, in fact, executed by only four of them. The money borrowed was carried to their credit, on the account book kept by their clerk, as money borrowed "on mortgage of the premises." The mortgage was

recorded, and further sums were afterwards borrowed from the same lender on the joint notes of the mortgagors. *Held*, that the joint tenant who had not executed the mortgage, must be presumed to have known of it, and was bound by it as an equitable estoppel; and that a subsequent purchaser, at sheriff's sale, of the title of the mortgagors, was also bound by it.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. § 17; Dec. Dig. ⟸12; Mortgages, Cent. Dig. § 772; Dec. Dig. ⟸275.]

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[*Judgment* ⟸780.]

*A judgment creditor is bound by all prior equities which bind his debtor, and so is a purchaser at sheriff's sale under the judgment.

[Ed. Note.—Cited in Boyce v. Shiver, 3 S. C. 528; Fraser & Dill v. City Council of Charleston, 11 S. C. 519; Parker & Co. v. Jacobs, 14 S. C. 117, 37 Am. Rep. 724; McAfee v. McAfee, 28 S. C. 224, 5 S. E. 593.

For other cases, see Judgment, Cent. Dig. § 1341; Dec. Dig. ⟸780.]

[*Corporations* ⟸479; *Principal and Surety* ⟸169; *Subrogation* ⟸10.]

The trustees of a company borrowed money for the use of the company, and mortgaged property, which they held for the use of the company, to secure the payment of the money borrowed, and afterwards, on the company being incorporated, conveyed the mortgaged premises to the corporation. The corporation also borrowed money from the same lender on mortgage of the premises, and it was agreed, between all the parties, that the mortgage by the corporation should take precedence of the mortgage by the trustees and be considered as the first lien. The lender sued the trustees for the money borrowed by them, recovered judgment and assigned it. *Held*, that the trustees stood as sureties for the corporation, and had the right as sureties to the security of the mortgage given by them. *Held*, further, that they might sustain a bill against the lender and his assignee, and a purchaser at sheriff's sale of the corporation's equity of redemption, to compel a resort, in the first instance, to the mortgaged premises before enforcing the judgment recovered against them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1872; Dec. Dig. ⟸479; Principal and Surety, Cent. Dig. § 475; Dec. Dig. ⟸169; Subrogation, Cent. Dig. § 30; Dec. Dig. ⟸10.]

[*Corporations* ⟸448.]

[Prior to the organization of a corporation, the persons who, under the agreement for the organization, were to act as its trustees, borrowed money on their joint note, and executed a mortgage as security on property held by them in trust for the future corporation. One of the trustees did not execute the note, but the proceeds of the loan were paid over to the corporation on its organization, and afterwards the trustee who had not joined in the note participated in the procuring of another loan from the mortgagee, which the latter made under an agreement with all the trustees that it should be prior to the former. *Held*, that the trustee who had not executed the first note and mortgage was estopped from asserting its invalidity.]

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1790; Dec. Dig. ⟸448.]

In order fully to understand these cases, reference should be made to the case of Robert Wotherspoon, James Rose, William A. Carson, Henry Gourdin and Richard W. Cogdell against The Bank of the State of South Carolina, reported in Speers' Eq. 488. Before that case was heard in the Court of Appeals, the bill in the case first above stated was filed. It alleges that Robert Wotherspoon, James Rose, William A. Carson, Henry Gourdin and Richard W. Cogdell, on the 24th May, 1837, being seized and possessed of a lot of land in Meeting street, on which the New Theatre is erected, borrowed, on account of the company engaged in building said Theatre, six thousand dollars, and to secure the said loan, and any future loans which might be granted to them on the same account, mortgaged to the complainants the whole of the said lot, and all the buildings and erections, with the rights, members and appurtenances thereunto belonging, and that on the same account, other loans were made, and payments received from time to time, until the said debt reached the sum of ———— which, with interest from ———— is now justly due and owing to the complainants, and secured by the said mortgage. That by an Act passed on the 20th December, 1837, the company for whom the mortgagors had acted in the foregoing matters, were incorporated by the style and title of the Charleston New Theatre Company. That on the 16th September, 1839, the mortgagors conveyed the premises to the corporation, and the corporation obtained a

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fur*ther loan from the complainants, under the provisions of the Act for rebuilding the city of Charleston, to the amount of six thousand five hundred dollars, and by deed bearing date the 19th November, 1839, mortgaged the premises to secure the payment of the same according to the provisions of the Fire Loan; and it was then and there stipulated in behalf of the complainants, that as between the complainants and the said Robert Wotherspoon, James Rose, Henry Gourdin, W. A. Carson and R. W. Cogdell, the said mortgage for the Fire Loan should be regarded as the first mortgage, and have priority to the mortgage of the 24th May, 1837. But the complainants did not agree to release the mortgage of the 24th May, nor to give up any security which they held for the payment of the whole of the money which they had thus lent and advanced on account of the Theatre.

That on the 7th March, 1842, under a judicial sale by the sheriff of Charleston District, by virtue of an execution of Cornelius & Co. against the Charleston New Theatre Company, the house belonging to the corporation was sold, and conveyed by Alex. H. Brown, sheriff of Charleston District, to James B. Campbell, Esq. for the sum of twenty dollars, who entered upon his title so acquired, and has taken the rents and profits of the same to his own use. That Robert Wotherspoon, one of the mortgagors before mentioned, has become bankrupt, and his estate assigned to Richard Yeadon, Esq. and the incorporated company, called the Charleston New Theatre

Company, is insolvent, and has ceased to do any corporate act.

The bill prayed that the mortgaged premises be sold to satisfy, 1st. the mortgage of 1839, and 2dly. the mortgage of 1837.

The answer of the Charleston New Theatre Company admitted the allegations of the bill, and that the complainants were justly entitled to a sale of the mortgaged premises. The answer of James Rose, Henry Gourdin, William A. Carson and Richard W. Cogdell, was to the same effect.

The defendant, James B. Campbell, in his answer, neither admitted or denied the existence of the mortgage deed of May 24th, 1837, in manner and form as set forth in the bill; but for the terms of the same, referred to the original deed itself, when it should be produced for inspection. But he altogether denied that it was then, or had been since his purchase, a valid subsisting security, and claimed that, if it ever did exist, it had been long since in law cancelled and annulled, and

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ought to be formally *satisfied and discharged; and insisted, that the debt claimed to be secured by the mortgage, was a new and subsequent debt, for which the mortgage never was a security. And he relied upon the law of the land, prescribing the only order and manner in which mortgages shall be paid, and upon the circumstances and transactions between the parties, to show that the prior mortgage of May 24th, 1837, ought to be deemed to have been satisfied at the time of the Fire Loan mortgage. And especially did he rely upon the judicial opinion of his Honor Chancellor Dunkin, delivered at the instance of the complainants in the case of Wotherspoon and others against the Bank.

The case was heard before Johnston, Ch. at Charleston, February, 1844. At the hearing, the allegations of the bill were substantially proved. It appeared, however, that the mortgage of the 24th May, 1837, was not signed by W. A. Carson, one of the defendants, as alleged in the bill.

His Honor took time to consider of his decree; and on the 23d November, 1844, the complainants recovered judgment in the Common Pleas, and issued execution thereon, against the defendants, James Rose, William A. Carson, Henry Gourdin and R. W. Cogdell, for the debt alleged to be secured by the mortgage of 1837, and on the same day assigned the judgment to Martin, Starr and Walter.

On the same day, the defendants, James Rose, W. A. Carson, Henry Gourdin and R. W. Cogdell, filed their cross bill against the Bank of the State of South Carolina, James B. Campbell, Martin, Starr & Walter and the Charleston New Theatre Company, in which, after alleging the proceedings in the original suit and the assignment to Martin, Starr and Walter, they pray for a sale of the premises to satisfy the mortgages, for an account of the rents and profits, &c. and for an injunction to restrain proceedings under the judgment recovered against them.

On the 25th November, the complainants, The Bank, having no further interest in the cause, moved the court to dismiss their bill on payment of costs. This motion was refused; see the case as reported, [Bank of South Carolina v. Rose,] 1 Rich. Eq. 292.

On the 29th November, his Honor, Chancellor Johnston, filed his circuit decree, as follows:

Johnston, Ch. The pleadings and the evidence indicated by my notes taken at the hearing, sufficiently state the case.

In the suit brought by the trustees against

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the Bank, a point *was decided which may assist, to some extent, in the determination of this case. It was there established, as a matter of fact, that, at the execution of the mortgage of 1839, a binding stipulation was made between the Bank and the trustees that that mortgage should take precedence of the mortgage of 1837; and upon that ground the trustees' bill was dismissed. That decree is binding on the trustees, and estops them from contesting here the rights of the Bank to observe that order in the application of the fruits of their two mortgages which conforms to the stipulations; and which will throw the burden upon the trustees, of satisfying any thing that may remain due on the senior mortgage, after the avails of the mortgaged premises shall have been applied, first, to the junior, and then, as far as they may extend, to the senior mortgage.

The only question left open as between the parties mentioned, is, whether the mortgages are unsatisfied and forfeited: and the answer of the trustees in this suit solves that question against them.

There is, therefore, no difficulty in this case, so far as the trustees are concerned; the only difficulties arise out of the defence of Mr. Campbell.

How stands the case as regards this defendant?

It has been established here that the mortgage of 1837, was a pledge of land held by the trustees in trust for the company; that it secured notes, discounted and to be discounted, for the benefit of the company, and of which they received the benefit; that the title of the land was then released and conveyed by the trustees to the company, to enable them by further mortgage to raise further sums of money; which they did by the fire loan and mortgage of 1839.

If we pause at this stage of the proceedings, will it admit of a doubt that, as between the company and the trustees, the company was bound to assume the debt of the trustees, and exonerate them from all personal responsibility under the mortgage of 1837? To all intents, the trustees were the sureties of the company: being bound

for a debt, the benefits of which were received by the company, and the company having received property from them which was bound for the same demand.

In this condition of affairs the judgment was obtained, under which Mr. Campbell bought the company's equity of redemption. Mr. Campbell claims the rights of the judgment creditor; and he is entitled to them—but what complaint could this creditor make?

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*It is said, that by the terms of the fire loan act, the Bank was inhibited from making loans on property already incumbered: and that the loan of 1839, was equivalent to a certificate from the Bank to the creditor that the lien of 1837 was satisfied. The Bank is an institution of the State; and the statute must be considered as the direction of the State to its agent in the dispensation of a great public charity, extended to the sufferers by the fire of 1838. The object and meaning of the Act cannot be mistaken. The directions were given with a view to the safety of the loan to be effected, and to secure a return of the money.

If a money lender were instructing his attorney in relation to monies put into his hands to be let out, he would give just such directions as the Legislature gave to its fiscal agent here; but if the attorney should, through oversight or an enterprising temper, take a new security while an older one still subsisted against the person accommodated; is it conceivable that his wrong amounted to more than a mere disobedience of orders? He might be responsible to his principal for any consequent loss, but the instructions of the principal could never be construed to represent an intention on his part that a disobedience of orders in making new contracts, should operate as a release of pre-existing contracts. This parallel is of service in the inquiry which now occupies us;—what was the intention of the Act? For if in the case I have supposed, we could not ascribe to a prudent man the intention to release all his debts, are we at liberty, under circumstances precisely similar, to attribute such a degree of folly to the State? The Bank may have acted unwisely in making the loan of 1839; but if so, she is answerable to the State, who has suffered the wrong.

It is surmised, that the judgment creditor may have been betrayed by the conduct of the Bank into a wrong impression with regard to his debtor. But how? The mortgage of 1837 was on record, and informed him that the debt of 1837 existed. Here was due notice. Why, then, should he, in a question whether the debt was satisfied or not, draw his conclusions, by mere implication, from the acts of the mortgagee, instead of going and putting the question plainly to him? Why should he conclude that the prior debt was either released or satisfied, when the statute does not declare it so?

Then it is argued that the note given by the trustees in 1840, must operate as a payment of the debt, and extinguish the mortgage of 1837. It is not absolutely certain

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that this note, which *was executed in precisely the form described in the mortgage, might not be passed as one of the after discounts covered by the terms of the mortgage. But suppose it operated as a payment. As I have said, the trustees were substantially sureties on the mortgage debt of 1837; and if a surety pays a debt, he is entitled to the benefit of the security thereby extinguished; and upon the principle of Finch v. Wenchelsea, 1 P. Wms. 277, he who extinguishes a specific lien, has a right to set it up, though he thereby disappoint a general creditor, such as the holder of a judgment.

If Mr. Campbell, therefore, measures his rights by those of the creditor, under whose judgment he purchased, his defence cannot avail him.

If he resorts to another position, and presents himself in the light of a subsequent purchaser, that will not vary the conclusion. For, as a purchaser, he was as little liable to be imposed on by the acts of the Bank, and had as little right to infer the satisfaction of the old mortgage, as the judgment creditor. Indeed, as a purchaser, unless under peculiar circumstances, he can stand but in two relations, and occupy but two positions. His relations are to the creditor under whose judgment he bought, and to the debtor whose property was sold to him. He can have no rights which the one or the other of these cannot uphold. We have seen that the former could have no just objections to urge. Still less could the latter complain: the acts out of which the complaint must arise being all traceable to the company themselves, the debtors in this case.

In stating the rights of a purchaser under judicial process, as I have, I accommodated my expressions rather to the general opinions, than to my own opinion: which is more briefly this: that the purchaser's rights are measured by those of the creditor: and the creditor's rights extend only to those which the debtor had when the lien or credit commenced; together with the privilege of setting aside any rights of which the debtor was subsequently deprived by fraud or collusion.

The plain fact, after all that can be said, is, that this defendant bought the company's equity of redemption, and is bound to redeem to the same extent as the company. The company was bound by the liens. He has bought the property at a certain sum, subject to the incumbrances; which is the same thing as if he had agreed to give the amount of the incumbrances and that sum for the property: so that although not per-

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sonally bound *for the debts, he would have no right even as between himself and the

company, to call on them to reimburse him for, or assist him to pay, what he may be obliged to expend in satisfying the incumbrances. In other words, he could not obtain property at a diminished sum, in consequence of its burdens, and then call on him whose property has been thus sacrificed, to make it valuable to him. I have said this, not with reference to this case, or to any pretension of the sort set up here, but because I believe a very general error of opinion exists upon the subject.

A single remark will close this judgment: and it is, that to this defendant, whose property is liable to the extent of both the mortgages, it can make no sort of difference in what order these liens are to be satisfied: nor can it have been any injury to him that the loan of 1839 was applied in part satisfaction of the first mortgage: he was, on the contrary, benefited by the application, since it diminished a debt for which his property was responsible.

It is decreed and adjudged, that the plaintiffs are entitled to have a foreclosure of both mortgages, which will be ordered as soon as it shall be ascertained what is due on them respectively; and that in case of sale, the proceeds be applied, in the first instance, to the junior mortgage. That the plaintiffs are also entitled to an account of the rents and profits of the mortgaged premises from the defendant, Mr. Campbell, from the time of his purchase; to be applied in the same order of payment. And they are entitled to a decree against the defendants, the trustees, for any balance that may remain of the mortgage of 1837, unsatisfied by the said foreclosure, sale, and the said rents and profits.

It is ordered, that the masters of the court take and state the accounts.

On the 13th and 14th days of February, 1845, the cross bill was heard, on evidence and argument, before his Honor, Chancellor Dunkin, at Charleston, who, in May following, filed an interlocutory order, enjoining Martin, Starr & Walter from enforcing the judgment assigned to them by the Bank.

The defendant, J. B. Campbell, appealed from the decree of Chancellor Johnston, and the order overruling the motion to dismiss, on the following grounds:

1. Because before decree or decretal order of any sort, pronounced or filed, the complainants having moved to dismiss their bill on payment of costs, the same should

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have been allowed, *and this defendant is entitled to the benefit of said motion, and no decree should thereafter have been pronounced.

2. Because so far as this defendant is concerned, and had or could have notice, his co-defendants, James Rose and others, trustees, were not sureties, but principal debtors, to complainants, and this defendant cannot be affected by secret subsisting equities between the trustees and other parties, to which he was in no wise privy, and without notice.

3. Because if it is true that the trustees are sureties, and defendant's title in fee at law is subject to equities binding upon him, of which he could have no notice, then at least the trustees, having a double security, which equity will marshal, cannot be aided by the mortgage of May 24th, 1837, until they shall have first exhausted the capital of the New Theatre Company, which capital is within the reach of the trustees, and not within the reach of this defendant, and is a full and perfect indemnity for their liabilities as sureties for the corporation, and it is only by the laches of the trustees that said capital has not been long since applied in full discharge of all debts and liabilities of the corporation.

4. Because, if the senior mortgage is in fact still subsisting, it is entitled by express provision of law to be paid in the order of date of its record, "and in no other order." But it having been already adjudged, that the mortgage junior in date of record is entitled to precedence of payment, this appellant insists it is thereby established that said mortgage of May 24th, 1837, is extinguished, and no longer a subsisting lien upon the premises.

5. Because the corporation having executed the fire loan mortgage with a warranty of title therein, are estopped from setting up for their benefit, through their trustees, a prior incumbrance, to defeat said mortgage, in open breach of their covenant of warranty.

6. Because the mortgage of May 24, 1837, never was executed, as alledged in the bill, inasmuch as William A. Carson, one of the co-tenants in fee, never did execute the same, but all the co-tenants did join in the execution of the conveyance in fee to the corporation under which this appellant holds, and thereby the interest of William A. Carson, at least, passed to appellant unincumbered by said mortgage.

7. Because the verbal agreement (if any such were ever made,) to postpone one mortgage to the other, while both were preserved

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*as existing liens, is clearly within the Statute of Frauds and void, and the plea in that respect should have been sustained.

8. Because the evidence is positive as against the defendants, James Rose and others, trustees, that there never was any such agreement as the pretensive agreement merely to postpone. The affidavit produced at the hearing of James Rose, who was the agent of all parties in the transaction, is positive, that he and his co-trustees "were strangers to any such agreement," and it is against equity and good conscience to aid them in claiming the benefit of an agreement, which they boldly deny ever to have had existence.

9. Because the Act of Assembly, known as

the "Fire Loan Act," having provided and required that the Bank of the State (the complainants) "shall be satisfied with the titles, and that it, the land, is free from incumbrances, prior to making any loan under said Act," it will, in the absence of proof to the contrary, be assumed that the Bank did in good faith discharge their trust, and that the prior incumbrance is properly extinguished. And least of all, it cannot be permitted in this court, that James Rose, the President and Agent of the Bank in this transaction, Wm. A. Carson, a director, and R. W. Cogdell, an officer of the Bank, with full notice, should, as parties, now claim relief and personal benefit from a neglect of duty on the part of the Bank, produced by their own acts, and the greater part of the benefits of which they had.

10. Because a certain, cheap and expeditious form of foreclosure is provided by the fire loan Act, and in this case, by the fire loan bond and mortgage, the benefit of which this defendant is entitled to, and the requisites of which have in no wise been complied with on the part of the complainants.

11. Because this defendant is not liable to account for rents and profits from the time of his purchase.

12. Because the decree is in other respects against law and equity.

The defendants, Martin, Starr & Walter, appealed from the order for an injunction made on the cross bill, on the following grounds:

1. Because the said defendants, Martin, Starr & Walter, are creditors having a judgment execution at law, and have a complete legal right to levy the same, without hinderances on the part of their debtors.

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*2. Because all the equities set up in the bill for an injunction are denied in the answer and no proof whatever having been offered by the complainants to sustain their allegations, the case presents the aspect of a creditor, having a bond of his debtor secured by mortgage, and the fact of having such mortgage is made to prevent his recovering his money at law upon the bond; thus making it worse for the creditor to have a security, than to be without one.

3. Because the court has twice decided that the Bank of the State, the original creditor, could not be stayed from enforcing their legal remedy, even before judgment recovered; but now after judgment duly recovered their assignee is restrained, when no change in the case has occurred, other than a change of parties.

4. Because the orders worked a prejudice to the defendants, Martin, Starr & Walter, in withholding a large amount of interest and principal now absolutely due them, without any sufficient protection to their interests in case the court shall see fit to reverse them.

5. Because the order is in other respects contrary to law and the principles of equity.

Torre, Hunt and Bailey, for Mr. Campbell.

Petigru, for Mr. Rose and the other trustees.

Memminger, for Martin, Starr & Walter.

In the case of the Bank against Campbell and others, the opinion of the court was delivered by DUNKIN, Ch., as follows:

DUNKIN, Ch. On the points discussed by the Chancellor, this court is satisfied with his conclusions, and do not deem it necessary to add any thing to the reasoning of the decree.

The question involved in the sixth ground of appeal, was not considered by him, because, from the slight or imperfect manner in which it was presented at the hearing, it had escaped his further notice. It might well be so. The point is not presented by the pleadings, either in the answer of the trustees or of the appellant. The answers of the trustees and of the Theatre Company admit the execution of the mortgage of May, 1837. "The only question left open," says the Chancellor, "as between the parties mentioned," (i. e. the Bank of the State and the trustees,) "is, whether the mortgages are unsatisfied and forfeited; and the answer of the trustees in this suit solves that question against them." But it is justly insisted on

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the part of the appellant, that *he is not bound by the answer of the trustees—that he stands on his own rights, unaffected by the questions raised or admissions made by the trustees.

It is proper, then, first, to inquire whether, as between the Bank and W. A. Carson, the decree for foreclosure can be sustained, independent of his admissions. The mortgage bears date the 24th May, 1837. It is in the name of all the five trustees; recites a note of six thousand dollars made by the trustees, and purports to convey the entire premises to the Bank by way of mortgage, to secure the payment of this note and its renewals, and of any other note or notes which the trustees might thereafter have discounted by that institution. The mortgage bears the signature of only four out of the five trustees. But in the account book of the trustees, kept by their clerk and treasurer, the nett proceeds of the first note is carried to their credit on the 25th May, 1837, as "discounted by the Bank of the State, and on mortgage of the premises." The mortgage was recorded on the 5th June, 1837, and notes were subsequently made and signed by all the trustees, and discounted by the Bank of the State, amounting, at one period, to the sum of eighteen thousand dollars. "There is no principle," says Chancellor Kent, in Wendell v. Van Rensselaer, 1 J. C. R. 354, "better established in this court, nor one founded on more

solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively, by looking on, suffers another to purchase, and expend money on land under an erroneous opinion of title, without making known his claim, he should not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel. Qui tacet, consentire videtur. Qui potest et debet vetare, jubet." If Mr. Carson, or any one representing him, had relied on the defence now assumed, his conscience would be bound by the equitable estoppel. His signature is proved to the notes, to secure which the mortgage was executed. On the next day, an entry is made in a book kept by their own clerk, open to the inspection of all, and to which all the trustees must be presumed to be privy, that the discount of the note was made by the Bank of the State "on mortgage of the premises," and the mortgage was placed on the records of the country in ten days afterwards. Did he not then know of the mortgage? But if a mere bystander is estopped, who, from fraud or folly, permits injury to

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be done, how much *more strongly should the principle be enforced against one who has participated in the advantages of the sale, and received his proportion of the consideration money. Certainly under such circumstances, very slight evidence of acquiescence would preclude a defendant from insisting on his legal title. If Mr. Carson had made the defence, the court is of opinion, that on the evidence submitted, it would not have availed him. The inquiry then remains whether the purchaser at sheriff's sales is in any better condition.

The rights of a purchaser at sheriffs' sales are very fully considered in the decree, and it is proposed only to apply the principle to the case presented by the appeal. The rule is well settled, that a person having a particular equity is preferred to a general incumbrancer on the estate. In Ashe v. Livingston, 2 Bay, 80, even an unrecorded mortgage was declared to have precedence over a junior judgment, and the rights of an equitable mortgagee are fully recognized in Read v. Simons, 2 Dess. R. 552, and Dow v. Ker, Sp. Eq. 414. The purchaser at sheriffs' sales is invested with all the rights of the creditor, and no more, and these are shown to be subordinate to the equitable rights of the Bank.

The decree declares the defendant liable to account for the rents and profits from the date of his purchase, in March, 1842, and this is the foundation of the eleventh ground of appeal. All the court are of opinion that the account for rents and profits cannot be carried beyond the period when the demand was made, to wit: the 31st October, 1843. In this respect, the decree is modified. In all other matters, the decree of the circuit court is affirmed, and the appeal dismissed.

JOHNSON, Ch., concurred.

In the case of Rose and others against Martin, Starr & Walter and others, DUNKIN, Ch. delivered the opinion of the court, as follows:

DUNKIN, Ch. It was not doubted at the hearing, nor is it susceptible of reasonable doubt, that Martin, Starr & Walter occupy, precisely, the position of the Bank of the State, from whom they purchased the judgment against the complainants.

In addition to what is said in the decree, (*a*) it may be observed that, by the rules of law, mortgages should be paid ac-

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cording to *their priority. The complainants were not liable for the fire loan; and on general principles, they might well insist that the proceeds of the mortgaged premises should be first applied to the extinguishment of that debt to secure which the mortgage of May, 1837, was given, and for which only they are sureties. But the action of the Bank has changed the order of payment, has established a particular equity, as between themselves and the complainants, to have the payment of the first mortgage postponed to that of the fire loan. They have properly obtained a decree in derogation of the ordinary rights of the sureties; and which rights might, probably, be insisted on against all others except the Bank of the State. Having, by their previous action, thus varied the position of the complainants, they cannot be now permitted to enforce their judgment at law, and leave the complainants to litigate their ulterior rights under these disadvantages.

It is ordered, that the decree of the circuit court be affirmed.

JOHNSON and JOHNSTON, CC., concurred.

(*a*) It is believed, that after the order for an injunction was made in this case, his Honor, Chancellor Dunkin, filed a circuit decree, of which, however, no copy has ever come to the hands of the Reporter.

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2 Rich. Eq. 192

HUGH WILSON, WILLIAM M'CANTS, EDWARD BECKET and HUGH WILSON, Jr. v. THE PRESBYTERIAN CHURCH OF JOHN'S ISLAND AND WADMALAW, THOMAS LEGARE, KINSEY BURDEN and ELIPHA WHITE.

(Charleston. Jan., 1846.)

[*Religious Societies* ⟸25.]

Where a fund is in the hands of a trustee for the benefit of a church, a bill will lie to compel the trustee to apply the fund to the purposes for which the trust was created.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 155; Dec. Dig. ⟸25.]

[*Religious Societies* ⟸23.]

In 1735, funds were bequeathed to certain persons in trust to apply the interest "to the sole use and behoof, and for the maintenance of a minister of the Gospel, according to the Presbyterian profession, who is, or shall be, from time to time, regularly called and settled on John's Island, and who shall acknowledge and subscribe the Westminster confession of

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faith, as the confession of *his faith, and shall firmly believe and preach the same to the people there committed, or which shall hereafter be committed to his care and pastoral inspection." The church on John's Island, for the benefit of which the trust was created, was in regular connexion with a Presbytery until 1838, when, by resolution of its members, adopted by a majority of twelve to three, it was declared an "Independent Presbyterian Church, absolved from all connection with the Presbytery and every other ecclesiastical body." The majority remained in possession of the funds of the church, and retained the minister who had been before in charge of the church, and who was a regularly ordained minister of the Gospel, according to the Presbyterian profession, had signed the Westminster confession of faith, as the confession of his faith, and had been regularly called and ordained minister of the John's Island Church. The minority organized themselves as a church by the election of officers, and were recognized by the Presbytery, by the Synod and General Assembly of the United States, as the Presbyterian Church of John's Island. *Held*, on bill filed, that the minority, the complainants, were the persons who, under the terms of the bequest, constituted the church for whose benefit the trust was created.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 151; Dec. Dig. ⟸23.]

[*Religious Societies* ⟸23.]

In 1754, property was conveyed to trustees for the use of the minister or pastor, for the time being, of the John's Island Church, "during the time he shall so be and continue minister or pastor of said congregation, according to the rules and discipline of Presbyterian Church government, and no longer." *Held*, that the minority, through their pastor, were also entitled to the use of this property.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 147–153; Dec. Dig. ⟸23.]

[*Religious Societies* ⟸23.]

In 1785, and again in 1835, the church on John's Island was incorporated. *Held*, that the minority constituted the true corporation, and were entitled to all the funds thereof.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 147–153; Dec. Dig. ⟸23.]

[*Evidence* ⟸108.]

Where the rights of property depend upon the religious belief of any man or set of men, the court may receive evidence to show what that belief is; semble.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 202; Dec. Dig. ⟸108.]

[This case is also cited in Morris Street Baptist Church v. Dart, 67 S. C. 342, 45 S. E. 753, 100 Am. St. Rep. 727, without specific application.]

Before Harper, Ch. at Charleston, July, 1842.

The Chancellor. By his will, dated in 1735, Robert Ure, of John's Island, supposed to have been a native of Scotland, bequeathed as follows:

"As to one moiety of my estate, unto Joseph Stanyarn, Wm. Holmes, and Thomas Upham, and their assigns, in trust, and to the intent and purpose that the said Joseph Stanyarn, William Holmes and Thomas Upham, and their assigns, (in manner hereinafter mentioned to be appointed,) shall immediately, or as soon as conveniently may be, after the sale and division to be made as aforesaid, put out the same at interest, on

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good and sufficient *securities; and from time to time, and at all times thereafter, shall yearly, and every year, well and faithfully pay and apply the interest therefrom arising, to the sole use and behoof, and for the maintenance of a minister of the Gospel, according to the Presbyterian profession, who is, or shall be thereafter, from time to time, regularly called and settled on John's Island, in Colleton county in the said province, and who shall acknowledge and subscribe the Westminster confession of faith, as the confession of his faith, and shall firmly believe and preach the same to the people there committed, or which shall hereafter be committed to his care and pastoral inspection."

It appears from the inventory and appraisement of the estate of Robert Ure, that the entire value of the estate was estimated at £3656.12s. It appears that the Presbyterian church or congregation of John's Island, had been in existence a considerable time before the bequest, and its origin cannot be distinctly ascertained.

By a deed dated 24th December, 1754, one Robert Turner, in consideration of £600 currency, conveyed to five trustees therein named, a tract of 250 acres of land, in trust, "that they shall, from time to time, and at all times hereafter, permit, and suffer the minister or pastor for the time being, of the Protestant Presbyterian Church, or congregation of Christians which do and shall usually meet and assemble together for divine worship, at or in their public meeting-house on John's Island, in the said county and province, during the time he shall so be and continue minister or pastor of the said congregation, according to the rules and discipline of Presbyterian church government, and no longer, peaceably and quietly to enter into, have, hold, occupy, possess and enjoy the said piece or parcel of two hundred and twelve acres of land, together with the houses, edifices, premises, and appurtenances thereunto belonging, as tenant or tenants, for years, without impeachment for waste."

It is probable that this land was afterwards sold, for there was in evidence a mortgage, of the date of the 14th May, 1799, of the same land, to James Legare, Hugh Wilson, and Thomas Hanscome, as trustees for the Presbyterian Church, to secure the payment of the sum of £512. There was in evidence a receipt of James Legare, as treasurer of the Presbyterian Church, to

Hugh Wilson, for certain specialties, amounting to £2243 14s. 8d. dated 19th August, 1809. Some of the bonds for which the receipt was given, purported to be payable to

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the trustees of the Presby*terian church. It seems that the church is in possession of land on which the church is built, but of the mode of its acquisition I am not informed. About the year 1822, it was found necessary to rebuild the church,—and for this purpose a subscription was raised to the amount of $3645. To this there contributed not Presbyterians alone, but also Methodists and Episcopalians. The church is stated to be in possession of stocks and money, in the hands of the treasurer, some of which funds are known to be derived from an old John's Island Society, which was composed of Presbyterians and Churchmen;—and becoming nearly extinct, the funds were divided between the churches by the surviving members. The amount received from this source, by the Presbyterian Church, was about $4000. By a deed of the 6th of July, 1820, Thomas Hanscome conveyed to James Legare, Sen., Thomas Legare, Sen., and Hugh Wilson, Jun., trustees of the John's Island Presbyterian Church, fifty-six acres of land on John's Island, and by his will gave and bequeathed "to the Presbyterian Church of John's Island, whatever may be its corporate name or title in law, the sum of $6,000." It appears in evidence that Mr. Hanscome was not a member of the church, nor of any church,—indifferent about forms of church government, and induced to make his donation by his regard for the members of the congregation, and the good he supposed the church might effect. The church was incorporated in 1785 by an act of the Legislature, and in consequence, it is said, of that act having fallen into oblivion, again incorporated in the year 1835, by the name of the "Presbyterian Church of John's Island and Wadmalaw." Provision was made by the will of Ure, and the deed of Turner, for keeping up a succession of trustees. How the succession has been kept up, or whether the present defendants, named as trustees, properly represent the original trustees, does not appear; nor is it material in the view which I shall take of the case.

At the time of the donation of Ure, it does not appear that there existed any Presbytery in the State of South Carolina, nor until after the conveyance of Turner in 1754. Though it appears probable, from the private journal of a Presbyterian clergyman, which was read to the court, that a Presbytery did exist in 1755. That it existed in 1754, or that the John's Island Church was connected with it, however, I do not consider established by evidence. The first connexion with any ecclesiastical judicatory, which is shown, was with the "Charleston Presbytery," which was incorporated in 1790, long after the first

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incorporation of the *church. While the Charleston Presbytery was still in existence, there existed another Presbytery in the State, called "the South Carolina Presbytery." About the year 1799, the South Carolina Presbytery was divided into two Presbyteries, called the First and Second Presbyteries of South Carolina. The First Presbytery was afterwards called the Harmony Presbytery; and about 1823, the "Charleston Union Presbytery" was formed, by the union of part of the Harmony Presbytery with the South Carolina Association of Congregationalists. That the John's Island Church did maintain a connexion with this last named Presbytery, by sending delegates to it, making contributions, and otherwise, I consider sufficiently established; and that the connexion was maintained, with more or less regularity, up to the date of the resolutions hereafter to be mentioned. A General Assembly of the Presbyterian Church was organized by the Synod of New York and Philadelphia, to which the Charleston Union Presbytery afterwards adhered. I consider it also sufficiently proved, that the John's Island Church did send delegates to the General Assembly, thereby recognizing its authority. In 1838, occurred the well known schism, by which the Presbyterian Church was divided into two bodies, commonly known by the names of the old and new school. This was effected by the secession of a minority from the General Assembly, claiming to be the true Presbyterian General Assembly of the United States. The majority which remained, known as the old school, was declared, by the judicial authorities of Pennsylvania, to be the true corporate General Assembly, which had been before created by the Legislature of Pennsylvania. This last Assembly is designated as that which met in the Seventh Presbyterian Church of Philadelphia, and of which Mr. Plumer was Moderator.

This General Assembly passed various ordinances, and among other things provided that "In case the majority of any Presbytery shall refuse or neglect to take proper order in regard to its seceding commissioners, or shall approve their conduct, or adhere to the new sect they have created, or shall decline or fail to adhere to the Presbyterian Church in the United States of America, upon the said basis of 1837 and 1838, for the reform of the Church,—then, and in that case, the minority of said Presbytery shall be held and considered the true Presbytery, and shall continue the succession of the Presbytery, by its name and style, and from the rendition of the erroneous and schismatical decision, which is the test in the case, be the Presbytery; and

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if sufficient*ly numerous to perform presbyterial acts, shall go forward with all the proper actions and functions of Presbytery." And in like manner the said General Assembly ordained, "That the principles of this

act should be applied to Churches, with their majorities and minorities; and to Church sessions, as far as they are applicable." These ordinances were approved and sustained by the Synod of South Carolina and Georgia; of which ecclesiastical body, the Charleston Union Presbytery was a component part. At a meeting of the Charleston Union Presbytery, on or about the 4th day of December, 1838, resolutions were introduced, declaring the adhesion of the Presbytery to the General Assembly which met in the Seventh Presbyterian Church in Philadelphia, of which Mr. Plumer was Moderator. These resolutions were overruled by what I must consider the vote of a majority; whereupon the minority withdrew, and formed themselves into a separate Presbytery. On or about the twenty-fourth of December, 1838, there was held a semi-annual meeting of the Church of John's Island and Wadmalaw. At this meeting a preamble and various resolutions were passed, and among others, the following:

"Resolved, That the Presbyterian Church of John's Island and Wadmalaw, feeling its dependence upon the Great Head of the Church, acknowledging its obligations to Him for past mercies, and trusting in Him for the future, and desiring to cultivate and maintain a spirit of harmony and unity within itself, and without which, its usefulness must be destroyed, does hereby declare itself an "Independent Presbyterian Church," absolved from all connexion with the "Charleston Union Presbytery," and every other ecclesiastical body, and placed upon the same ground occupied by other Presbyterian churches in our neighborhood."

These resolutions were passed by a majority of twelve to three. The majority of the church have acted in pursuance of their resolution, and refused to recognize any superior ecclesiastical jurisdiction. The complainants filed their bill on behalf of themselves and others, the minority of the congregation or corporation of the John's Island Church, claiming to be the true Presbyterian Church of John's Island and Wadmalaw. They state that they have organized themselves as a church, by the election of elders according to the Presbyterian practice, and have been recognized as such true church, by the Presbytery, the Synod of South Carolina, and the General Assembly of the United States, known as that of the old school; and this

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is admitted by the answer. They *claim to be entitled, as the true Church of John's Island and Wadmalaw, to all the funds which were given for the support of that church; they pray that all the funds and property in the hands of the treasurer, the trustees, or the corporation, may be paid or delivered over to them, the minority, as worshipping and governed by the discipline, directory, and rule, of the Presbyterian church. As I have before said, with respect to the funds which were given to trustees, it does not appear whether there has been a due succession of trustees, or whether the present trustees properly represent the original donors, or whether they must be regarded as vested in the aggregate corporation. I shall take it for granted that they are so vested in the corporation, which must also be regarded as a trustee.

I regret that suits relating to ecclesiastical affairs have become common in our courts, and that undefined and mistaken views have been entertained, in relation to the powers of the civil and ecclesiastical tribunals. I think it necessary to repeat, what other Judges have thought it necessary to say, that the civil tribunal possesses no authority whatever to determine on ecclesiastical matters —on a question of heresy, or as to what is orthodox, or unorthodox, in matters of belief. So the ecclesiastical tribunals have no authority, as recognized by the law, to entertain any civil question, or in any manner effect a disposition of property by the decisions of their judicatories. I think that some difficulty may have arisen, from the ambiguous use of the word church. In one sense, (and the common sense) the word church is understood to mean a number of christian persons, agreeing in their faith, usually assembling together at one place, for purposes of worship,—submitting to its ordinances, and receiving its sacraments. This is entirely distinct from the meaning of the word "church," as applied to a corporation. In the former sense of the word, many persons are usually members of the church,—and most commonly a large majority, who neither are, nor can be, members of the corporation, married women, infants, and slaves. When persons are incorporated by the name of "church," this can be regarded only as a name of designation,—or at most, as indicating, when property is given to them, the trusts upon which it is given. This does not constitute the corporation a church, in what I consider the proper sense of the word, any more than if they were called by any other name. Nor do I consider a corporation, for the managing of church funds, can properly be called an ecclesiastical corporation, any

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more than if *property were given to the South Carolina Society, for the support of the minister of St. Michael's Church. In either case, they are merely regarded as trustees for the entire body of worshippers, and are merely a civil institution for the management of property. It is solely from their having the management of funds or revenues given for a specific purpose, that this court has any power to control or interfere with them. The doctrine is explained by Lord Commissioner Eyre, in the Attorney General v. Governors of the Foundling Hospital, 2 Ves. jun. 47. Where property is given in trust for a particular purpose, it pertains to the ancient jurisdiction of this court to compel the exe-

cution of the trust, whether the trustee be an individual or a corporation; and in either case, perhaps, if there have been a great abuse of the trust, to remove the trustee, and direct the transfer of the trust funds to other trustees. See what is said by the Master of the Rolls, in the Attorney General v. the Earl of Clarendon, 17 Ves. 499. Apart from this, the court has no power to determine any thing with regard to the corporation, or its members. It has no power to declare the corporation dissolved for any abuse of its powers, or to remove an individual corporator, for any disqualification or misconduct whatever. If there have been such an abuse of power as to defeat the purposes for which it was created, the corporate franchise may be declared forfeited in another tribunal. But in no tribunal whatever, is there authority to interfere between the members of a corporation regarded as a majority, or minority, or to decide which of them is entitled to exercise the corporate franchises, as pursuing the true purposes of their institution. That the majority must govern, is the general rule of corporations, unless something else be expressed by their charter. And I repeat, that this court cannot control or interfere with that majority, in any manner whatever, except to correct the misappropriation of trust property or funds. Regarded as a minority of the corporation, the complainants have no standing whatever in court, nor any title to be heard; though as cestuis que trust, regarding the corporation as trustee, they may individually have some interest, which they have a right to call upon the court to enforce. As the civil tribunals have no right to interfere with any thing but property, so the ecclesiastical judicatories have no authority whatever except over spiritual matters; nor any means of enforcing their determinations, except spiritual ones, spiritual censures, appeals to the conscience, or the refusal of communion. Their jurisdiction

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is over the church, *in the sense which I have first attributed to the term. If any member of that church shall be found guilty of heresy or immoral conduct they may inflict those spiritual penalties of censure or excommunication. But they have no power at all over the corporation, so as to affect its existence, or dispose of property. If every member of the corporation should be excinded from the spiritual church, this could not affect it, although on the justest grounds. If every member of the corporation were guilty of the grossest heresy—were infidels or Mussulmen—the ecclesiastical authority would have nothing to do with that —nor any other tribunal, unless there should be a breach of trust with regard to matters of property. Indeed it happens every day, that in incorporating churches, as they are called, men of the most various religious tenets are made members of the corporation —thinking it better, when they cannot support a church of their own denomination, to contribute to the support of another. This may apply even to Deists or Atheists, who having no religion themselves, may think it a useful moral or political engine. There are various qualifications to constitute a corporator, such as contribution of money, holding a pew—but none of them having any thing to do with opinions or spiritual qualifications. That the minority of this congregation were recognized and declared by the ecclesiastical authorities, as the true Presbyterian church of John's Island and Wadmalaw, cannot, of itself, have the slightest effect, so far as any question of property is involved. If property were given to a church, expressly so long as it should continue connected with a particular Presbytery; and if, upon the church's being excinded for any heresy, ecclesiastical offence, or irregularity, this would operate a forfeiture of the property, (on which point I give no opinion,) it would not be in consequence of any authority of church tribunals over property, but the power which the owner has over his own property, and which he has delegated to them as individuals, or as a corporation. He might have delegated a similar power to any lay individual or corporation, to determine when a forfeiture was incurred.

We come then to the question, whether there has been a breach of trust on the part of these defendants? The donations of Mr. Hanscome were to the Presbyterian church—and so far as I can collect, such was that of the John's Island Society. The contributions for rebuilding the church, by whomsoever made, were for a Presbyterian church. Supposing this property to be vested in the corporation, I take for granted that it must

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have been in *trust for the "Presbyterian church of John's Island," in that which I regard as the proper sense of the word. I shall not at present inquire respecting the terms of the donations of Ure and Turner. The question then is, whether the defendants have applied the funds and property in their hands to any other purpose than the support of the Presbyterian church of John's Island and Wadmalaw.

The first and principal ground taken by the complainants is, that it is no longer a Presbyterian church at all, inasmuch as it is not connected with any presbytery; which is said to be essential to the character of a Presbyterian church. It is said there can be no such thing as an Independent Presbyterian church. The case of the Trustees of the English Presbyterian Congregation in the Borough of York v. James Johnson and others, (of which a newspaper report was furnished me, but which is said to have been since reported, I Watts & Sergeant, 1,) is fully in point to the present. In that case, donations were made to trustees in trust for the English Presbyterian Congregation, which

was afterwards incorporated. After the incorporation, the congregation connected itself with the Presbytery of Carlisle, which afterwards became connected with the General Assembly. On the division of the General Assembly in 1838, the Presbytery of Carlisle adhered to that which is known as the Assembly of the New School. In October, 1838, by the vote of a majority, the congregation resolved, as in the present case, that "It is inexpedient, for the present, to recognize the jurisdiction of any of the conflicting church judicatories, which might claim authority over them." A minority of the congregation separated from the majority, and as in the present case filed their bill claiming to be the true Presbyterian church, and entitled to the church building and property; they having adhered to one of the sects of ecclesiastical judicatory. It was determined by the court, that though the founder of such a charity may make it an express condition of his gift, that the church shall be connected with a particular ecclesiastical authority, yet he had not done so in that case, "the beneficiary being described as the English Presbyterian Congregation, evidently to individuate it; and that subjection to a particular assembly, was not a condition of the grant, is proved by the fact, that there was at that time no such assembly in America." The judgment of the court was in favor of the majority. The subject is very fully consid-

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ered by the Assistant Vice-Chan*cellor, Hoffman, in the case of Gable and others v. Miller and others, decided in 1842; which I have in pamphlet. In that case, the church had been originally formed as an Independent German Reformed Church. It subsequently connected itself with the Classis of the Dutch Reformed Church. With various interruptions, the connection continued until 1837, a few years before the filing of the bill. It then declared its resolution to withdraw from its connection, and did withdraw accordingly. The bill was filed, charging that the congregation had lost their church character by this secession, and claiming the property, as I understand, for the minority. The bill was dismissed. The Vice-Chancellor draws a distinction between the dedication of property to support peculiar tenets, and its dedication to support such tenets, in connection with, and subjection to, a particular church government. He seems to conclude, that where the church was originally an independent church, and afterwards connects itself with a particular ecclesiastical judicatory, its subsequent secession will not operate a forfeiture of the property; but if it had been originally formed as a constituent part of such judicatory, the case might be different. This applies to the case now before us. But I find some difficulty in agreeing to the latter part of his conclusion. As I have before said, it must depend on the intention of the donor, and the intention must be collected from his words alone. But where the donor simply gives to the John's Island Presbyterian Church, how can I infer the intention that it shall be in connection with, or subjection to, the Charleston Union Presbytery? Even in the case where the party gives to a particular church, and describes it as being at present connected with a particular ecclesiastical body, I do not perceive that these can be regarded as any thing more than terms of description, or how they can express a condition of forfeiture, upon the withdrawal from such connection. The argument, however, is, that connection with a Presbytery is so entirely essential, that no church can answer the description of a "Presbyterian Church," unless in such connection. It might seem a sufficient answer to this to state the fact, that this church existed—that donations were made to it—and that it was incorporated,—when, so far as we know, no such connection existed. It is said, however, that there is an exception in cases of necessity. But this is only saying, in other words, that it is not essential. Of the witnesses examined, two clerical gentlemen expressed the opinion, that a Presbyterian church could not exist, unless

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in connection with a Presbytery, *where such connection is practicable. Yet one of these gentlemen (the Rev. Mr. Forrest,) stated himself to be pastor of an Independent Presbyterian Church. He referred this, however, to the necessity of the case,—as he himself was ordained by the Presbytery of Edinburgh. And he stated, that the Church of Scotland does not fully recognize the Presbyterian Church of America, or perhaps the validity of its ordination. Yet his congregation are not members of the Church of Scotland,—and it was in proof, that previous pastors of the same church were ordained in America. Though the Church of Scotland may not recognize the validity of American ordination, the American recognizes the validity of Scottish ordination, and I see nothing to prevent this church being represented in Presbytery. Are we to suppose that it was essential to the Presbyterian character of this church, that it should be connected with a Presbytery, while Mr. Buist was minister, and should not be so, while Mr. Forrest was minister? I can account, however, for the impression of this gentleman. He is a native of Scotland, where the Presbyterian religion is part of the law of the land. The Scottish Act of Parliament was referred to in argument, though it is not now before me. That act establishes the church government by Sessions, Presbyterys, &c. It is probable that the territorial limits of the various Presbyteries are defined by law, and the churches within these limits subjected to the authority of the Presbytery; which, there, has more than mere spiritual authority. Three other clergymen expressed the opinion, that con-

nection with Presbytery was not essential to the character of a Presbyterian church, but only government by church sessions. And, for manifest reasons, I must hold this to be the better opinion. Are courts to investigate when the exception from necessity exists? It is said that three ministers and congregations are necessary to constitute a Presbytery. In the case of a single church, constituted in a newly discovered country, there can of course be no Presbytery. But are we to pronounce that it loses its Presbyterian character, upon the establishment of two other churches in the same country? Within what distance is it necessary that the newly established churches should be? Are they bound to unite, though they should be separated by the utmost limits of India or America? If it be essential to the character of the church, and without any express declaration, it forbears or refuses to send delegates, for how long a time shall this recusancy continue, before we shall declare its character forfeited? It is very evident, that re-

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garding *it as a duty of every Presbyterian congregation to be connected with and governed by a Presbytery, it is merely a matter of spiritual duty; the neglect or nonperformance of which, may subject the offenders to the spiritual censure, or spiritual excommunication of the judicatory—may attach upon their consciences—but cannot incur any temporal forfeiture. It would be a dangerous power to attribute to ecclesiastical tribunals—the power to dispose of the property of the citizen by means of its excommunication,—and one which, I am sure, the churches in this country are very far from desiring. Another ground on which the property is claimed by the complainants, is, that the present minister of the church is heretical in his religious opinions, so that he cannot come within the description of a Presbyterian minister, or the congregation that employs him, of a Presbyterian congregation. Here again I must inquire into the meaning of words. The donation of Ure is for the support of a minister who shall acknowledge and subscribe the Westminster confession of faith, as the confession of his faith, and shall firmly believe and preach the same; and that of Turner, to him who shall be the minister or pastor of the said congregation, according to the rules and discipline of Presbyterian church government. The other donations are simply to the Presbyterian church.

First, I inquire, what is a Presbyterian minister? The meaning of this, like the meaning of every other word, must be settled by usage, and the common understanding of mankind. As I have said, I have no jurisdiction to try or determine any question of heresy or orthodoxy. Perhaps half of the whole number of individuals who are known by the name of Presbyterians, in the United States, entertain the opinions which I understand to be attributed to the gentlemen in question. As observed by Chief Justice Gibson, in relation to the separation of 1838, "though it was held by this court, in the Commonwealth v. Green, 5th Whar. Rep. 531, that the party which happened to be in office, by means of its numerical superiority at the time of the decision, was that which was entitled to represent it, and perform the functions of the original body; it was not because the minority were thought to be any thing else than Presbyterians." Indeed, as he observed, the individuals entertaining those opinions were recognized as Presbyterians by the very men who afterwards declared them to be heretical, and not to conform to the true Presbyterian doctrines and discipline. What is called the old school par-

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ty, succeed at law, on account of *their numerical superiority; but this gave them no higher authority to decide on the heresy or orthodoxy of the other party, any more than the new school had to decide on their heresy or orthodoxy. Similar in effect was the decision of the Vice Chancellor (Gridley v. Jessup) against the trustees of the Presbyterian Congregation in Florida—though in that case the congregation adhered to the new school, and the bill was filed by the minority. The Chancellor says, "the majority of the church and congregation, is seems, are in favor of the present incumbent; and it does not appear that he is of a denomination different from that for whom the funds were designed." At the very time when the minister in question was employed by this congregation, and for a long while afterwards, he was a member of the various ecclesiastical bodies now claiming to be the exclusive orthodox Presbyterian church in the United States. Evidence was offered of heretical opinions expressed by this gentleman, as I understand it, in the Synod of South Carolina, which I rejected. These opinions were expressed as a member of that body, who did not, on that account, separate him from their association or communion, but continued to recognize his ministerial character. I rejected the testimony, because I am not a judge of heresy. It does not follow, that because an individual may entertain heretical opinions, according to the views of a particular church, that he therefore ceases to be a member of that church. Hooker, in his Ecclesiastical Polity, lays it down that a heretic continues a member of the church, though he may be for the time excluded from its communion. There are heresies of a graver and of a lighter character. Perhaps there is no church which does not include many members who, on some points, entertain opinions which would be thought heretical by the great body of that church, and which are yet not thought of sufficient importance to induce their exclusion. While individuals are regarded by the church itself, and the common under-

standing of mankind, as members, it is not for courts to excommunicate them for heresy. Suppose the present bill had been filed previous to the schism of 1838, and while Mr. White was still a member of the Charleston Union Presbytery, of the Synod of South Carolina, and of the General Assembly. Is it imaginable that such a bill could have been sustained? Yet I suppose his opinions were as heretical then, as they are now. Can it make a difference, that one ecclesiastical body has since pronounced them heretical,

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when, as I have *said, regarding the matter as a Judge, and deciding as a court, another body of equal authority has pronounced them orthodox?

But it is said, that though I may have no jurisdiction to determine what is orthodox or heterodox, yet I am bound to execute a trust according to the intention of the donor of the property; and the terms of Ure's will, and of Turner's deed, are referred to as evidence of what they thought orthodox Presbyterianism; and it is argued, that the testimony ought to have been received, to shew that the minister's opinions were not in conformity to their standard of Presbyterianism. Ure's donation is for the support of a minister who shall subscribe the Westminster confession of faith, and shall firmly believe and preach the same. The defendant, Mr. White, in reply to interrogatories on the subject, declares that he has subscribed the Westminster confession of faith, and adopts it as the confession of his faith. No evidence was offered that he ever preached any doctrine incompatible with that confession. We can only know what men believe by what they profess, and he has made his profession by his answer. Nor do I understand the testimony to have been offered with a view to shew that he disclaimed the authority of the confession of faith, but that while professing to submit to it, he expressed opinions in reality incompatible with it.

Both parties profess to found their faith on the Westminster confession, though differing, it is said, in their construction of it; and I am, in effect, called on to decide that the profession of one party is so palpably unwarranted, that I must hold the profession to be insincere. For a sincere profession is all that is required. And this brings me back to a part of the subject which I have already disposed of. I cannot enter into the question of sound or heretical construction, when, by the common consent of all parties, neither construction is incompatible with the Presbyterian character, which is founded on the recognition of the same confession of faith. Among the articles of the Church of England are some which would be thought, by one set of men to be as explicit and as incapable of misinterpretation as any portion of the confession of faith. These articles must be subscribed by all the ministers of that church. Yet it is known that a large proportion, perhaps a majority, of the ministers of that church, put on them an interpretation as widely different from what others would regard as their clear, explicit, and unequivocal meaning, as have ever occurred

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with regrd to the *confession of faith. Yet it has never entered into the mind of any one to conceive, that the holders of the various opinions are not all true ministers of the Church of England; or that if property were given for the support of the ministry, courts should set themselves to construe the articles, and decide whether the incumbent were of the high or low church party, as they are sometimes distinguished.

With regard to the deed of Turner, it provides for the support of a minister or pastor, according to the rules and discipline of the Presbyterian church government. What is here meant by church government? It could not mean government according to the Scotch system of Presbyteries, Synods, and General Assembly, for there was no General Assembly, no Synod, and, as far as we know, no Presbytery. It must mean the rules and discipline of church government which were essential to the constitution of the Presbyterian character, under the existing circumstances. This, according to the testimony of the clergymen who were examined, consists in the government by church sessions. Indeed, according to the views I have before expressed, no more than this can be necessary, in a legal point of view, under any circumstances.

It is ordered and decreed that the bill be dismissed.

From this decree, the complainants appealed, on the grounds:

1. Because the complainants established, by sufficient evidence, that the funds in the possession of the defendants had been originally devoted by the founders, "to the sole use and maintenance of a minister of the gospel, according to the Presbyterian profession, and who shall acknowledge and subscribe the Westminster confession of faith, as the confession of his faith, and shall firmly believe and preach the same to the people committed to his care, during the time he shall be and continue minister or pastor of the congregation, according to the rules and discipline of Presbyterian church government, and no longer." And thereupon it was further proved, that the defendants being thus trustees of the said fund, had applied, and were applying the same to the support of a minister who, together with the majority of his congregation, were no longer members of the Presbyterian church, and had departed from its discipline and church government.

2. Because the complainants offered testi-

mony to prove that the minister, for whose
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support the defendants were using the *said funds, did not believe or preach the Westminster confession of faith, but believed, and actually preached, doctrines contrary to that profession, but the Chancellor refused to admit the same in evidence.

3. Because unity of action, and the means of perpetuating itself, are essential features of the Presbyterian church; and that the first of these features is preserved in that portion of its organization which combines the whole church into one body—and the other is provided for in the succession of the ministers, which the Presbytery alone are authorized to ordain; that the first of these is an important element, but the last is so essential that without it no Presbyterian church can be said to exist.

4. That all ecclesiastical authorities upon Presbyterian church government, concur in declaring that several churches must unite to form a Presbytery—and that, therefore, an Independent Presbyterian church is an anomaly which cannot consist with the Presbyterian system.

5. That the Presbyterian church of John's Island for many years—from as far back as the year 1755, was regularly connected with other Presbyterian churches, and with all the judicatories recognized in such connection, and continued in such connection until the schism in 1838, when the defendants, a majority of the congregation, declared the church independent and separate—and by such separation, they ceased to be a Presbyterian church, in the sense in which such church was founded; and no longer had a right to apply the funds to the support of such a church, which had been devoted as aforesaid, to the support of a minister.

6. Because either the civil or ecclesiastical tribunals must decide whether the objects of the trusts are fulfilled. If the civil decline to decide the question, as involving matter of faith and discipline belonging to the ecclesiastical, then, in this case, the question has been decided for them, inasmuch as the ecclesiastical judicatory has declared for the complainants, and rejected the defendants as schismatical. If the civil tribunals entertain the question, then the Chancellor erred in refusing the proof tendered, and in dismissing the bill.

7. Because the complainants, as members of the Presbyterian Church of John's Island, are entitled to the protection and aid of the court, in preventing the diversion of the
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fund by the corpora*tion holding it in trust, to a purpose contrary to that trust,—and are entitled to a decree, ordering the fund to be applied to the objects to which it was originally devoted.

8. Because the complainants, in fact, form and constitute the ecclesiastical body, for whose use the fund was devoted; and the defendants are merely a corporation acting as trustees for the ecclesiastical body, and are bound to apply the said funds for the use and benefit of that ecclesiastical body, and according to their direction, in carrying out the trusts to which the funds are dedicated.

9. Because the evidence offered to the court, to prove the religious tenets of the defendant, Elipha White, ought to have been received.

10. Because trust funds in the hands of a trustee, dedicated by the donor of these funds to a specific lawful purpose, cannot be diverted from that purpose by the trustee.

King for the appellants.
————, contra.

Curia, per JOHNSON, Ch. For the facts of the case, I refer to the decree of the circuit court, and shall proceed directly to the consideration of the questions raised by the grounds of appeal, under certain propositions, which I propose to state in my own way: and for the purpose of avoiding the perplexity which would arise out of presenting in one view the claims of the parties to the property and several funds in controversy, I propose, in the first place, to consider them in reference to the bequest of Robert Ure alone, supposing that their determination as to that, will conclude all or most of the questions that can arise out of the others.

The bequest of Robert Ure is "to the sole use and behoof, and for the maintenance of a minister of the Gospel, according to the Presbyterian profession, who is or shall be thereafter, from time to time, regularly called, and subscribe the Westminster confession of faith, as the confession of his faith, and shall firmly believe and preach the same to the people there committed, or which shall be hereafter committed to his care and pastoral inspection."

It has not been questioned, and I take it for granted that Mr. White has been regularly ordained a minister of the Gospel according to the Presbyterian profession; that he has signed the Westminster confession of
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faith as the confession of his own faith *and that he was regularly called and ordained minister of the Presbyterian church of John's Island and Wadmalaw; and that the church united itself to the Charleston Union Presbytery about 1790, and was a component part of it, or some other Presbytery, up to the 24th December, 1838, when, by a resolution, which was carried by a majority of twelve to three, it declared itself an "Independent Presbyterian Church, absolved from all connection with the Charleston Union Presbytery, and every other ecclesiastical body, and placed upon the same ground occupied by other Presbyterian churches in their neighborhood."

The defendants, being the majority, have

organized a congregation, and are in possession of the property and funds of the church, and have retained Mr. White as their pastor. He is said to have been present at that meeting, but whether he directly assented to the resolution or not, does not appear. The complainants, being a minority, have also organized themselves as a church, by the election of officers, and have been recognized by the Presbytery, by the Synod, and General Assembly of the United States, as the Presbyterian Church of John's Island and Wadmalaw. The causes which led to these proceedings are found in the memorable schism in the Presbyterian Church in the United States, which took place at the meeting of the General Assembly, held at Philadelphia in 1838. The defendants were disinclined to enter into that controversy, and set up for themselves. The complainants, on the contrary, adhered to what is familiarly called the old school Presbyterian party, and insist that they constitute the true church, and as such, are entitled to the funds and property of the church. The court disclaims, altogether, any authority to decide on questions of religious faith, or on the fitness and propriety of the forms of government which a church or congregation may adopt, if it inculcates nothing that is prohibited by law or subversive of good morals.

Within this rule, every society or association, whether the object be religious or secular, has the right to adopt such rules for its government, as to them shall seem best fitted to attain the ends of its institution. There is no controversy between these parties as to matters of faith. The faith of both is professedly based on the Westminster confession of faith. They differ only in the form of government, and it is that alone which characterises and distinguishes them from each other, and that is the only distinction. They cannot both have the fund, and therefore it becomes necessary to look into their forms of government, not to deter-

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*mine which ought to be preferred, but to ascertain which the testator intended should have it; and the leading question is, whether he intended this charity for the support of a minister of an independent church, professing to believe in the Westminster confession of faith, or the minister of a Presbyterian church, organized according to the form of government adopted by that church.

The terms used by the testator to designate the person for whose benefit this charity was intended, require, 1st. That he shall be a "minister of the Gospel, according to the Presbyterian profession." 2d. That he shall "subscribe the Westminster confession of faith, as the confession of his own faith." 3d. That he shall "preach the same to the people committed to his care and pastoral inspection."

The terms are all of familiar use, and when used in reference to the organization of a Presbyterian church, have an appropriate and well defined meaning. A church is defined, in the form of government of the Presbyterian church, to be a "number of professing christians, with their offspring, voluntarily associated together for divine worship," &c., "and submitting to a certain form of government." These have the power of appointing deacons, to whom the secular affairs of the church, and the care of the poor are committed, and ruling elders, who, with the pastor, constitute a judicatory, called the "church sessions," which has authority to enforce obedience to the government and discipline of the church, but the organization is incompleto without a pastor. The mode of obtaining one is pointed out in the 15th chap. of the form of government. If the church is satisfied with the ministration of any licentiate, they present him with a call, in which they promise him, among other things, "all proper support, encouragement and obedience in the Lord." This, if he consent to accept, is presented to the Presbytery to which he belongs, and is regarded there as a petition from the congregation, that he should be installed their pastor: and it is expressly declared that no candidate or minister shall receive a call but through the hands of the Presbytery, and if the Presbytery approve it, his installation follows upon his professing, amongst other things, his approbation of the form of government and discipline of the Presbyterian church, and promising to subject himself to his brethren in the Lord, and the organization of the church is complete. They have, in the language of the will, a minister of the Gospel according to the

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Presbyterian profession, *regularly called, and a people committed to his care and pastoral inspection.

The recognition of the complainants by the Presbytery, the Synod and General Assembly, as a Presbyterian Church, clearly authorizes them regularly to call a minister of the Gospel, according to the Presbyterian profession, and puts them in a condition to be committed to his care and pastoral inspection; and it will not be questioned that the minister of the church, in conforming to the other requirements of the will, by signing the Westminster confession of faith, &c., would answer the description of the person designated.

The defendants answer, that they too have a complete organization, and equally come within the description, and being the majority of the former congregation, ought to be regarded as the true church, and the complainants as dissenters from it. But they have thrown off their allegiance to the Presbytery, and all other judicatories of the Presbyterian church, and the question is, whether they now answer the description of the will, as the persons intended to take.

A Presbyterian congregation, with its officers, pastor, elders and deacons, is said to

be a complete organization in itself, but the church authorities all agree that it is not independent. Baird, in his work on religion in America, p. 234, chap. 5, says that "it is a part of an extended whole, living under the same ecclesiastical constitution, and therefore subject to the inspection and control of the Presbytery, whose business it is to see that the standards of doctrines and rules of discipline are adhered to by all the separate churches under its care. It is the court of review and control, over all the sessions of the several churches within its bounds. The supervising body, bound to see that the pastors are faithful in the discharge of their duties, having also authority to license and ordain candidates for the ministry," &c. To the Presbytery is superadded the higher judicatories of Synods and General Assemblies, as the means of preserving the standards of doctrine and discipline on a more extended territorial scale.

Such has been the organization of the Presbyterian church in Scotland, from the time of John Knox to this day, and has been substantially followed by the Presbyterian church in England and the United States.

Synods and General Assemblies do not seem to be indispensably necessary, as the Presbytery is, in itself, a complete and in-

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*dependent organization. They are only necessary when the number and territorial extent of the churches are too great to be under the control of the Presbyteries, and are calculated to preserve greater uniformity in doctrine and discipline over a wider extent of territory. The Rev. Mr. Forrest, the witness, was right therefore, in saying that there could be no Presbyterian church without a Presbytery. According to the form of government, no congregation can regularly call a minister, nor can a minister be ordained to a particular church, but through the Presbytery, and that upon his professing to approve of the government and discipline of the Presbyterian church, and consenting to receive and adopt the confession of faith of the church, &c. The congregation, on their part, promising, among other things, to "submit to him in the due exercise of discipline." In this way, and in this alone, can a minister of the Gospel, according to the Presbyterian profession, be regularly called, and the people (the congregation) committed to his care and pastoral inspection—and it follows, that without it, a Presbyterian church could not be perpetuated. The Presbytery could not ordain a minister, nor commit a people to his care and inspection. The Independent churches, on the contrary, maintain that each congregation of christians, that meet in one house for public worship, is a complete church, has sufficient power to act and perform every thing relating to religious government within itself, and is in no respect subject or accountable to other churches. (Buck's Theo. Dic'n., Article—Independents.) And although they may profess the same faith, teach the same doctrines, and practice the same ordinances as another sect, governed by different rules, they are always marked by something to distinguish them from each other, most frequently by some epithet characteristic of their form of government and discipline. The defendants have assumed the name and character of an Independent church, by which they are distinguished from the Presbyterian church, as clearly as the Roman Catholic Church is from the Protestant Episcopal Church; and it would be a perversion to suppose that by the terms "minister of the Gospel, according to the Presbyterian profession," the testator meant a minister of an Independent church.

It is not certainly known that any Presbytery existed in the State at the date of the will, nor is there any direct evidence of the existence of one until 1755, nor does it appear when that was organized, and it is argued that the testator could not have contemplated a minister of a regularly organized Presby-

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terian *church, on account of the inconvenience of this church connecting itself with a Presbytery; and we are therefore ignorant whether it was an Independent church or not, at the date of the will; but upon referring to the clause of the will before cited, it will be seen that the donation was for the support of a minister "hereafter" to be called, and if it was an Independent church, I should conclude that the donation was intended as an inducement to the church to submit to the authority of Presbytery, and thus to preserve the great landmarks of faith and discipline.

Usage is often called in to aid in the interpretation of words of doubtful import, and may be safely depended on in such cases; but cannot control the obvious intent. The language of Lord Eldon in the Attorney General v. Pearson, is that "where an institution exists for the purpose of public worship, and it cannot be discovered from the deed, declaring the trust, what form or species of worship was intended, the court can find no other means of deciding, than through the medium of inquiry into what had been the usage of the congregation in respect to it; and if the usage turns out, on inquiry, to be such as can be supported, I take it to be the duty of the court to administer the trust in such manner as best to establish the usage. But if, on the other hand, it turns out that the institution was established for the express purpose of such form of religious worship, or the teaching of particular doctrines, as the founder has thought most conformable to the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time, to alter the purpose for which it was founded, or say to the remaining members, 'we have changed our opinions, and you

who assemble in this place for the purpose of hearing the doctrines prescribed by the founder, shall no longer enjoy the benefit he intended for you, unless you conform to the alterations in our opinions? The court have nothing to do with the merits of the original system, as it is the right of those who founded the institution, and who gave their money for its establishment, to have the trust continued as it was intended."—3 Meriv. 400, 18.

If it be assumed, that this was an Independent church, at the date of the will, and that the minister was provided for, out of this fund, down to the time of its union with the Charleston Presbytery, and that an uniform usage for so long a period, would control the obvious intent of the testator; yet I collect from the decree of the circuit court,

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that this church was con*nected with some Presbytery, from about the year 1790, down to the time of secession in 1838, certainly from 1823, so that there is usage against usage, utterly irreconcilable, and we are thrown back on the will to ascertain the intention of the testator. The case of the English Presbyterian congregation, in the Borough of York v. Johnson and others, has been referred to in the circuit court decree, for the purpose of showing, that by the terms "English Presbyterian Congregation," the founder of the charity did not mean a Presbyterian church, subject to the jurisdiction of Presbytery; and it did not forfeit its rights, by afterwards uniting with a Presbytery, and then seceding from it. The case of Gable and others v. Miller, also cited, is to the same effect. In both, the beneficiary is described by a known and established name, without any addition or qualification, and were left to adopt such form of government as it might think fit, and free to change or alter it, as often as was thought necessary, consistently with the leading objects of the charity. Not so here. The donation in Ure's will, is not to the John's Island Church, but for the use of a minister of the gospel, according to the Presbyterian profession, who must have a congregation regularly committed to his care; and Turner's deed expressly superadds, a Presbyterian form of government, as a part of the description.

The fact, that Mr. White was regularly ordained minister of this church, and is himself a member of the Presbytery, is relied on, as establishing his claim to be supported out of this charity, although the congregation has repudiated its authority. But a minister alone is not enough; there must be a people under his care and pastoral inspection,—to whom he must preach the doctrines of the Westminster confession of faith. In the act of ordination, as before shewn, the congregation promises obedience to the pastor, and the pastor to the Presbytery; and the defendants having violated this undertaking in the act of seceding from the Presbytery, they can no longer be regarded under his care and inspection. He derived his authority, and they the right to a minister, from the Presbytery, upon the pledge of subordination to it; and having thrown off that authority, and assumed the right of self-government, they no longer remain the same people; no longer the flock committed to his care. The people described in the will are wanting, and there is no necessity for a minister.

The question arising under the deed of Robert Turner, is free from all difficulty. The trust there, is for the "minister or pastor of the Protestant Presbyterian Church or

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congregation of chris*tians, who do or shall usually meet and assemble together, for divine worship, at or in their public meeting-house on John's Island, during the time he should be minister or pastor of the said congregation, according to the rules and discipline of Presbyterian church government." He clearly intended not to be misunderstood. It will not be pretended, that the defendants fall within this description, and I think it fairly deducible from this deed that there was at the time a congregation then governed according to the rules and discipline of the Presbyterian church. There were Presbyteries in the United States, at the time of the date of Ure's will, and however inconvenient it might have been, it is possible that this church might have been united to a Presbytery at home, or in the kingdom of Great Britain. No records of the church are left; and from the nature of things, there exists no human being to tell us how the truth was, and we are at liberty to resort to any circumstance calculated to elicit it.

It does not appear from what source the church derived its title to the land on which the church building was erected, or whether there was any, and what trusts connected with it. But it is sufficient that the church has so long had the possession and use. The rule is, that where a donation to a charitable or religious institution does not create a trust inconsistent with the trust declared by the original founder, it will be presumed that the donor intended it should be applied to the same use, and neither the trustees or corporation are at liberty to apply it to other objects.

The donation of Thomas Hanscome, of the land, was to the trustees for the use of the church; and of the money ($6000) directly to the corporation. Nor is there any evidence, that there was any direct trust declared, as to the donation from the John's Island Society, or the contributions for rebuilding the church; but the necessary inference is, that they were intended for the use of the corporation, and the defendants insist, that being the majority, they have the right to control the application of them. I agree that the majority of a corporation have the right to direct the application of its funds, and that

the court cannot control them in the legitimate exercise of that power; but the question is, whether the complainants or the defendants now constitute the corporation. The Act of 1785, 8 Stat. 128, by which this church was incorporated, after reciting that the John's Island Presbyterian congregation, amongst others, had petitioned to be incorporated, enacts that "the several and respective

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societies *above mentioned, and the several persons who now are or shall hereafter be members thereof respectively, and the successors, officers and members of each of them, shall be, and they are hereby declared, to be, severally, one body corporate, in deed and in name, by the name and style of "The John's Island Presbyterian Congregation," &c. It was, therefore, the members of the church, and their successors, members of the church, who were incorporated, and the defendants having seceded from it, are no longer corporators, and the disposition of these funds belongs to the complainants, who remain members of the church. These, as well as all the other funds, are said to be in the hands of the treasurer of the corporation, and are rightfully so, as regards those arising from the bequest of Ure, the grant of Turner, and the lands devised by Hanscome, (all of which are vested in the trustees by name) if the treasurer has been regularly substituted trustee, and for the purposes of this case it may be assumed that he was, nor is it material in whose hands the funds are—neither the corporation, the church, or any other body of men, or an individual, has the right to apply them to any other objects than those prescribed by the donors. The case of the Attorney General v. the Governors of the Foundling Hospital, and the Attorney General v. the Earl of Clarendon, referred to in the circuit court decree, abundantly show that the court will control the execution of the trusts, whether the trustee be an individual or a corporation, and will remove the trustee if he has abused the trust, and substitute others in his place.

A secondary and subordinate proposition, growing out of the grounds of appeal, is, whether evidence was admissible, to show that Mr. White entertained and preached doctrines inconsistent with the Westminster confession, and although it has, in the view which I have taken of the case, become unimportant, I refer to it for the purpose of reserving the question. I have before disclaimed the authority of the court to examine into the religious faith of any one, for that he must account to another tribunal, but what he has publicly said or done, is capable of being proved without resorting to machinery of an inquisition to extort it from him; and I apprehend that where the right of property depends upon the existence or non-existence of the fact, the civil tribunals must of necessity examine into it. It is not difficult to conceive of extreme cases, calculated to illustrate the necessity. As if the pastor had openly declared his disbelief in the Westminster confession of faith, and avowed his belief in the doctrines of the Ko-

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*ran and preached them to his congregation. In Henrickson v. Shotwell, which I have examined in pamphlet form, (p. 41.) Chief Justice Ewing, of New Jersey, asserts, in decided terms, the right and power of the court to ascertain by competent evidence, the religious belief of any man, or set of men, where the rights of property depend on it, and the same rule is clearly deducible from what is said by the Lord Chancellor in the case of the Attorney General v. Pearson, 3 Meriv. 415.

It will be found necessary to obtain orders for carrying this judgment into effect, and the case is ordered back to the circuit court for that purpose.

JOHNSTON and DUNKIN, CC., concurred.

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2 Rich. Eq. 218

CHARLES COTESWORTH PINCKNEY and Others, Executors of Thomas Pinckney, v. ELIZA PINCKNEY, BENJAMIN HUGER and His Wife, CELESTINE, and Others.

(Charleston. Jan., 1846.)

[*Wills* ⇐564.]

Testator devised a plantation and the slaves thereon, in trust, and gave to his wife "the use of the mansion house and furniture, and the usual family accommodations" at the plantation, "during the continuance of the trust estate." *Held*, that while residing on the plantation, she, the wife, would be entitled, as in the life time of the testator, for herself, her servants and horses, to the use of whatever supplies the plantation afforded, and was usually consumed by the family.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1230; Dec. Dig. ⇐564.]

[*Husband and Wife* ⇐30.]

Where a party on his marriage, consented to a settlement of his wife's property, and afterwards made a voluntary settlement of property on her, including in it a considerable portion of the property embraced in the first settlement—*held*, that the last was no satisfaction of the first deed, and that the wife, after the husband's death, was not bound to elect between them, it not appearing on the face of the last deed, that it was intended as a substitute for the first.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 172; Dec. Dig. ⇐30.]

[*Wills* ⇐778.]

The doctrine of satisfaction applies, it seems, only to executory, and not to executed contracts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2004, 2006, 2010; Dec. Dig. ⇐778.]

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[*Wills* ⇐782.]

*Where a party is put to his election, whether to take under or against an instrument, he is not bound to elect, until all the circumstances necessary to enable him to make a deliberate

and discriminating choice, are ascertained; and, it seems, if he make an election without it, he is not bound by it.

[Ed. Note.—Cited in Powers v. McEachern, 7 S. C. 300; Brazel v. Fair, 26 S. C. 390, 2 S. E. 293; Williams v. Newton, 82 S. C. 229, 64 S. E. 219.

For other cases, see Wills, Cent. Dig. § 2030; Dec. Dig. ⟸782.]

[*Wills* ⟸487.]

Where a testator disposed of, by his will, a considerable estate, leaving, however, some residuary property, and provided that his debts should be paid from the income of a certain plantation and slaves; *held*, that it was inadmissible to receive evidence of the amount of the debts, as compared with the fund provided for paying them and with the undisposed of property, in order to shew that the testator must have intended that the residuary property should be first applied towards paying the debts, and that the fund specially provided for satisfying them, should only be used in case the residuary property should be insufficient for that purpose.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1029; Dec. Dig. ⟸487.]

[*Wills* ⟸836.]

Where a testator provides that his debts and legacies shall be satisfied out of particular property, or a particular fund, such property or fund, even though it be real estate, or the income derived from real estate, must be first used for that purpose, even in exoneration of residuary or intestate personal property.

[Ed. Note.—Cited in Brown v. James, 3 Strob. Eq. 30; Drayton v. Rose, 7 Rich. Eq. 338, 64 Am. Dec. 731.

For other cases, see Wills, Cent. Dig. § 2150; Dec. Dig. ⟸836.]

[*Executors and Administrators* ⟸272.]

The order in which assets, real and personal, are to be administered in this State, as laid down in Warley v. Warley, Bail. Eq. 397, approved of by the court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052–1057, 1059, 1065, 1068; Dec. Dig. ⟸272.]

Before Johnson, Ch., at Charleston, June, 1844.

The Chancellor. On the 27th December, 1803, the late Thomas Pinckney, the complainants' testator, and the defendant, Eliza Pinckney, his widow, then Eliza Izard, before and in contemplation of their marriage, entered into a marriage contract, wherein it is recited, that upon the treaty of the said intended marriage, it had been agreed, that all the real and personal estates of the said Eliza, should be conveyed and settled to certain uses thereinafter to be expressed and declared; and in pursuance thereof, the said Eliza conveyed to Ralph Stead Izard and William Lowndes, (the trustees of the settlement,) certain real and personal estates, whereof she was then seized and possessed, consisting of two plantations, one called Cow Savannah, and the other Fair Springs, and about thirty slaves, described by their names and families, in trust: 1st. For the use of the intended husband during the joint lives of himself and his intended wife. 2d. In the event of the death of the said intended husband, leaving the intended wife without issue, then to her use in fee simple. 3d. In the event of his dying, leaving issue of the

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*marriage, and she surviving, then to her use for life, and after her death, to her issue, whether of that or any subsequent marriage. 4th. In the event of the said intended husband surviving the intended wife, having issue of the intended marriage, then to his use for life, and upon his death, remainder to the issue in fee; but if he survived the issue, then to his use in fee. 5th. In the event of his surviving her without having issue of the marriage, then he was to take one half the estates in fee, and the other moiety to such person or persons as she might by writing appoint; and in default of such appointment, then to him in fee. The deed confers on the trustees the power, with the consent of the parties in writing, to sell and dispose of the whole, or any part of the estates, and to put the proceeds out at interest, or to reinvest them in other property, subject to the same uses.

The marriage was shortly after had and solemnized, and the testator made another deed, dated 11th May, 1813, which purports to have been entered into by himself on the one part, and Ralph Stead Izard and Stephen Bull, of the other part, for and in behalf of Eliza Pinckney, the testator's wife, wherein it is recited that the said testator, since his intermarriage with his said wife, by the death of her father Ralph Izard, Esq., had received in her right a distributive share of his estate, real and personal, of considerable value, and that in consideration thereof, he was desirous of providing a better support and maintenance for his said wife, and her present and future issue. By this deed, the testator goes on to convey to the said Ralph Stead Izard and Stephen Bull, a plantation lying on Santee river, called Morelands, and eighty slaves by name, upon the following trusts: 1st. For the use of his wife for life, and from and immediately after her death, in case he shall survive her, and there shall be no child or children of the said Thomas and Eliza Pinckney living, then in trust to and for the said Thomas Pinckney in fee. 2d. If the said Thomas Pinckney "shall survive the said Eliza Pinckney, and there shall be one or more child or children of the said Thomas and Eliza Pinckney living, then in trust for the said Thomas Pinckney during the term of his natural life," and after his death, "in trust for the said child, if only one, his or her heirs, executors, and administrators, and if there shall be more than one, then in trust for such children, their heirs, executors, and administrators and assigns; but in such shares and proportions as the said Eliza Pinckney shall,

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by *testament in writing or writing of appointment in nature of a will, which she shall have power in such case to make, direct

or appoint." 3d. If the wife survive the husband, and there shall be one or more children of the marriage living, then "in trust for the said child if only one, if more than one child, then in trust for them, in such proportions as the said Eliza Pinckney shall or may by will, or any writing of appointment in nature of a will, give, direct and appoint; but if the said Eliza Pinckney shall survive the said Thomas Pinckney, and there shall be no child or children" of the marriage, living at the time of her death, then in trust for her use in fee.

The deed then goes on to confer on the trustees power of selling and disposing of the whole or any part of the estate conveyed, the proceeds to be invested in other property, subject to the same uses and trusts, and declares that the provision for Mrs. Pinckney, made therein, was intended, and should be taken and accepted by her, in bar of her right and title to dower in the testator's real estates.

On the ——— day of April, 1842, the testator made and executed his last will and testament; in the first clause he refers to the marriage settlement of May, 1813, and adds, "as this settlement is now of force, and comprised one half of our (himself and wife) joint property, and now more than one third, according to my estimation, it stands, of course, in lieu of any bequest from me, fully recognizing, as I do, its validity, and confirming, if need be, all its provisions." He then goes on to give to his wife for life, his farm in Pendleton, with the household furniture, and his carriage and horses, and the Mansion House in Broad-street in Charleston, and the furniture and plate belonging to it, and his servant James.

In the 2d clause of the will, he gives to the complainants, his executors, his plantation called Fairfield, in St. James' Santee, and all the slaves thereon, of whom a list is subjoined, amounting to one hundred and twenty in number, and all the stock, interests and furniture, and every thing belonging to it, or used on the said plantation in the actual ordinary management thereof, in trust, to employ the said plantation, slaves, &c. in making crops, and directs that the income therefrom shall be applied—1st. That they (the executors) pay the expenses of the plantation. 2d. "That they pay the debts I may leave, and the legacies bequeathed by this will. 3d. That they invest in some secure stock of this State or of the city of

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Charleston, all the in*come arising from the sales of the crops, not expended in the predisposition or appropriation of them as aforesaid;" and he then adds, "and I do hereby make the following disposition of the sums of money thus invested in stock as aforesaid. It is to constitute a fund from which to pay the said plantation expenses, in the event of any failure of crops, by reason of freshets or storms, the interest accruing, first to be applied to the purpose, and if insufficient, as much of the principal as may be necessary; but should this stock or its interest not be required, it is to be kept as an accumulating fund, reinvesting its interest, and adding thereto all surplusage of income from crops as they may arise; and I do hereby expressly enjoin it on my said trustees, not to loan any portion of this stock or its interest, or any money arising from my estate, to any private individual whatever," &c.

In the 3d clause of the will he remarks, "as this disposition of my said plantation called Fairfield, and the people thereon, which I designed for my eldest daughter, Celestine, has been made in pursuance of the express declaration in writing, addressed by her husband, Benjamin Huger, a Captain of Ordnance in the service of the United States, that he would never receive or accept one dollar of my property in any shape, it follows that this disposition of it is to endure during the joint lives of my said daughter and her husband; from the strong sense and determined character of the said Benjamin Huger, he would see that a bequest to his wife would involve benefits to himself, and would lead him to treat this property as he has done the Abbeville estate, which I offered him personally, and which he sternly refused with neglect and apparent repudiation. But if my said daughter should survive her said husband, Benjamin Huger, then I give and bequest my plantation Fairfield, and the people thereunto belonging, to said daughter Celestine, to her and her heirs forever; and I will that the trust estate hereinbefore devised and vested in my trustees, shall absolutely cease and determine on the death of the said Benjamin Huger, in the life time of my daughter, and the said trustees shall deliver all that part of the trust estate, consisting of the said plantation and negroes thereon, according to the subjoined list, to her immediately on the decease of her said husband, together with the crop or its value, made in the year of his death. But if the said Benjamin Huger survive his wife, my daughter, then on the decease of my said daughter Celestine, I give and bequeath the

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*plantation Fairfield, with the negroes thereon, as aforesaid, to my brother Charles Cotesworth Pinckney, until his second son, Thomas Pinckney, shall arrive at the age of twenty-five years, and then to his said son, Thomas Pinckney, and his heirs forever."

By the 4th clause of the will, he gives to his wife Eliza Pinckney, the use of the Mansion House, furniture, and the usual family accommodations on his Fairfield plantation, "during its continuance as a trust estate." When that terminates, the whole estate is to follow the provisions of the preceding section, and he directs that "its accumulations, which may arise from the sale of crops of Fairfield, and exist, at the decease of the said Benjamin Huger, or of my daughter Celestine,"

be divided into two equal parts; "and I do hereby direct and enjoin it on my executors, to keep both parts invested in the public securities aforesaid, reinvesting the interest of each, so that they may increase by compound interest; and as soon as my nephew Thomas Pinckney, the second son of my brother Charles Cotesworth Pinckney, shall arrive at the age of twenty-five years, I give one part or moiety of this fund to him and his heirs; and as soon as my grandson, Thomas Pinckney Huger, the fourth son of my daughter Celestine, shall arrive at the age of twenty-one years, and on the further condition, if he shall then assume and use the name of his great grandfather Thomas Pinckney, without addition of any kind, then I give and direct the other part or moiety of the said fund and its accumulations, to him and his heirs. The fact of his assuming the name of Thomas Pinckney alone, to be signified by his publishing such fact in two of the daily papers of the city of Charleston, within six months after his arriving at the age of twenty-one years." If on his coming of age, he refuse to conform to these conditions, the fund is given to the testator's nieces, (Ann J. Harleston, wife of Edward Harleston, Esquire, and Maria Pinckney, daughter of C. C. Pinckney,) to be divided between them, share and share alike.

The 5th clause is as follows: "And as to the rest and residue of my estate, including any which I may hereafter (the word derive I suppose is omitted here) from the will of my father and mother, or from any other source, I will that my trustees as aforesaid, shall receive and put at interest any monies that may accrue, and that they receive the rents and profits of any real estate that I may be entitled to, and that they may employ any negroes that may fall to my share on my

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plantation, Fairfield, and that *they pay over to my niece Mrs. Rebecca Rutledge, and her husband Edward C. Rutledge, Esquire, the amount of my bond to them from this source." And the testator then directs that if there should be any deficiency, it should be supplied from the trust funds in the hands of the executors.

By the 6th clause, the testator gives to his daughter Celestine his farm in Pendleton, after the death of her mother, in fee; but provides if she should die before the termination of the life estate, before given to the mother, or before the death of Benjamin Huger, her husband, the said farm should go to and be equally divided between his nephew Thomas Pinckney, the second son of his brother C. C. Pinckney, and his, the testator's daughter, Rosetta Izard. In this clause he also gives to his said daughter, Rosetta Izard, after the termination of his wife's life-estate therein, the Mansion house in Broad street, in Charleston, and the furniture, and the servant James, in fee, with a limitation over in the event of her dying without issue surviving her, to his brother Charles Cotesworth Pinckney, for life, remainder in fee to his son, Thomas Pinckney.

In the 7th clause, he gives to his daughter, Rosetta Izard $1000, "as a small testimony of the affection of her father, who leaves her this sum immediately, because it has been always understood she is to inherit her mother's settled estate. To Mrs. Lowndes, his sister, and to his brother, he gives each $500: and to Edward Harlston, his gold watch and a painting of the Virgin and child, by Rubens; and to John L. North, $500.

In the last clause, the complainants are appointed executors, and the will thus framed is signed and sealed by the testator, and attested by three witnesses. Following this, is a list of the negroes on the Fairfield plantation, one hundred and twenty in number, and of those on Moreland, amounting to seventy-three; and then follows the following clause, also signed and sealed by the testator, and subscribed by the same witnesses, and was probably done at the same time as the body of the will, and intended to constitute a part of it, and was so treated at the hearing. "And I do hereby give and devise to my wife Eliza and her heirs, all such of the negro slaves named in the within list, as belonging to Moreland plantation, as were not named in the marriage settlement, referred to at the commencement of this my last will. In consideration of the great loss sustained by the said plantation in the year of the Cholera, her list is now made up to her. Provided, nevertheless, that should there be

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a few people named origi*nally in her settlement, and not now named in the foregoing list, or by their forming connexions with the Fairfield people, such shall remain of the Fairfield list and considered as being exchanged. The two above lists including all the people I now own, excepting ten or twelve whom I retain, and will dispose of hereafter."

Not long after the execution of the will, the testator sailed for Europe, and died at Havre in France, on the 7th July, 1842, leaving the defendant, Eliza Pinckney, and his daughters Celestine Huger and Rosetta Izard, both of whom have children, Thomas Pinckney, son of C. C. Pinckney, and Thomas Pinckney Huger, son of his daughter Celestine Huger, surviving him; and the complainants state in their bill that they have proved the will, and assumed the execution thereof. But that differences of opinion have arisen and are entertained by the parties interested as to their various rights under the two marriage settlements and the will, which I shall state particularly hereafter, and which they are unwilling to take the responsibility of deciding, concerning which they ask the advice and direction of the court. They state more particularly, that they are informed and believe that the real estate,

described in the marriage settlement of December, 1803, has been long since sold, but that they do not know to whom the purchase money was paid, or whether it was received by the testator, or laid out in the purchase of other estates to the same uses. That the negroes named in this settlement, or some of them, are included in the deed of May 1813, and that they are advised that the last mentioned settlement was intended as a satisfaction of, or a substitute for the first, and that the defendant Eliza Pinckney, the widow, was bound to elect between them, and Celestine Huger and Rosetta Izard were bound to elect to take under these settlements or the will of the testator, and they submit whether they are bound to make the election at any and what time. They state also that the testator left considerable real and personal estates not disposed of by his will, and died considerably indebted, and they submit whether the debts are to be paid out of the undevised personalty, and the real estate descended, or out of the fund charged with their payment by the will; and they pray that the rights of the parties may be ascertained and declared.

The defendants have all answered; each of them presenting some questions applicable to themselves, and it will therefore be necessary to refer to all the answers, pre-

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mising that they all, *without exception, admit the execution of the marriage settlement of 27th December, 1803, of the deed of the 11th May, 1813, and of the testator's will of April 1842; and I shall begin with the answer of Mrs. Eliza Pinckney.

She insists that the deed of 1813 was founded on the consideration of a large accession of fortune, which the testator derived through her on the death of her father, and was intended not as a substitute for, but an addition to the provision made for her by the deed of 1803. She arrives at this conclusion from the circumstances, that she had never heard it spoken of as a substitute; that there is no reference in the last to the first deed; that the provisions and limitations of the last are different from those in the first, to an irreconcileable extent; and she admits that some of the negroes named in the first, may be included in the last, and how that happened she does not know, but insists that she is entitled to all the benefits conferred on her by both deeds and the will, considered as entirely distinct and independent of each other. But that if the court should be of opinion, and so decide, that they cannot all stand together, and she is bound to elect under which she will take, she submits that she is not bound to make the election until it shall be ascertained what shall be most for her benefit. She admits that the testator died possessed of real and personal estate not disposed of by his will, and that he was considerably indebted at the time, but contends that the debts and pecuniary legacies are a charge upon the fund specifically set apart in the will for their payment, (the income from the Fairfield plantation) which she supposes to be ample, and that the undevised estates are distributable between herself and Celestine Huger and Rosetta Izard, and that if it should be necessary to sell any portion of the estates to meet pressing demands, they will be entitled to be reimbursed out of the income from the Fairfield estate.

She submits also, that under the devise to her, of the testator's "farm in Pendleton district, situate on the west side of eighteen mile creek, together with the household furniture, carriage and horses," she is entitled to all the fixtures on the said farm which belonged to the houses and offices of the said farm, during her life. (What these fixtures are, is not stated in the answer, but I think it was stated in the argument to be a cotton gin or horse mill for grinding corn, or both.) She submits also, that, in the event of the court's adjudging that herself and her two daughters are not entitled to the undevised estates, discharged from the payment of debts, then, under the devise to her for life

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of the "Mansion house *in Broad street, in the city of Charleston, with the furniture and plate belonging to it, and also my servant James," who usually has charge of it, and of the use of the Mansion house and furniture, and the usual family accommodations, at Fairfield plantation, during its continuance as a trust estate, she is entitled to all the testator's wines and family supplies, and the usual supply of plantation provisions or supplies while residing at Fairfield; and to show that such was the intention of the testator, she refers to a letter addressed by him to her, dated on board the Duchess D'Orleans at sea, off the banks of Newfoundland, 19th of June 1842, whilst on his voyage to France, from which he never returned, in which among other things he says, "in the secret drawer of my secretary there is a note of Mr. W. C. Smith, and a note or bond of Mr. Holland, of Pickens district, for money lent. If any difficulty occurs in the payment of them, ask Mr. Lorton to collect them for you. My stock of wine goes to you and Ralph" (the defendant Ralph Stead Izard) "of course, as you have a life estate in both houses; there are a few dozen fine old wine of Prioleau in the wine loft;" and she adds, that when he, the testator, was about to leave Charleston on his voyage to France, he took the key of his cellar, in which his wines were kept, under his own care, and delivered it to the said Ralph Stead Izard, saying that the wine might be used by the family, then consisting of herself, the said Ralph Stead Izard and his wife Rosetta, which she insists is good as a donatio mortis causa to her, of the wines and money secured by the

said notes: and that she is entitled to the whole, or at least to one half, of the wines, or the proceeds in the hands of the complainants.

In respect to the effect and operation of the two deeds or settlements, and the testator's will, the defendants, Ralph Stead Izard and his wife Rosetta, rely on the same grounds as those stated in the answer of Mrs. Pinckney; they insist too that the fund set apart by the testator, for payment of debts and legacies, which they regard as ample, is primarily liable, and that the undevised estates are distributable amongst his heirs at law, as in cases of intestacy, and that if a sale of any portion of these estates be necessary to meet these demands, they are entitled to be indemnified out of the income of the Fairfield plantation. But if the court should otherwise adjudge, then they submit that they and their co-defendant, Mrs. Pinckney, are entitled to the testator's wines, under the donation in contemplation of death, referred to in the answer of Mrs. Pinckney; and they

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state in addition, that, *when the testator, in very bad health, was about to leave Charleston, on a voyage, from which he never returned, he took the key of his wine cellar, which was always kept by him, and presented it to the defendant Ralph Stead Izard, telling him, in substance, to use the wine there for the family, consisting then of themselves and the defendant, Mrs. Pinckney, and refer to the letter of the testator to Mrs. Pinckney, of the 19th June, 1842, as evidence of his intention.

The dispositions of the will, in relation to his daughter Celestine Huger and her children, and the terms in which they are expressed, manifest, too clearly, that he was at the time, influenced by strong resentments against, perhaps, her husband only, but certainly operating on the testator's mind to the disadvantage of both. Whatever may have been the cause of these feelings, it is a matter of deep regret that they should have found their way into the will itself, especially as they have proceeded from a man so distinguished as the testator was for intelligence and elevation of character. The will bears date but a short time before the testator sailed for Europe, avowedly in the hope that it might restore his impaired health, and he must have calculated on the possibility of his never returning: and it is matter of astonishment that, under such circumstances, he should, in the solemn act of making a last will and testament, when it might be supposed a parent would have forgotten the delinquencies of his children, if they were guilty of any, and would be influenced only by affection for a daughter, who, from the will itself, appears to have been, before that time, peculiarly the object of his solicitude and regard. Happily examples like this are of rare occurrence: indeed I do not remember that any like it has fallen within my observation. The consciousness of the defendants, Benjamin Huger and his wife, that these resentments had their origin in some imaginary cause, must be a consolation to them. They state in their answer, most solemnly, that they are unconscious of any dereliction of duty or just cause of offence, given by them or either of them, to the testator, and they deplore the existence of such a state of feeling towards them, not on account of the influence they might have had on the dispositions of the will, but that they should have found their way into the breast of the testator.

These matters have no necessary connexion with the questions of law growing out of this most extraordinary will; but as the will itself is a part of the case, and contains the

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charges *against the defendant, Benjamin Huger, I have thought this explanation due to him, and shall not again recur to the subject.

These defendants, (Benjamin Huger and wife,) in their defence, rely on the same grounds as those taken by the defendant, Mrs. Pinckney, in relation to the effect of the two deeds and the will, and as to the appropriation of the funds set apart for the payment of debts and legacies to that object, instead of the undevised estates, to a portion of which they claim to be entitled, and they insist that if the court should decide that they are not entitled to take under both the deeds and the will, and are bound to elect between them, they ought not to be called on to do so until it is ascertained which will be most for their benefit.

These defendants state, in their answer, that the defendant, Celestine, was entitled, under a gift from her great uncle, General Charles Cotesworth Pinckney, to one-fourth part of the nett proceeds of the crops raised on a plantation in Georgia, called Steadfield, from 1812 to 1825, which, as they are informed and believe, amounted to a considerable sum, and that they were received by the testator in his life-time, and they pray an account of them.

The answer of Thomas Pinckney, the minor, by his guardian ad litem, whose interests are opposed to the claims set up by the other defendants, admits the execution of both the deeds of 1803 and 1813, but submits that the last was intended to embrace the property contained in the first, and actually stands in lieu thereof, and relies on the following facts for the correctness of the conclusion, viz: That Cow Savannah and Fair Springs, the lands conveyed in the first deed, were of so little value that the testator did not think them worth planting, and they were sold to Mr. Timothy Ford for a small amount, long before the execution of the second deed. That the property conveyed in the second deed was of much greater value than that which he derived from his wife's fortune at the division of her father's estate in 1813,

and at a fair valuation would have covered not only this accession of fortune, but the value of the property conveyed by the first deed. That the last deed embraces twenty-four out of thirty negroes named in the first deed, and allowing for probable deaths, probably all that remained of that stock.

He insists also that the general personal estate, not specifically devised, is the proper fund from which debts and legacies are to be paid, and that the charge on the proceeds

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of the crops, made *on the Fairfield plantation, for the payment of debts and legacies, is merely subsidiary.

In relation to the claim of Benjamin Huger and wife, for an account of the proceeds of the crops of the plantation in Georgia, called Steadfield, received by the testator, this defendant states that he is informed and believes that they did not much more than pay the plantation expenses; that considerable sums of money were paid by the testator to his said daughter, through the hands of John Vaughan, of Philadelphia, and that he had made to her an advancement of a valuable plantation and negroes in Abbeville district, which he insists must be regarded as a satisfaction of this demand.

Being a minor, this defendant in all other matters submits himself and rights to the protection of the court.

The questions arising out of these conflicting claims may be thus summarily stated:

1st. Whether the deed of 1803 is to have its full effect and operation, or whether that of 1813 was intended as a substitute for it, and thus to render it inoperative.

2d. Whether the will contains a disposition of the general residue of the testator's estate.

3d. If not; whether the debts and pecuniary legacies are to be paid out of funds provided in the will or the residuary estate.

4th. Whether if it becomes necessary to provide for the payment of pressing debts, and a sale of the residuary estate should be required, the parties, entitled to it, will not be reimbursed out of the income of the Fairfield plantation.

5th. Whether Mrs. Pinckney and Huger and wife, are, under the dispositions of the will and the provisions of the deed, called on to elect under which they will take, and if so, at what time and under what circumstances will they be required to make the election.

6th. Whether Mrs. Pinckney is entitled to the use of the fixtures on the Pendleton farm for life.

7th. Whether there is a good donation mortis causa of the wines to Mrs. Pinckney and Ralph Stead Izard, or whether Mrs. Pinckney is entitled to them as a part of the usual family supplies.

8th. To what is Mrs. Pinckney entitled under the bequest in the 4th clause of the will, "and as my plantation Fairfield must continue a trust estate during the life-time of the said Captain Benjamin Huger, I give

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the use of my mansion house and furni*ture, and the usual accommodations there, to my wife, Mrs. Eliza Pinckney, during its continuance as a trust estate."

9th. As to the rights of the defendants, Benjamin Huger and wife, for an account of the income from the Steadfield plantation in Georgia.

1st. Mr. Justice Story, in his treatise on Equity Jurisprudence, p. 360, vol. 2, defines what is technically called satisfaction, to be the donation of a thing, with the intention expressed or implied, that it is to be an extinguishment of some existing claim or right of the donee; and whether the act done will or will not operate as a satisfaction of a pre-existing obligation, must necessarily be resolved by the intention of the donor, independent of the will or consent of the donee; not that he is bound to accept the substitute, but when the intention of the donor is clear, he, the donee, cannot have both, but must elect between them; when the intention is expressed, there can of course be no controversy about it, the donee must elect, and all the difficulties that have arisen about it is, in ascertaining under what circumstances the intention may be implied. From the nature of the inquiry, no rule would reach every case. The intention of an equivalent act may be manifested in such various forms, that no human foresight could anticipate and provide for every case that might occur. The cases, however, which have passed in review before the courts, serve as land-marks in the inquiry, and certain rules are deduced from them, which for the sake of consistency and uniformity, ought not to be lost sight of. Thus, if one is bound to do a particular act, and does one ejusdem generis, in the absence of all countervailing circumstances, it is usually regarded, by the court, as intended in satisfaction of his preceding obligation. (2 Story's Eq. 360, 1.) But if the thing given is ejusdem generis with that due to the donee, the presumption, that it was intended as a satisfaction, does not necessarily arise, unless the thing substituted be equally beneficial, either in amount, or certainty, or value, or the time of enjoyment, with the thing contracted for. (2 Story's Eq. 363; Blandy v. Widmore, 1 P. W. 324; Atkinson v. Webb, 2 Vern. 478.) So when the thing given depends on a contingency, or is given with a view to some other purpose, it will not be presumed to be intended as a satisfaction of the existing obligation; as where a parent is under obligation by settlement to provide for his children, and by his will makes a provision for them inconsistent with it, or with a view different from that provided for

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in the settlement, it *will not be regarded as intended as a satisfaction. (2 Roper on Legacies, ch. 18.)

The question here is, whether the deed of 1813, which is reaffirmed in the will, and made a part of it, was intended by the testator as a satisfaction of the deed of 1803. No such intention can be collected from the deed or will. There is no allusion in either to the deed of 1803, and the intention must be ascertained from extrinsic circumstances. Those relied on by the defendants, Mrs. Pinckney and her daughters, are—1st. That the deed of 1803 is professedly founded on the consideration of marriage, in pursuance of a previous agreement between the parties. 2d. That the provisions of this deed are different from and inconsistent with those of the deed of 1813. And 3d. That the consideration of the last deed is avowedly the accession of fortune derived from the estate of Mrs. Pinckney's father. On the other hand, the defendant, Thomas Pinckney, to shew that the last deed was intended as a satisfaction of the first, relies on the circumstances, 1st. That the property settled by the deed of 1813, was equal or greater in value than all the property which he acquired by his marriage. And 2dly. That all that remained in specie of the property, included in the first deed, is embraced in the second.

That the two deeds were founded on different considerations can admit of no question. The first on that of marriage, the best and most valuable. The second on the moral and good consideration of providing for a wife and children; and it is equally clear that, although the property conveyed by the second deed is ejusdem generis with that conveyed by the first, the dispositions in them are essentially different. I will advert to one only which admits of no controversy. The first provides that "in the event of Mrs. Pinckney's surviving" the testator, "and having issue of the intended marriage, then for the use of the intended wife during her natural life, and from and immediately after her death, then to the use of her issue if more than one, as also for any other issue which the said Eliza Izard, the intended wife, shall or may have by any future husband." In the deed of 1813, in the event of her surviving the testator, the limitation is to the use of the child of the marriage, if but one, and if more, then to their use in such shares and proportions as the said "Eliza Pinckney shall and may by her will, or by any writing or appointment in nature of a will, give, direct and appoint." In the first, the issue of the marriage, and that by

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any subsequent *marriage, are entitled to take independent of the will of Mrs. Pinckney. In the second, the issue only are to take, and if more than one, then in such portions as Mrs. Pinckney shall appoint; and it is unreasonable to suppose that the testator intended that the last should be a satisfaction of the first deed. It is impossible that he could have intended that the provisions of the last deed should be regarded as a satisfaction of the provision made in the first for the issue that Mrs. Pinckney should have by any other marriage; and according to the rule it cannot be so regarded; they are altogether excluded by the last deed, and no compensation is provided for them if there had been any.

But it strikes me that the question does not necessarily enter into the case at all. The property conveyed by the first deed never belonged to the testator; it was the property of his intended wife, Eliza Izard. The grant is not the act of Thomas Pinckney, but her's, with the intention to provide for the issue of the marriage. It was a subject over which he never had any control, and it will not be presumed, in the absence of any express intention, that in making the deed of 1813, he intended to impose the condition, that his wife and children should surrender their rights to the property conveyed by the deed of 1803. That is not all—according to the definition of Mr. Justice Story, the doctrine of satisfaction applies only to the case of an existing claim or right, and if we assume that, by the first deed, the testator disposed of any right or property which belonged to him, it is an executed contract, by which he parted forever with all interest which he had in the property, and vested it in trustees for the use therein expressed, and not an existing claim or right of the donees against the donor; and we look in vain for any principle or authority by which one, who has given an article of property to another, may resume it, without the consent of the owner, on his giving another article of property ejusdem generis of equal or greater value.

It is stated in the answer of the defendant, Thomas Pinckney, that the second deed includes all that remains in specie of the property conveyed by the first. The parties entitled under it can take no more than is covered by the two deeds. If all is included in the last, they can of course have nothing else. Whether it is or not, must be the subject of inquiry before the master. On principle, however, the complainants must account for any property embraced in the first deed, which the testator sold, including Cow Savannah and Fair Springs.

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*2d. In the solution of the second question proposed, I need only refer to the 5th clause of the will. By that, the executors or trustees are directed to appropriate the residue of the testator's estate to the payment of the bond due by him to his niece, Rebecca Rutledge, and her husband, Edward C. Rutledge, and if that should be insufficient to pay that debt, the deficiency should be supplied from the fund before set apart for the payment of debts. Now if this clause be taken in connexion with the concluding sentence, subjoined to the lists of the slaves, in which he says, "the above lists include all the people" (negroes) "I now own, except

ten or twelve, whom I retain, and will dispose of hereafter," it is quite clear that the testator did not intend to dispose of the corpus of the residue of his estate, and his directions to his executors, as to the payment of his bond to Rebecca Rutledge and her husband, contained in the clause under consideration, renders this conclusion irresistible. He manifestly looked to an accession of fortune from the estate of his father or mother, or both, in the form of lands, negroes, or money; and directs that if any negroes should fall to his share, they should be employed on the Fairfield plantation, and that the income to be derived from this source, the rents of the lands and the interest of the monies, should be applied to the payment of that bond. He does not stop here, but directs that if there should be any deficiency from this source, "the balance must be supplied from the trust fund," (obviously the income from the Fairfield plantation) "remaining in their hands," and gives as a reason that "this payment will be required long before the appropriation of the trust fund." That he intended that all his debts and legacies should be paid out of the income of his estate, and that no portion of the corpus should be sold for this purpose, is as clearly expressed in this and the other provisions of the will as if he had said in terms "my executors are hereby directed not to sell any part of my real or personal estate, devised or bequeathed, to pay my debts, or the pecuniary legacies bequeathed by this will, but must pay all from the income of my estates." The principal, the corpus of the rest and residue of the estate, is not therefore disposed of by the will, and is distributable amongst his next of kin or heirs at law; his widow and children.

3d. The third proposition cannot now be regarded as an open question. When a testator has set apart a fund for the payment of debts, it would seem, if we would follow the intention, which generally, and ought univer-

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sally to govern in the interpretation *of wills, that the fund alone was primarily liable for their payment, and must be exhausted before any other could be resorted to. In England, the policy of the government is to sustain the landed aristocracy, and the courts, entering into the spirit of it, have resorted to the most subtle and refined distinctions, to disburthen real estates from the payment of debts, in favor of the heir at law. But that policy is wholly inapplicable to the state of things here, where real and personal estates are equally liable for the payment of debts, and where estates, in cases of intestacy, are equally distributable amongst the kindred, whether lineal or collateral; and we are left free to carry out the intention of the testator, unembarrassed by State policy. I take it, therefore, that when the testator gave to his executors his Fairfield plantation, and the slaves, &c. belonging, in trust, amongst other things, that out of the income therefrom, "they pay the debts I may leave, and the legacies bequeathed by this will," he intended precisely what he expressed, and that that, and no other portion of his estates, should be charged with their payment.

The cases in our own courts furnish abundant authority for this conclusion. In Hall v. Hall, 2 McC. Eq. 303, the testator charged his estate generally, real and personal, with the payment of his debts, and after the execution of his will, acquired other real estates, and it was held that the estates charged were liable for the payment of the debts, and that the subsequently acquired real estates descended to his heirs, as in cases of intestacy. In Warley v. Warley, Bail. Eq. 404, the rules laid down are, that in the administration of assets, real and personal estates devised for the payment of debts, or in any manner directed to be so applied, are first to be applied to the payment of debts. Secondly, personal estates not specifically bequeathed; and a bequest of the testator's whole personal estate, or of the residue, after specific legacies out of it, is to be regarded as specific. Thirdly, descended real estates. Fourthly, personal estates specifically bequeathed. And lastly, real estates devised.

These rules were practically carried out in Pell v. Ball, Sp. Eq. 520, in a manner directly applicable to the case in hand. In that case, the testator directed by his will, that his debts should be paid "from the nett proceeds arising from the sales of the crops" on his plantation, and after providing for the payment of his debts, and a pecuniary legacy of ten thousand dollars to one of his relations out of that fund, he disposes of the subsequent crops; and it was held,

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that the debts must be charged *on this fund, in exoneration of descended real estates; and my brother Dunkin, who tried the cause, and whose judgment was affirmed by the court, remarks, that if the testator had bequeathed to his creditors by name, a sum sufficient to pay their debts, directing it to be paid out of the proceeds of the crops, the appropriation could not have been more perfect.

The case in hand would clearly fall within this rule, but it does not stop here. The income of a particular residue of the estate is charged with the payment of a debt due by the testator to his niece Rebecca Rutledge, and her husband, Edward C. Rutledge; and if that should prove insufficient, it is to be paid out of the income of the Fairfield plantation; and it is impossible to reconcile this disposition with the intention of the testator, that this fund should be charged with the payment of his other debts, and the pecuniary legacies. No phraseology could more effectually negative such an idea.

4th. Having arrived at the conclusion, that the income from the Fairfield plantation is

the fund primarily liable for the payment of debts, it follows as a necessary consequence, that if any other fund is broken in upon, the parties entitled to it have the right to be reimbursed out of it. The creditors, so to express it, have a lien upon the whole estate, real and personal, whether devised or bequeathed, or not; and it is a natural equity, that if they lay hold of another fund than that specifically charged with the payment, the party entitled to it must be reimbursed out of the fund charged. He is, in legal parlance, entitled to be subrogated to the rights of the creditor. (See Pell v. Ball, Sp. Eq. 524–5.)

5th. I have before shewn, that there is nothing apparent on the face of the deeds or the will, which renders them incompatible, and that they may all well stand together, and have their full operation and effect. It may be, however, that some of the negroes embraced in one or the other, or both of the deeds, are disposed of by the testator's will with the Fairfield plantation. He seems to suppose that such might be the case, and has provided in the last clause of the will, that if any of them should be found on the list of the Fairfield people, either by mistake, or by their forming connexions with them, they should be considered as exchanged for those given to Mrs. Pinckney, as attached to the Moreland plantation; and if it should so turn out, it presents a clear case of election; she cannot have both, for the bequest of the negroes on the Moreland plantation,

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not included in the deed, *is, by the will itself, put expressly upon the footing of an exchange, for those contained in the deed, found upon the list of the Fairfield negroes.

The term election, imports, of itself, a right to choose between one and another, or more things; and it is impossible to exercise that right understandingly, unless the party is fully informed of their relative value, for without it, his judgment or will, or even his caprice, could not enter into the act of chosing. Hence, the well settled rule, that he is not bound to elect, until all the circumstances necessary to enable him to make a deliberate and discriminating choice, are ascertained; and if he even make an election without it, he is not bound by it. (2 Story's Eq. 359–60.) If, therefore, any of the negroes included in either of the deeds, are otherwise disposed of by the testator's will, Mrs. Pinckney is not bound to make her election until they are identified, and the relative value between them and the negroes substituted for them by the will, ascertained.

In the event of Mrs. Huger becoming entitled to the Fairfield plantation and negroes, on the contingency provided for in the will, she also would have the right, and be bound to elect, whether she would take under the deeds or the will, for she would not be bound by the election of Mrs. Pinckney; but according to the rule, she is not bound to do so until the contingency happens, for it is impossible now to anticipate what will be the condition of the property at that time—a circumstance in itself, clearly demonstrating the propriety and wisdom of the rule.

6th. There can be no question that Mrs. Pinckney is entitled to the use of all the fixtures on the Pendleton farm that are attached to, and are necessary to, the full enjoyment of it in the condition it was at the death of the testator. In Fairis v. Walker, (1 Bail. 541,) it was held that a cotton gin, attached to the freehold, passed under a conveyance of the land, and a distinction is taken between fixtures that are put up for merely temporary purposes, the use of which was not necessary to the enjoyment of the land itself, and such as are intended to be permanent, and are used to increase the comforts or the profits derived from the land itself; and in this respect, between a saw gin and a corn mill, there can be no distinction; the first is necessary to prepare the cotton crop for market, and the other to prepare food for the tenant and his household. Indeed, it would, at this day, astonish any one,

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to be told that the machi*nery of a grist mill, propelled by water, did not pass under a grant of the land on which the house stood, and there is no difference between that and one propelled by steam or animal power.

7th. Unless the claim of Mrs. Pinckney and Ralph Izard to the wines, under the supposed gift causa mortis, should be sustained, it follows that they belong to and constitute a part of the residuum of the estate, and must be disposed of with it. In that event, Mrs. Pinckney, and Izard and wife, and Huger and wife, would only be interested in the question, and their counsel has withdrawn the question raised, and I shall not, therefore, consider it.

8th. It is not very clear what the testator meant, when, in the 4th clause of his will, he bequeaths to his wife, in addition to the Mansion House and furniture at Fairfield, "the usual accommodations there." The bequest of the use of the Mansion House and furniture is direct, and when he added "the usual accommodations there," he must have intended something more, and what these accommodations are, is the question. In general, the term accommodations embraces every thing necessary to comfort, but the interposition of the word "there" seems to give it a locality, and I should infer from it, that he intended to give the usual supplies which a family derives from the produce of the plantation itself, in the form of provisions for the family, the servants, horses, &c., suited to their fortune and condition.

9th. The fact that Gen. Charles Cotesworth Pinckney, the grand uncle of the defendant, Celestine Huger, gave to her the one fourth part of the income of the Steadfield planta-

tion in Georgia, and that the testator received them on her account, from the year 1812 to 1825, is not controverted in the answer of the defendant, Thomas Pinckney, jr., by his next friend, but it is stated and insisted, that considerable sums of money were paid to the said Celestine from time to time by the testator, which were intended by him as a satisfaction of this demand, and in addition to this, the testator had made an advancement to his said daughter, Celestine Huger, of a valuable plantation and negroes in Abbeville district, which it is insisted, was intended as a satisfaction of this demand.

That the defendants, Benjamin Huger and wife, are entitled to an account of the sums received by the testator, on account of the income of this plantation, and that the testator will be entitled to be credited with any

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sums paid her on that account, (I *mean expressly) there can be no question. But whether the provision represented to have been made for her, as represented in the answer, of the plantation and negroes in Abbeville, was intended as a satisfaction of this demand, (if, in fact any such provision was made,) must be subject of inquiry before the master.

The parties will be at liberty to move for all the orders necessary to carry this judgment into effect.

From this decree some of the parties appealed, and it was now moved that the same be modified.

Curia, per JOHNSTON, Ch. In determining this cause the court has attended, rather to the points made in the argument, than to the grounds of appeal: which were widely departed from, and much extended, in the remarks of counsel.

We are satisfied that the Chancellor has given a fair construction to that part of the will, in which the testator gives to his wife "the use of his mansion house and furniture and the usual family accommodations," at Fairfield, "during the continuance of the trust estate." No reference was necessary to ascertain that the testator intended that, when Mrs. Pinckney might choose to visit, or reside, at Fairfield, she should be entitled, for herself, her servants and horses, to the use of the supplies which she might find on the place. Not, as apprehended by counsel, that the executors should be under the necessity of purchasing for her special accommodation, articles not on hand at the time, or not produced on the plantation; but that she should have the right, as in the lifetime of her husband, to enjoy whatever the plantation afforded, and was usually consumed by the family. No precise direction can be given by the court. Nor can more be done than to lay down the general rule; and, in case of contest about its application, to apply it according to the particular circumstances which may then exist. If a contest should arise, I apprehend that evidence may be received upon the point, whether the accommodations claimed are such as the family usually enjoyed. But the admissibility of such evidence need not be decided now: and the question is reserved.

The next point relates to the property covered by the two deeds of 1803, and 1813. It has been argued that an inquiry should have been made, to ascertain how far the latter embraces property included in the former: because, it was insisted, that so far as the property is common to both deeds, the latter

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must *operate as a satisfaction to the former, or the parties interested must elect between them.

There is no evidence of any intention on the part of the testator to satisfy the first deed by the execution of the last. There is no reference, whatever, in the last deed, nor, indeed, in the will, to the deed of 1803; nor any thing to show that that deed was in the mind of the testator, when he executed the two junior instruments. When we consider the nature of the first deed,—that so far as the testator was concerned, it was an executed, and in no sense, an executory, contract; that it left in him no interest to convey, no duty to perform, nor obligation to fulfil:—we are at a loss to conceive how the last can be regarded as a satisfaction made on his part. Where a party, under obligation to pay money, or to convey property, and who has not already done it, makes a payment or conveyance, corresponding to his obligation; here is a case of satisfaction. But satisfaction can never arise,—as the very word imports,—where the duty is already fulfilled. Here the deed of 1803 had already divested Mr. Pinckney of all legal interest in the property covered by it: and if he undertook to convey any portion of the same property in the deed of 1813, the latter conveyance is simply inoperative, and the property remains where it was before.

Where the obligation is attempted to be got rid of, by fulfilling it upon different terms, or out of different materials, than those which it demands, there may arise a case of election: and the party entitled to it may either insist upon a precise execution of the duty, or take the substitute. The option is with him and not with the opposite party; as it is in every case of unconditional satisfaction. If he elects the substitute, there follows a discharge, or satisfaction of the precedent obligation: but this satisfaction is incident to, and consequent upon the election made.

But even if we assume that there is property common to both the deeds in this case, and take that as the ground of an election; no election (as between the deeds) can be made at the present time, or between the present parties. In the events which have happened, as well as in any event that can now

happen, the interests of Mrs. Pinckney are the same under both deeds. She cannot, therefore, be required to elect between them. It is only upon her death, that the interests provided for in the instruments diverge. Under the one, all the issue of Mrs. Pinckney by any marriage she may contract, are to

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take: under the other *only her children by Mr. Pinckney. But if an election is to be made with reference to Mrs. Pinckney's death, it must be made by the parties who shall then be interested in the property, and must depend upon the condition of the property at that time: and I apprehend that the trustees, who are responsible for the execution of the deeds, must be parties. But I do not imagine that a case for election will then be presented. The children cannot elect to the exclusion, or to the prejudice, of the other issue then in esse: nor is it to be expected that the latter will concur in an election to take under the last deed, which does not seem to provide for them, instead of the first, which does.

There does, however, appear to be a necessity for an election in the case; but it does not arise as between the two deeds: but between the last deed (or perhaps between both the deeds,) on the one hand, and the will on the other. This election is to be made by Mrs. Pinckney, and will not extend beyond her personal interests. By that part of the will which follows the lists of the negroes belonging to Moreland and Fairfield, respectively, the testator by way of compensating for the loss which Moreland had sustained by the cholera, seems to add to the Moreland stock a number of slaves who, he says, may not be enumerated in the deed of 1813. But this is done upon condition that such of the original Moreland stock as may have been omitted in that list, and included in the Fairfield list, shall be regarded as passing with the Fairfield trust estate created by the will. If Mrs. Pinckney elects to take under the will, she must submit to this condition. But, as is said in the decree, she will not be required to make the election until the condition of the property shall be ascertained: and an enquiry may be made before the master as to what negroes are added to or omitted in the Moreland list, as intimated by the testator.

The remaining questions relate to the provision made for the payment of debts.

It is insisted that an enquiry should have been made to ascertain the amount of the debts as compared with the fund provided for satisfying them and with the residue of the estate; without which, it is said, the real intention of the testator cannot be discovered. The fund specially provided, it is argued, is to remain subject to that trust only during Captain Huger's life, which was subject to terminate at any moment after the

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death of the *testator, and is still subject to terminate at any moment; and it is argued that a fund so precarious, could not have been intended by the testator to be substituted for, and in exoneration of the residuary, undisposed of property, which is the primary fund; especially if, upon enquiry, the debts should be found to be of such an amount as, in all probability, to require the residuary property to satisfy them.

But the evidence that would have arisen from such an enquiry, so far as it is competent evidence to disclose the intention of the testator, is already before the court. The fact was before the chancellor that there were debts to be paid; that the testator had provided a special fund for satisfying them; and that the rest of his estate consisted, partly of property specifically bequeathed; partly of property covered by a general residuary clause of the will; and partly of property undisposed of. Now nothing could be added to these facts, by the enquiry demanded, but the amount of the debts and the comparative value of these different parts of the estate.

The question to be now discussed is not what is the proper fund for payment of debts under the true construction of this will;—to that I shall attend hereafter;—but the present question is whether evidence of the particular circumstances of the estate is to be received to aid in, or to control, that construction: and we apprehend it would be repugnant both to principle and authority to receive, or use, it for such a purpose.

Mr. Roper, (Vol. 1. Ch. 12, § 3, pl. 3) lays it down "that the amount of the personal estate, in comparison with the debts, &c. is not to be considered, in forming an opinion of the testator's intention to exonerate it;" and he refers to four cases, which I have examined; and they fully sustain his position.

In Inchiquin v. French, (Amb. 40) Lord Hardwick said that Lord Holt had held, rightly, that the court ought not to consider the circumstances of the testator in determining what was his intention.

In Stephenson v. Heathcote, (1 Eden, 39, 43) parol evidence to shew an intention of the testator to exempt the personalty, was rejected by Lord Nottingham. And in decreeing upon the merits of the case, his Lordship says "The intention must be discovered from the words of the will itself, and not from extrinsic circumstances. The court must proceed upon known principles: not on loose conjectural circumstances, or by con-

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sidering what a *man may be imagined to do, in the testator's circumstances. We are not to enquire into the amount of the personal estate, to know whether it be or be not sufficient to pay debts," &c.

In Brummel v. Prothero, (3 Ves. 111) Lord Alvanly said, "I will not look out of the will as to the state of the testator's affairs. I shall not be guided by the consideration, whether he could or could not, under certain

circumstances, have intended, what might, or might not, have been inferred from the same will, under other circumstances."

In Bootle v. Blundell, (1 Meriv. 193) Lord Eldon remarked, "with regard to circumstances dehors the will, which have been sometimes called in to assist in explaining it; (such as the respective amount of the real and personal estate; the greater or less degree of personal favor which the testator may be presumed to have intended towards this or that object of his bounty, and others of that nature.) I apprehend that they ought all to be set aside, in the consideration of a question depending on a will: such question being fit to be decided only by an examination of the whole will, taken together."

In considering the remaining question, which is, whether the fund provided by the testator for payment of his debts, is to be regarded as the primary fund, the first observation is, that there are no creditors here, pressing their demands beyond the ability of this fund. No other fund has yet been broken into by creditors: nor are the executors here, shewing an exigency calling upon the court to set apart another fund in its place. Should creditors take hold of any other property, or, should the executors apply for leave to make use of other property; and shew a necessity for the application; it will then become necessary to determine some of the questions argued here; as, for instance, whether any compensation, and what compensation, should be made to the parties entitled to the property thus treated, and from what source the compensation should come. At present the only question is, which is the fund primarily liable.

It has been candidly conceded, in argument, that by the English rule personalty is liable before realty; and that in each of these classes respectively residuary or intestate property is liable before that which is specifically disposed of; and that where a specific property is charged with debts, that shall not exonerate other property, otherwise liable in the first instance, unless the will contains an express exoneration or bears

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evidence of an inten*tion to exonerate the latter. Evidence of this is found in the authorities quoted.

Mr. Roper says, (1 Rop. Ch. 12. § 3. pl. 11.) "The rule is general, that, in the absence of contrary intention, the personal estate is the first and natural fund for the payment of debts and legacies, and the real estate is only to be resorted to in aid of the personal."

Again: "whether the real estate be devised to a person upon condition of his paying debts and legacies, or be charged with them generally, or whether it be given to trustees for those purposes, and the personal estate is disposed of by general residuary bequest;—none of these circumstances will prevent the personal fund being applied, in the first instance, to the satisfaction of these demands."

He says, again, (Id. pl. 2.) when the question presented is, whether the realty is to be considered the primary fund for paying debts and legacies, it resolves itself in each particular case, into this: "does there appear from the whole testamentary disposition, taken together, an intention on the part of the testator, so expressed as to convince a judicial mind, that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal? for it is not by an intention to charge the real, but an intention to discharge the personal estate, that the question is to be decided."

But we concur with the Chancellor that this is not the rule with us. It is admitted that the cases of Hall v. Hall, and Warley v. Warley, referred to by the Chancellor, did not necessarily require the decision which has been made in this case. But the question now before us was well considered in Warley v. Warley, with a reference to the principal cases cited by Mr. Roper, and which have been again quoted by counsel: and upon mature reflection we are satisfied with the order of liability laid down in that case; and principally for the reasons so ably urged by the Chancellor who delivered that opinion.

We take it to be the rule with us that where particular property is pointed out, and especially where, as in this case, a particular fund is created, for the payment of debts and legacies: this is sufficient evidence of an intention that that shall be the primary fund or property to pay them. And we are satisfied that this rule in all cases accomplishes the prima facie intention of the testator, as well as the policy of our law. This must suffice. We might go further into

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this subject: but it must be ap*parent to all who witness and candidly consider the labors of this bench, that it is really impossible, in the time allowed us, to exhibit our opinions in a manner corresponding to the importance of the questions presented to us, or satisfactory to the profession, or even to ourselves.

It is ordered that, with these explanations and modifications of the decree, the appeal be dismissed.

JOHNSON and DUNKIN, CC., concurred.

COLUMBIA, MAY, 1846.

CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
" JOB JOHNSTON,
" B. F. DUNKIN.

HARPER, CH. absent from indisposition.

2 Rich. Eq. *247

*ADMINISTRATOR OF JOHN M. KINARD v. THOMPSON YOUNG et al.

(Columbia. May, 1846.)

[*Executors and Administrators* ⟸539.]

Executors de son tort are only chargeable with assets which come to their hands; they have no right, as lawful executors have, to reduce the other assets, and therefore, are not liable for not reducing and administering them.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2590; Dec. Dig. 539.]

[*Executors and Administrators* ⟸264.]

In the administration of the assets of an insolvent testator or intestate, mortgages, as mortgages, are not entitled to priority over rent, specialties, and simple contract debts, except so far as they are 'liens on any particular part of the estate.' After the lien is exhausted, the grade of the demand must be determined by the nature of the instrument which the mortgage was given to secure.

[Ed. Note.—Cited in Haynsworth v. Frierson, 11 Rich. 478; Edwards v. Sanders, 6 S. C. 332, 334; Piester v. Piester, 22 S. C. 146, 53 Am. Rep. 711; McLure v. Melton, 24 S. C. 566, 569, 58 Am. Rep. 272.

For other cases, see Executors and Administrators, Cent. Dig. § 1007; Dec. Dig. ⟸264.]

[*Executors and Administrators* ⟸541.]

Where an executor de son tort, who has not called on creditors to render their demands, is compelled to apply the assets received by him to debts of an inferior grade, he may be afterwards compelled to apply the value of the same assets to debts of a higher grade, and of which he had no notice. Per Johnston, Ch.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2592; Dec. Dig. ⟸541.]

[*Executors and Administrators* ⟸541.]

An executor de son tort is liable for interest from the death of the testator, if at that time he took possession of the assets. Ib.

[Ed. Note.—Cited in Chaplin v. Hopkins, 3 Strob. Eq. 184.

For other cases, see Executors and Administrators, Cent. Dig. § 2592; Dec. Dig. ⟸541.]

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[*Executors and Administrators* ⟸541.]

*An executor de son tort has no right to retain for his own debt, but, with this exception, he may pay debts, even one to which he is surety, in the same order in which a rightful executor is required to pay them. Ib.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2592; Dec. Dig. ⟸541.]

[This case is also cited and reversed in Piester v. Piester, 22 S. C. 139, 53 Am. Rep. 711.]

Before Johnston, Ch., at Newberry, June, 1845.

The complainant is the administrator of the estate of John M. Kinard, deceased; the defendants are creditors of John Enlow, deceased.

Enlow was the son-in-law of Kinard, and was employed as his overseer, for the year in which he (Enlow) died; and Kinard became executor in his own wrong, of Enlow, by intermeddling with the property which he left.

The defendants, as creditors of Enlow, brought suits at law against the complainant; and this bill was filed, to ascertain with what amount Kinard's estate was chargeable on account of his intermeddling, and how that amount should be distributed among the creditors of Enlow.

The Chancellor. The very clear report of Mr. Higgins, the special referee in this case, including his observations upon the exceptions taken by the several parties, contains a full statement of every thing necessary to an understanding of the points to be now decided.

The case comes up upon the exceptions. Some of the questions are very important, although the amount involved is small.

1. The plaintiff's first exception complains "that the referee disallowed, as a preferred debt, the sum of $108.42, recovered by James Enlow from him, and paid by him, when he had no notice of any claim against his testator as executor de son tort of John Enlow, except that of the said James Enlow and another demanded by Thompson Young."

I concur with the referee in overruling this exception; because this debt to James Enlow was, at the death of John Enlow, a simple contract debt; and his assets were not sufficient to reach claims of that character

and grade. It does not appear that plaintiff's testator called on the creditors of John Enlow to render their demands; and if he or his executors remained ignorant of their extent it was their fault, and resulted from his illegal interference with Enlow's assets; and his estate must suffer the consequences. As to Enlow's creditors, the statute (5 Stat. 111,) has fixed the order in which they shall be paid, and this cannot be varied.

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*But, in the settlement of the estate of Kinard, the plaintiff will probably be allowed for this payment, although it cannot pass in the accounts of Enlow's estate.

2. The plaintiff's second exception is, "because the referee in making up the account, charged the plaintiff's testator, as executor de son tort, with $55, for three beds, and $25, for a clock, when the witness who identified the property, and established its value, proved that the clock and, at least, one of the beds, went into, and continued in, the possession of Enlow's widow, after his death."

It does not appear that Kinard, the plaintiff's testator, specially interfered with this clock and bed. Enlow died on his premises, and the report states that part of his property came into Kinard's actual possession, and the whole of it was in his enclosures; and the referee charged Kinard with all the property, except where it was made to appear what had become of it. I suppose this was a correct rule. But, upon a review of the testimony, the referee discovered that this clock and bed, (which had never been in the actual custody of Kinard) was seen by one of the witnesses in the possession of Enlow's widow, after her removal from Kinard's. He therefore sustained this exception to the extent of the value of the clock and bed, making together $50; and I concur with him.

It was contended, indeed, that by his interference with part of the property, Kinard became executor in his own wrong; and, the character of executor being thus fixed on him, he became chargeable with the whole of the assets; as well those which had not as those which had come to his hands. In our own case of Leach v. House, (1 Bail. 42,) it was held that an executor de son tort is not liable beyond the assets which come to his hands. In that case there was no attempt to charge him to a greater extent; the demand sued on being clearly less than the value of the property interfered with by the defendant: so that the point did not actually arise in the case. But both reason and authority concur in supporting the dictum of the Judge who delivered the opinion in that case. (See Wentworth Ex. ch. 14, p. 331; Williams Exr's. ch. 5, p. 142.) The cases quoted in argument here do not go to the origin of the rule on the subject, but even they contain incontrovertible traces of the position that executors de son tort are liable only to the extent of their intermeddling. This was admitted in argument in Porter and Baredin's case, (1 Mod. 213,) and it is

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necessarily implied in *all those cases where it is held that it is a sufficient defence for such executor to plead that he delivered over the assets in his hands to a lawful representative, before suit brought against him; (Keble v. Osbaston, Hob. 49; Anonymous, 1 Salk. 313; Padget v. Priest, 2 T. R. 97; Curtis v. Vernon, 3 T. R. 587.)

It is expressly laid down, that if an executor de son tort plead properly, he is not chargeable beyond the property which came to his hands, (Godolph. part. 2, ch. 8, sec. 2; Wentworth Exor's. p. 331; 1 Williams Exor's. ch. 5, p. 142;) and that, in an action by a creditor of the deceased, if he plead plene administravit, his liability shall be thus limited; (1 Saunders' Rep. 265, note 2 to Osburn v. Rogers; Dyer 166, b. in margine.) The position is no where contradicted, and the reason of it is plainly this, that an executor de son tort is a trespasser, and, as such, is liable to the extent of his trespass; but he cannot be made liable beyond this, because he has no right to reduce the other assets, as a rightful executor has, and therefore shall not be liable for not reducing and administering them.

3. The plaintiff's third exception is "because the referee allowed interest from the death of Enlow on all the articles of property charged to the executor de son tort, including the wages which he owed Enlow as his overseer."

The referee has overruled this exception, and at first I was inclined to differ from his judgment, but upon more reflection, I think his decision is correct. A rightful executor would not be charged with interest, except upon funds bearing interest, until the expiration of one year from his entering on his administration. He would be allowed that time to ascertain the debts, and to arrange for his administration. But an executor de son tort is a mere trespasser, liable to damages for his interference, and takes possession not for the benefit of creditors, nor with a view to pay them, but for his own benefit. I therefore concur with the referee.

1. The first exception of the defendant, John Feagle, complains that his claim was ranked by the referee as a simple contract, when in fact it was a specialty. The referee has allowed this exception, which arose from a mistake at the reference; and I concur with him.

2. This defendant's second exception complains "that the referee did not confine the plaintiff to his plea of plene administravit, put in to some actions at law yet pending,

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which plea *was put in without full knowledge of the accounts of his testator, as executor de son tort of Enlow." The referee has overruled this exception, and I concur

with him. Nothing could be more unjust than to make a mispleading in another cause —(the mere effect of mistake) conclusive on the plaintiff here.

3. Feagle's third exception complains "that the referee, in stating the accounts, has allowed the executor de son tort credit, as for bond debts, for sums paid by him after Enlow's death, on two sealed notes, in which he was Enlow's surety; and, also, that the referee has allowed the plaintiff to set up, as a bond debt, a sealed note held by the executor de son tort against the said Enlow." The referee has overruled this exception in all its parts. I concur with him, in relation to the sealed notes paid by the executor de son tort, after the death of his reputed testator; so far as the payments were within the amounts to which the sealed notes paid off, were entitled in a due course of administration. The other part of the exception stands upon different ground, and involves the question whether an executor de son tort is entitled to retain for his own debt, as against other creditors. At first view, nothing can appear more just than to allow the executor de son tort to stand upon a footing with all other creditors; and this, I have no doubt, governed the referee; but the law is otherwise.

The statute of 1789, after providing by its 26th clause (5 Stat. 111,) in what order the debts of testators or intestates shall be paid by executors or administrators, declares, in the 31st clause (ib. 112) that all persons who, by intermeddling with the chattels and choses of a deceased have made themselves executors in their own wrong "shall be made liable as trespassers" "and charged as executors of their own wrong at common law."

The evident effect of these two clauses is this: the wrongful executor shall be liable, on the score of the assets which have come to his hands, to the extent that the common law would have charged him, but (the sum of his liability being thus fixed) the creditors to whom he is responsible shall be entitled to share it among them, according to the scale of distribution, established by the statute.

The liability of a wrongful executor, at common law, was for the whole of the assets with which he had intermeddled: that is to say, he was not entitled to retain any part of them for his own debts. So it was

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said in Leach v. House, (1 Bail. 44) al*ready referred to, a case in our own courts. This decision is well founded. In Coulter's case (5 Coke, 30,) where the question was directly made, "it was resolved by the whole court that an executor in his own wrong should not retain; for from thence would ensue great inconvenience and confusion;—for every creditor (and chiefly where the goods of the deceased are not sufficient to satisfy all the creditors) would contend to make himself executor in his own wrong, to the intent to satisfy himself by retainer; by which others would be barred. And it is not reasonable that one should take advantage of his own wrong; and if the law should give him such power, the law would be the cause and occasion of wrong, and of the wrongful taking of the goods of the deceased."

All the cases hold the same doctrine. It is true that a subsequent grant of administration to the trespasser will cure the trespass, and justify the party in retaining for his own debt; and may be pleaded for that purpose, even though it be granted after action brought against the wrongdoer: as in Vaughn v. Brown, (2 Str. 1106) where it was said "it would be very hard to lay it down, that, if a man, who sues for administration, is opposed, and the cause runs out into any length, the acting pendente lite should be construed such a wrongful executorship as can never be purged, so as to give him the right of retaining." But if he deliver the assets to another, to whom administration is committed after his trespass, this, according to Bradbury v. Reynel (2 Cro. Eliz. 565) shall not purge his tort nor discharge his liability as wrongful executor:—a doctrine, however, which was qualified by Holt, Ch. J. who held (1 Salk. 313, anonymous) that if the delivery be made before action brought against him, the executor de son tort may support such transfer under the plea of plene administravit, but if the delivery be after action brought, it is otherwise. To the same effect is Curtis v. Vernon (3 T. R. 587.)

Upon the right of retainer, the cases are innumerable; all denying any such right to a wrongful executor. Therefore so much of this exception as relates to this point is sustained.

4. The fourth exception of this defendant objects to the credit allowed to the executor de son tort for a coffin for his testator. All the authorities say that payments or expenditures which a rightful executor might lawfully make, are good acts of administration in a wrongful executor. I concur with the referee in overruling this exception.

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*Johnson and Stewart have put in two exceptions which have been substantially decided in the foregoing observations.

Thompson Young has also filed five exceptions; the 1st, 4th and 5th of which have been disposed of in what has been said in relation to Feagle's.

The second and third exceptions of this defendant raise questions of much difficulty. I have never known them to arise in the 27 years that I have been conversant with the profession; and although either these or kindred questions must necessarily have occurred, the counsel did not refer to a single decision or reported case upon the subject. I have found one, but it seems to have been little argued and hastily decided.

The questions presented in these two exceptions arise in the following way:

The funeral expenses (being the only charge of the first grade,) are reported at $25.34. Then follow two judgments against Enlow in his life-time, amounting, principal, interest and costs, according to the report, to $83.93. The balance of assets, after paying these charges, is reported at $281.50, and has been apportioned by the referee among the bond creditors. Among the bonds is a sealed note held by Thompson Young, amounting, principal and interest, at the date of the report, to $285.98; but the sum allotted to this creditor out of the assets is only $139.55. His debt is reported to have been secured by a mortgage of several articles of Enlow's property, which came to the possession of his wrongful executor; and he contended that this mortgage entitled him to take precedence of the other bond creditors; in which case nearly the whole of his debt would have been satisfied. But the referee overruled this pretension, because his mortgage had not been registered.

He then excepted to the report:

"2. Because the referee did not allow this defendant's debt (which was secured by a mortgage of property converted by the executor de son tort to his own use:) to rank as a mortgage debt as against bond and simple contract creditors: the objection of its non-registration having no validity as to them, but only applying as to judgment creditors."

"3. Because the referee did not allow this defendant the value of the property on which he had a special lien by mortgage; whereas it is contended the mortgage should have been allowed to its full extent, there being sufficient assets, besides, to satisfy all the judgments."

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*The referee overruled these exceptions: and I am now to consider them.

The 26th clause of the statute of 1789 (5 Stat. 111,) is in the following words: "The debts due by any testator or intestate shall be paid by executors or administrators, in the order following, viz:

"'Funeral and other expenses of the last sickness, charges of probate of will or of the letters of administration; next, debts due to the public; next, judgments, mortgages and executions—the oldest first; next, rent; then bonds or other obligations, and lastly, debts due on open accounts. But no preference whatever shall be given to creditors in equal degree, (where there is a deficiency of assets,) except in the cases of judgments, mortgages, that shall be recorded, from the time of recording—and executions lodged in the sheriff's office: the oldest of which shall be first paid; or in those cases where a creditor may have a lien on any particular part of the estate."

This clause of the statute is very badly drawn, and abounds in obscurities; and I venture on the construction I am about to give it with much hesitation; still trusting that the case will be carried up for further examination. It might have been a question formerly, whether the direction that the debts should be paid "in the order following" was not intended to give precedence to every species of claim enumerated, over every other species of claim subsequently enumerated in the statute; for instance to funeral expenses, &c., over expenses for probate, &c., and again to judgments over mortgages; so that no mortgage could claim till all the judgments were satisfied. But I believe a construction has obtained, to which the general practice has conformed, that the order intended to be established consists in general classes; as, for instance, funeral expenses and expenses of probate, form the first class, and are both put upon an equal footing.

So, again, all debts due to the public, whatever their form, whether judgments, mortgages or in any other form, constitute the second class. The third class consists of judgments, mortgages and executions, belonging to others than the public, and these are all put upon an equality, except such difference as may arise from their respective ages. And so on;—all claimants for rent stand upon a footing, without regard to priority of date, as do all specialty debts. The last to be paid are open accounts, and these all stand upon an equality.

The grades of the debts being established

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by the classification *I have spoken of; and it having been declared that as amongst judgments, mortgages and executions, the oldest should be first paid, and so on down to the youngest (which was the only instance of discrimination or preference allowed in any one class) the Act goes on to declare that in no other class shall there be any discrimination allowed, except in that one. It then takes up that class and endeavors to give a clearer view of what it meant by its previous declaration, that as among the subjects of the class, the oldest should be first; and by a very awkward phraseology, enacts that the date of mortgages shall be determined by the time of their registration. The Act of 1698 had provided that as among mortgages, the first recorded should be first, in efficacy. This Act applies the same principle as between mortgages and judgments in the distribution of the assets of deceased persons.

It follows I think from these observations that the non-registration of a mortgage cannot affect it except when it comes in conflict with a debt of its own class, for instance with a judgment, execution, or another mortgage.

There was not until lately any statute in this State requiring mortgages (especially of personalty such as this) to be recorded, or declaring them invalid for want of registration. The only effect of the registration spoken of in the Act before us, relates to the

order of payment in case of conflict with a demand of "equal degree," that is with a demand of the same class. The conflict in this case is with bonds; an inferior class, and the nonregistration cannot affect it. Its status in its own class being unaffected, it is entitled by the very terms of the statute to its proportion of assets, in its character of mortgage; without regard to its lien or the grade of the contract to which it is collateral.

A contrary judgment seems to have been formed in Tunno v. Happoldt, (2 McC. 188,) the case to which I before referred. In that case there was a deficiency of assets as among the simple contract creditors. Ogier, one of the creditors, held a promissory note secured by a mortgage, and claimed payment as a bond creditor in virtue of his mortgage. This of itself is enough to show that the case was not argued with reference to the precise terms of the Act. It seems to have been hastily determined. The judge who delivered the opinion for the court, simply remarking "the claim of Ogier was by simple contract, i. e. by a note; and the question is—can the mortgage deed change the character of the note, or give it a preference to

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other simple *contract debts under the administrators' law? I cannot perceive any reason for supposing the simple contract debt changed by the mortgage. The deed gave a particular lien upon certain property, but here its object and intent terminated, and otherwise left the note as it stood before, still a simple contract."

I am perfectly satisfied from the report of this case, that the Act was never adduced or examined. If it had been it would have been seen that mortgages, as mortgages, are expressly provided for, and given a precedence to which as mere specialties they were not entitled under the Act: and, with deference, the question was not whether the mortgage could change the note or elevate it to a higher grade, but whether the character of the debt intended to be secured by the mortgage, could divest the mortgage of its character or dignity. Again, the lien of the mortgage was not the test of its title to stand in the rank assigned it by the Act. As well might it be said of a judgment, when the intestate had no land upon which its lien could operate, that it is no longer entitled to be paid as a judgment. The effect of the lien of mortgages is provided for in a subsequent part of the Act, and forms quite a distinct consideration. At present we are considering mortgages without reference to this lien. There may be mortgages which have lost their lien; as, for instance, by the destruction of the mortgaged property. In these cases the Act certainly could not intend to add to the misfortune of the mortgagee, by degrading his mortgage. Nothing but the annihilation of the mortgage can deprive him of the preference given it by the Act eo nomine. If it be a mortgage, it suits the description of the Act, and is entitled to what the Act gives it; and that is a rank above not only simple contracts but bonds and all other specialties.

I spoke of the lien as distinguished from the grade of the instrument itself; and this brings me to remark upon another part of the Act, applicable to the exceptions now under consideration.

The statute declares that no preference shall be given among creditors of equal degree, except in the cases already noticed, "or in those cases where a creditor may have a lien on any particular part of the estate." These are two distinct exceptions.

There may be special liens which are not mortgages; such as pledges, &c., but all mortgages are in their origin, special liens. The very fact, that after assigning rank to mortgages in general terms, it was thought necessary to make further provision for special liens, serves, I conceive, to confirm the con-

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struc*tion I have given to that part of the Act, upon which I have already commented, and to manifest that the Legislature, in the foregoing words, contemplated mortgages apart from their lien, and intended to provide for their payment, irrespective of that quality. But now the statute comes to consider the lien itself, and to provide for it. And justice as well as a due regard to contracts required this. At the date of this Act, all mortgages whether real or personal, carried the title to the mortgagee, as in respect to those of the latter class, (such as the mortgage of this creditor,) is still the case. At the death of Enlow the property mortgaged was not his property, but the mortgagee's, subject only to an equity of redemption. It might have borne a question in this very case, though it was not raised, whether Kinard was executor de son tort in respect to this property; for, in law, it was not assets of Enlow. But (not to take up that question,) the manifest intention of the Legislature was to preserve whatever liens existed. It would never do to say that the mortgagee had a title so long as the mortgager lived, which ceased in him and revested in the latter at his death. But at all events, the Act expressly makes a difference on account of the lien; and this should have been attended to in making up the account in this case.

It would seem to follow from these remarks, that this creditor would be entitled, in virtue of the lien of his mortgage, to claim payment, so far as the mortgaged property came to the hands of the wrongful executor, and after this is exhausted, to claim, as mortgage creditor merely, a precedence over the bonds for the balance, so far as the assets extend. The distinction between the lien of the mortgage, and the mortgage itself, will, however, be of no practical importance in this case, as it is enough for Mr. Young to

prevail over the bonds. That will give him the whole of the remaining assets.

If the exception had claimed a preference over, or an equality with the judgments, so far as the lien extends, I should have considered a further question—whether such a lien would not overreach all the higher grades. But the form of the exception concedes to the judgments, and this question is unnecessary.

The 2d and 3d exceptions of this creditor are sustained as far as the opinion I have expressed upon them goes.

It is ordered that the report be recommitted, to be modified according to the foregoing opinion.

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*The defendants appealed, and moved this court to reverse so much of the decree as sustains the complainant's second exception to the extent of exempting John M. Kinard's estate from liability for "the value of the clock and bed, making together $50," upon the ground:

That the character of executor in his own wrong being fixed upon Kinard, he ought to be held responsible for all the property of Enlow which was upon his premises; and the fact that the clock and bed were afterwards seen in Mrs. Enlow's possession, ought not to exempt him from liability for them, especially as she was his daughter.

The defendants, Johnson and Stewart, appealed, and moved this court to reverse so much of the decree as sustains the defendant Young's second and third exceptions, upon the grounds:

1st. That the mortgage given by Enlow to Young is void, for want of recording and other causes.

2d. That Young was Enlow's security to Paysinger, and the mortgage was given to secure Young from loss on account of this securityship; and Young having, after Enlow's death, paid the debt to Paysinger, can be allowed to set up the demand as a bond debt only on equitable principles, and it would be against equity to allow the demand to stand as a mortgage debt, and thus to give it priority over the bond debts.

3d. That if the mortgage to Young is valid, it is good only as to the property embraced in it, and it does not give Young the right to have his debt paid out of the property not embraced in the mortgage, in exclusion of the creditors by bond.

4th. If Young claims the property embraced in his mortgage, he cannot, according to the principles of equity, be allowed to stand in Paysinger's shoes as to the balance of the debt.

5th. That the decree as to this matter, is contrary to equity in other respects.

Pope, for appellants, cited Bail. Eq. 397; 3 Ves. 128; 19 Ves. 525; 1 Story Eq. p. 531; 2 Ves. Jr. 377.

Fair, contra.

Curia, per JOHNSTON, Ch. This court feels much difficulty in giving construction to the Act of 1789, recited in the decree; and is not prepared to say, that, if the question were entirely open to them, the construction adopted by the Chancellor is not a fair deduction from its phraseology. But, it is deemed expedient to defer to the case of

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Tunno v. Happoldt, cited in the *decree, as an exposition of the court of law; leaving to that court, or to a future occasion, the consideration of the suggestions made in this case. The court is satisfied with the decree upon all other points.

It is therefore ordered, that the decree be modified, by allowing the mortgage to prevail only so far as it had a lien on property intermeddled with by the executor de son tort; and that in all other respects the decree be affirmed.

JOHNSON and DUNKIN, CC., concurred.

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2 Rich. Eq. 259

A JOYCE and Wife v. TEMPERANCE GUNNELS, GEORGE M. GUNNELS, and Others.

(Columbia. May, 1846.)

[*Equity* ⇐170.]

If a plea is coupled with an answer to any part of the bill covered by the plea, and which, by the plea, the defendant consequently declines to answer, the plea will, upon argument, be overruled. The reason is, that pleas are to be put in ante litem contestatam; because they are pleas only, why the defendant should not answer, and therefore, if he does answer to any thing to which he may plead, he overrules his plea; for the plea is only, why he should not answer, and if he answers, he waives the objection, and of course his plea.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 407; Dec. Dig. ⇐170.]

[*Equity* ⇐170.]

Defendant, an administrator, answered fully to every part of the bill, and in the answer, objected that the bill was prematurely filed. The objection being in the nature of a dilatory plea, *held*, that it was overruled by the answer.

[Ed. Note.—Cited in Sollee v. Croft, 7 Rich. Eq. 40; Myers v. O'Hanlon, 12 Rich. Eq. 210.

For other cases, see Equity, Cent. Dig. § 407; Dec. Dig. ⇐170.]

[*Life Estates* ⇐8.]

Tenant for life of a slave made a gift of the slave, and he was sold by the donee for a full price. Tenant for life died, and more than four years after her death, the remainder-man filed his bill against the donee, claiming the value of the slave. *Held*, that the bill was barred by the statute of limitations.

[Ed. Note.—Cited in Rice v. Bamberg, 59 S. C. 507, 38 S. E. 209.

For other cases, see Life Estates, Cent. Dig. § 26; Dec. Dig. ⇐8.]

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[*Limitation of Actions* ⇐102.]

*To cases of express or declared trusts, the statute of limitations is inapplicable, but im-

plied trusts constitute no exception to the operation of the statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 494–505; Dec. Dig. ⟸ 102.]

[*Limitation of Actions* ⟸102.]

Express trusts are those which are raised and created by the act of the parties, and implied trusts are those raised or created by act or construction of law. Express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or by proof of circumstances creating a violent and necessary presumption, that such declarations were made, either by word or writing, though the plain and direct proof thereof be not extant.

[Ed. Note.—Cited in Beard v. Stanton, 15 S. C. 168.

For other cases, see Limitation of Actions, Cent. Dig. §§ 494–505; Dec. Dig. ⟸102.]

[*Life Estates* ⟸5.]

A tenant for life is an implied, and not an express, trustee.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 12; Dec. Dig. ⟸5.]

[*Life Estates* ⟸21.]

The court will not enjoin a tenant for life from removing slaves, unless there is proof of danger. Without such proof, the remainder-man is only entitled to an inventory.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 17, 19; Dec. Dig. ⟸21.]

[*Remainders* ⟸17.]

A bill by a remainder-man against a tenant for life, for an inventory, is always at the costs of the complainant.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12–17; Dec. Dig. ⟸17.]

Before Johnson, Ch., at Greenville, June, 1845.

The Chancellor. The late George Martin, by his last will and testament, devised and bequeathed to his widow, Charity Martin, amongst other things, the tract of land on which he then lived, and eighteen slaves by name, during her natural life, and at her death, to be equally divided between all the surviving children of his daughter, Temperance Gunnels, then the wife, and now the widow, of the late William C. Gunnels.

In a subsequent clause of the will, the testator gave to his said daughter, Temperance Gunnels, fourteen other negroes, by name, during her natural life, and at her death, them and their increase to be equally divided between her surviving children, and appointed William Dunklin, and his widow, Charity Martin, his executor and executrix, both of whom have since died. Temperance Gunnels has had seven children; Eliza, the wife of defendant, William Leak; Maria, the wife of complainant, Joyce; the defendants, George M. Gunnels, Caroline, William, Ann and Harriet; the two last of whom, Ann and Harriet, died in the life time of Charity, the testator's widow, intestate and without issue, as I suppose, although it is not so stated in the pleadings. Wm. C. Gunnels died in 1844, and administration of his estate has been granted to the defendant, George M. Gunnels.

The bill states that after the death of Charity, the widow of the testator, all the negroes bequeathed to her for life, and limited over in remainder to the surviving chil-

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dren of Temperance *Gunnels, have been distributed amongst the persons entitled, except a man called Parker, who, the complainant charges, went into the possession of William Leak, one of the defendants, in the life time of Wm. C. Gunnels; and it had as well be stated here, that the defendant, Leak, admits that Parker did come into his possession, and that he has sold him; but states that he sold him as the agent of Wm. C. Gunnels in his life time, and exhibits his receipt for one thousand dollars, as the price paid for him, which is not controverted. The bill further states that not long since, the defendant, Temperance Gunnels, without any authority, made a partition and division of the slaves, and their issue and increase, bequeathed to her for life, and limited over in remainder to her surviving children, and allotted and assigned to each of her surviving children a portion of the said slaves; and that all of them have accepted and received the portions so allotted to them, except the complainants, who refused to do so, believing, as the bill states, that the said partition was extremely partial and unjust. The said Temperance Gunnels retaining possession of the portions of Caroline and William, who are minors, and reside with her. That the defendant, Geo. M. Gunnels, has some time since sold Chesly, one of negroes, to certain traders in negroes, who have carried him without the limits of the State, and that the complainants fear and believe that others of the said negroes will be removed from the State, unless the defendants are restrained by the order of the court.

The prayer of the bill is that an injunction do issue to restrain the defendants, Temperance Gunnels, George M. Gunnels and William Leak, from removing any of the said negroes out of the State, and that they be required to enter into bond and security for the forthcoming of the said negroes, at the termination of the life estate of the said Temperance Gunnels. That the defendants, Wm. Leak or Geo. M. Gunnels, as the administrator of Wm. C. Gunnels, should account for the value of the negro, Parker, and pay to the complainants their portion thereof. That the defendants, Temperance Gunnels and Geo. M. Gunnels, may be decreed to enter into bond and security for the forthcoming of the negro Chesly, at the falling in of the life estate of the said Temperance Gunnels, or account for his value.

The defendants, Temperance Gunnels, George M. Gunnels and Wm. Leak, have answered severally, and they all admit the material allegations of the bill, except the charge of design or the danger of removing the ne-

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groes in their several possessions out *of the jurisdiction of the court, which they unequivocally deny; and they admit that the defendant, Leak, sold the negro Parker, as the agent of Wm. C. Gunnels, to whom Charity Martin had given him up for $1000, which he paid to him in his life time; and the defendant, George M. Gunnels, admits that, as the administrator of the said Wm. C. Gunnels, he is bound to account for his value if the court shall so award; but he insists that the complainants' demand as to their distributive share of the said negro is barred by the statute of limitations. In connection with this defence, he states that the testator's widow, Charity Martin, who had a life estate in him under the will, died in 1840. That partition of the personal estate bequeathed to her for life, and limited over to the children of the defendant, Temperance Gunnels, was made on the 10th December, 1840. That his intestate, Wm. C. Gunnels, died on the 17th or 18th day of December, 1844, and that administration of his estate was granted to him in January or February, 1845. The defendant, George M. Gunnels, also states that the negro Chesly was given to him by his father in 1839, and that at his request, he sold him to one Hunter, who carried him to Mississippi; and he admits that he will be accountable to the complainants for their proportion of his value, in the event of the complainant, Mrs. Joyce, surviving her mother, to whom the property was given for life.

In relation to the partition of the negroes bequeathed to Temperance Gunnels for life, they state that in February or March, 1845, reserving eight or nine of them for her own use, she procured the others to be appraised by disinterested persons, and then divided them herself into five lots, as nearly equal as practicable, arranging them as well as she could with reference to family connections, and assigned a lot to each of her children; and that complainants having refused to accept the lot assigned to them, she has since hired them out, with the intention of paying them the hire—and she proposed that where the lots were of unequal value, the distributees should make them so by proper contributions. That Caroline and William, two of the children, were minors at the time of the division, but that Caroline has since come of age, and taken the control and management of the lot of negroes assigned to her; and that the lot assigned to William, who is still a minor, is employed on the plantation of his mother, the defendant, Temperance Gunnels.

There is no doubt that the court has the authority to restrain one who has a life estate

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in a chattel, from removing it out of *the jurisdiction of the court, at the instance of one who is entitled to it in remainder, and to compel him to give security that he will not—but so stringent a measure is never resorted to, but upon a reasonable distrust or apprehension that the person in possession intends to remove it, which must be shewn to the court by proof, in the same manner as other material facts are proved—and not upon the mere apprehension or fear of the party complaining. The defendants here positively deny in their answers, any intention on their part, to remove themselves, or send the negroes out of the State; and there has been no attempt to contradict this by evidence. The only fact attempted to be proved was, that the defendant, George M. Gunnels, contemplated removing those in his possession, from his plantation in Laurens district, to a plantation in Greenville, an adjoining district, where they will be as much under the power and authority of the court as in Laurens. The defendant, Temperance Gunnels, and all the children that are married, are settled on their several plantations, and are in good circumstances; those that are not, being minors, and reside with their mother; and, in the language of one of the witnesses, they are all respectable and entirely trust worthy. I do not, therefore, think, that in strictness, it is a case even for an injunction, as that would imply a suspicion of their integrity, which I do not feel, and which is not warranted by the evidence. And if that was all sought by the bill, I should not hesitate to dismiss it. The partition and distribution of the slaves made by Mrs. Gunnels, are the only circumstances, which throw the least shadow of suspicion on the intention of the defendants. If the object was to relieve herself from the trouble and vexation of governing them, or to provide temporarily for her children, there was nothing wrong or suspicious in it, however arbitrary or unequal the partition may have been. She was entitled to the property for life, and had the right to dispose of that interest as she pleased. If, on the other hand, the defendants regarded it as a final and absolute division of the property, which can hardly be supposed, (and we have no evidence on the subject) it is enough that they should know, that according to the provisions of the will, those children only who survive Mrs. Gunnels, will be entitled to share in the distribution; and neither the minor children, who were incapable of consenting to it, nor the complainants who dissented, are bound by it; and if any one of them should die in the life time of Mrs. Gunnels, that would derange any agree-

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ment that *might have been made between or entered into between the other defendants, and render the whole void. The slaves ought not, therefore, to be removed out of the jurisdiction, and as an injunction will not subject the defendants to any inconvenience, I shall order it. The bill also prays a discovery as to the slaves apportioned to them, and now in the possession of the defendants severally,

and in their answers they have set out their number, and described their names only. That is not excepted to, but as a long time may elapse before the life interest falls in, I shall order that the defendants do severally file schedules of all the slaves in their possession, with such further descriptions as may aid in identifying them hereafter.

The defendant, George M. Gunnels, admits his liability as the administrator of his father, Wm. C. Gunnels, for the value of the slave Parker, unless he is protected by the statute of limitations. There is no question, that Charity Martin, whether regarded as the executrix of the will of her testator, or as entitled to the slaves bequeathed to her for life, of whom Parker was one, held as trustee under the will for those entitled in remainder; or, in other words, it was an express trust, and it will not be pretended that the statute of limitations would operate as a bar against the rights of the cestui que trusts under such circumstances. But it is said that the possession of William C. Gunnels, if a trust at all, was an implied and not an express or direct trust, and having terminated it by the sale of Parker, in the lifetime of Mrs. Martin, the statute began to run from the time of her death, and four years having elapsed before the filing of the bill, the complainants are barred. On referring to authorities, and particularly to our own cases, it will be found that it has been often said, that the statute will operate in cases of implied trusts, but it is obvious that the distinction between those that arise out of the supposed intention of the parties and those that arise by operation of law, was overlooked. The case in hand will serve as an illustration of the first. Wm. C. Gunnels paid nothing to Mrs. Martin for Parker. He knew that she had only a life-interest, and that the remainder was limited over to his own children—I say he knew it, for his wife was largely provided for by the same will, and he could not have been ignorant of it; and although there is no direct evidence of it, there is no strained implication, in supposing that there was an understanding or agreement that he should hold for his own use for her life, and for the use of his children after her

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death—2 *Story's Eq. 438—§ 9, 1195—6. It is then a trust raised by the act of the parties, and although implied, it has all the properties and qualities of an express or direct trust. The statute cannot therefore operate to bar the complainants. Trusts arising out of the operation of law are governed by different rules, which it is unnecessary to consider here.

The defendant, George M. Gunnels, admits also his liability to account for the value of the slave Chesly at the falling in of the life-estate of his mother, and I shall further decree that he gave security to do so.

It is ordered and decreed, That the defendants do, within three months after notice of this decree, severally file in the office of the commissioner of this court, a schedule of the negroes bequeathed by the testator to the defendant, Temperance Gunnels, for life, with a limitation over to her children, now in their several possessions, describing them by their names and family connections and ages, as far as may be practicable; and the said defendants, and each and every of them, are hereby ordered and enjoined not to send or remove all or any one or more of the said negroes from or without the limits of this State, until distribution of them shall be made in pursuance of the provisions of the testator's will.

It is also ordered and decreed, That the defendant, George M. Gunnels, do pay to the complainants, out of the estate of his intestate, Wm. C. Gunnels, two hundred dollars, being the one-fifth part of the price at which Parker was sold, with interest thereon from the 10th December, 1840, the time at which the other negroes of the class to which he belonged were divided; and that he enter into bond with sufficient security in the penalty of one thousand dollars, to account with the complainants for any interest they may have at the death of Mrs. Gunnels in the negro Chesly at the price at which he sold him, unless he shall have the said negro present and forthcoming, to be distributed with the others of the class to which he belongs; and that the parties each pay their own costs.

The defendants appealed, and now moved this court to reverse the decree of the Chancellor, on the following grounds:

1st. Because the injunction ordered was granted without any adequate cause of complaint, contrary to equity, and mainly upon a misconception of the Chancellor, that the negro Chesly was embraced in the division made in 1845 by Mrs. Gunnels and sold

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*thereafter, when it is expressly stated in Dr. Gunnels' answer that his father, in his life-time, in 1839, gave him Chesly, and that he sold him by the request of his father in 1841.

2nd. Because the complainants' claim to an account for their share of the negro Parker was barred by the statute of limitations, and if not so barred, they have adequate remedy at law.

3rd. Because the complainants' bill was prematurely filed against Dr. Gunnels as administrator of his father, so far as respects their claim to an account for their share of the price of Parker, the intestate having died in December, 1844—administration granted in January or February, 1845—and the bill filed 7th May, 1845.

4th. Because the decree requires all the defendants, severally, to file in the office of the commissioner a schedule of the negroes bequeathed by the testator to the defendant, Temperance Gunnels, for life, with remainder to her surviving children, now in their

several possessions, describing them by their names and family connections and ages, as far as may be practicable; when the defendant, Mrs. Gunnels, alone was called on in the bill for an inventory of said slaves and to discover in whose possession they were: both of which she has done, and the other defendants have also set forth in their answers the number and names and family connection of the said slaves, now in their respective possessions.

5th. Because the decree is in other respects contrary to law and equity.

Sullivan, for the motion.
Young, contra.

Curia, per DUNKIN, Ch. It is proposed first to consider the claim of the complainants, in relation to the slave Parker. He was one of the eighteen negroes bequeathed to Mrs. Martin for life, with remainder to the surviving children of Mrs. Gunnels. During the life time of Mrs. Martin, she had given up Parker to W. C. Gunnels, and he was sold by the defendant, Leak, as the agent of W. C. Gunnels, for $1000. The defendant, George M. Gunnels, is the administrator of W. C. Gunnels, and he, with the other parties to these proceedings, are his distributees.

The complainants insist that the administrator of Wm. C. Gunnels must account to them for their share of the sale of Parker, under the will of George Martin.

Wm. C. Gunnels died in December, 1844,

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and the bill was *filed on the 7th May, 1845. The defendant, in his answer, objects that the bill was prematurely filed, and prays the same benefit of the defence as if it were specially pleaded.

Nothing is better settled than that "if a plea is coupled with an answer to any part of the bill covered by the plea, and which by the plea, the defendant consequently declines to answer, the plea will, upon argument, be overruled. The reason of this doctrine is, that pleas are to be put in ante litem contestatam; because they are pleas only, why the defendant should not answer, and therefore, if he does answer to any thing to which he may plead, he overrules his plea, for the plea is only why he should not answer; and if he answers, he waives the objection, and of course his plea." Mitf. 299; Story, § 688.

The defendant has answered fully to every part of the bill. If his dilatory plea had been formally spread on the record, it would have been overruled by the answer. His condition is not improved by the fact, that what should have been the subject matter of a distinct plea, has been incorporated into the answer.

But the defendant also relies on the statute of limitations. Mrs. Charity Martin, the life tenant, died in 1840, and the complainants' rights, whatever they were, then accrued. On the 10th December of that year, partition was made among the children of Mrs. Gunnels, of all the negroes held by Mrs. Martin for life, except Parker, who had been previously sold by direction of W. C. Gunnels. The death of W. C. Gunnels occurred on the 17th or 18th December, 1844. It is urged on the part of the complainants, that the plea of the statute is inapplicable, because Mrs. Martin was a trustee, and W. C. Gunnels sold Parker with a knowledge of the trust, and is affected with it. The principle is well established by the authorities, and indeed was not questioned at the argument, that to cases of express or declared trusts, the statute is inapplicable; but that implied trusts constitute no exception. See Fisher v. Tucker, 1 McC. Eq. 176; Miller v. Mitchell, Bail. Eq. 437. In Cook v. Fountain, 3 Swanst. 585, Lord Nottingham remarks that "express trusts are those which are raised and created by the act of the parties, and implied trusts are those raised or created by act or construction of law; express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts; and that is, when the court, upon consideration of all the circumstances, presumes there was a declaration, either by word or writing, though the

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*plain and direct proof thereof be not extant." "There is," says he, "one good, general, and infallible rule, that goes to both these kinds of trusts. It is such a general rule as never deceives; a general rule to which there is no exception; and that is this: the law never implies, the court never presumes a trust, but in case of absolute necessity. The reason of this rule is sacred; for, if the chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate; and so, at last, every case in court will become casus pro amico."

In several cases it has been held, and may now be considered as settled, that the tenant for life stands in the nature of a trustee to the remainderman. It is only necessary to inquire whether this is a direct declared trust, or only a trust by implication of law. The simplest form of implied trust is put by Mr. Justice Story, as where property or money is delivered by A. to B. for the use of C, or to be delivered to C. Although this might be regarded rather as a bailment for which an action at law would lie, yet, says he, it has been held on very high authority, that this is a trust, necessarily implied from the nature of the transaction, and which chancery will enforce in favor of the beneficiary, although no express agreement has been entered into to that effect. 2 Story Eq. § 1041, 1196. The guardian of an infant is an express trustee, whose duties as such, are declared in the condition of his bond. But

a man who enters on the lands of an infant, and receives the profits of his estate, is also a trustee, and accountable as such. But this latter is an implied trust, and when the infant, four years after he becomes of age, brings a bill for an account, the statute of limitations is as much a bar to the suit, as it would be to an action at common law; and so it was ruled by the Lord Chancellor in Lockey v. Lockey, Prec. in Chanc. 518, one of the cases cited with approbation by Chancellor Waties in Fisher v. Tucker.

An executor is a trustee. He holds on an express or declared trust, and as between him and the cestui que trust, the statute is inapplicable. Not so of a purchaser from an executor. He also is, to certain intents, a trustee, but this is an implied or constructive trust. This was the case of Beckford v. Wade, 17 Ves. 95. "It is certainly true," says Lord Eldon, "that no time bars a direct trust, as between cestui que trust and trustee; but if it is meant to be asserted, that a court of equity allows a man to make out a case of constructive trust at any distance

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of time, *I am not aware that there is any ground for a doctrine so fatal to the security of property, as that would be." Bonney v. Ridgard, 1 Cox Cas. in Eq. 145, was also the case of a purchase from an executor, in which Lord Kenyon, master of the Rolls, held the purchaser to be a trustee, but that the demand was barred by the statute. The distinction between actual trusts, and trusts by implication, in reference to the operation of the statute of limitations, is explained by Lord Commissioner Ashhurst in Townsend v. Townsend, 1 Bro. C. C. 550. He says, "as to trusts being an exception to the statute of limitations, the rule holds only as between trustees and cestui que trusts. It is true that a trustee cannot set it up against his cestui que trust, but this is merely the case of a trustee by implication, and as such, affected by an equity; but that equity must be pursued within some reasonable time."

The doctrine thus fully established, may be illustrated by the case under adjudication. The executor of George Martin is a direct trustee, to whom the statute affords no protection. But the tenant for life is a constructive or implied trustee. There is no "direct and manifest proof of a trust declared either by words or in writing." There are "no circumstances creating a violent and necessary presumption" that such declaration was made, "though the direct and plain proof thereof be not extant." This is necessary to constitute an express trust. But he is like the purchaser from an executor. He is affected by an equity. That equity must be pursued within a reasonable time, and the court adopts the statute of limitations as a convenient rule of restriction. W. C. Gunnels can be in no worse situation than the tenant for life, by whose permission he sold the negro. On the death of Mrs. Martin in 1840, the right accrued, and was barred by the statute, prior to the death of W. C. Gunnels, in December, 1844.

The court concur entirely with the Chancellor, that this was not a case for injunction; that the evidence showed no ground of reasonable distrust or apprehension on the part of the complainants, or any fact which would warrant a suspicion of the integrity of the defendants, persons proved to be, in the language of the decree, "all respectable and entirely trust-worthy." The principle on which the court proceeds, is stated in Smith v. Daniel, 2 McC. Eq. 150, [16 Am. Dec. 641,] and in the recently decided case of Ramsay v. Joyce, McM. Eq. 253, [37 Am. Dec. 550.] Not being a matter of right, we think the injunction should not have been ordered. The enjoyment of the

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*life estate should not be unnecessarily disturbed. Unless there is proof of danger, the remainderman is entitled only to an inventory of the property; 1 Story Eq. § 604; and in all such cases, as in bills to perpetuate testimony, of discovery merely, and the like, the proceeding must be at the costs of the complainants.

It is ordered and decreed, that so much of the decree of the circuit court as directs the administrator of W. C. Gunnels to account for the sale of the slave Parker, and so much as awards an injunction against the defendants, be reversed. It is further ordered, that the costs of Mrs. Temperance Gunnels be paid by the complainants. In all other respects the decree is affirmed.

JOHNSTON Ch., concurred.

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2 Rich. Eq. 270

ROBERT FORD and Wife v. JEREMIAH R. GAITHUR and Others.

(Columbia. May, 1846.)

[*Wills* ⇐S40.]

Testator directed that his property, both real and personal, remain together under the management of his executors, until his just debts be paid, disposing of the same thereafter. After the execution of the will he purchased land (which descended to his heir) and mortgaged the same to secure the purchase money. *Held* that, as between the heir and legatee, the property passing under the will was the primary fund for the payment of debts, including the debt for which the after-purchased land was mortgaged.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2149; Dec. Dig. ⇐S40.]

Before Dunkin, Ch., at Fairfield, July, 1845.

The Chancellor. Jeremiah Gaithur's will bears date 15th December, 1841. The 1st

clause is as follows, viz: "Item: It is my will that all my estate, both real and personal, remain together under the management of my executors hereinafter named,

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*until my just debts are paid; and until that time my wife is to have her home where I now reside, and to receive comfortable support and maintenance from my estate."

By the second clause, the testator devises to his wife, during her natural life, or widowhood, the tract of land on which he resided, and certain negroes and other personalty: all which, on her death or marriage, were devised and bequeathed to his son, the defendant, Jeremiah R. Gaithur; to which son he also, by the last clause, devised and bequeathed the residue of his estate, with a provision in the event of his son's death without leaving issue.

On the seventh of July, 1843, the testator duly executed a codicil to his will, by which, after reciting that he had made his will, leaving all his property, real and personal, to his wife and son, and the special provision made in the event of his son's death without leaving issue, he, by this codicil, modifies and varies the disposition made of his property, on the happening of that contingency. There are three witnesses to each instrument—two of them are the same persons.

On the 4th March, 1844, the testator purchased a tract of land from the commissioner in equity, and executed to him a mortgage of the premises, to secure the sum of sixteen hundred and fifty dollars and twenty-five cents. It is admitted that this land passed neither by the will nor codicil.

On the 17th June, 1843, (some three weeks prior to the execution of the codicil,) the testator purchased from the Superintendent of Public Works, a part of the Mountain Island, in the Catawba River.

In the judgment of the court, the codicil is a sufficient republication of the will, and the Mountain Island tract is well devised to the defendant. See Mooers v. White, 6 J. C. R. 375.

The next inquiry is, whether the real estate descended shall be applied to the payment of the testator's debts. In Pell v. Ball, Sp. Eq. 521, it is said, "If the testator has himself provided any fund, either expressly or by implication, his will is the law of the case;" and so in Warley v. Warley, Bail. Eq. 469, in prescribing the order of administering assets: "First, real or personal estate, devised for the payment of debts, or in any manner directed to be so applied."

If the first clause of the testator's will be regarded as merely an implication of intention to provide a fund for the payment of his debts, it is an inference not to be resisted. Every ultimate disposition of his property

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is made subordinate to the direction *that the whole should be kept together under the management of his executors, until his just debts were paid. The only other contemporaneous charge on the fund is the maintenance of his wife, for whom he makes an independent provision, after the object of keeping the property together had been accomplished.

It was suggested, that the land should at least be applied to the extinguishment of the debt for which it stood mortgaged to the commissioner. But this is beside the case. Certainly the commissioner may insist on his lien: but if he foreclose his mortgage, the heir would be entitled to reimbursement, in the same manner as an heir in England who has been compelled to satisfy a mortgage. The specific lien is the security of the creditor, but does not affect the principle of administering the assets as between the other parties.

There seems no foundation for the complainants' demand of an account of the personalty. A testament speaks at the death of the testator, and operates upon whatever personal estate a man dies possessed of, whether acquired before or since the execution of the testament. Williams' Ex'ors. 6: case of Elcock's Will, 4 McC. 39, [17 Am. Dec. 703.]

It is ordered and decreed, that a writ of partition issue to divide the land in Chester District, described in the pleadings, between the widow and two children of the testator, each taking one-third thereof, and that the commissioners make their return according to law. Parties to be at liberty to apply for any further or other orders to carry into effect the principles of this decree. Costs to be paid out of the estate of Jeremiah Gaithur, deceased.

The defendants, Jeremiah R. Gaithur, and Robert Bailey, appealed, and now moved this court to reverse or modify the decree, upon the following grounds:

1. Because, it is respectfully submitted, that the will of Jeremiah Gaithur does not charge any particular portion of his estate with the payment of his debts, but merely postpones the payment of legacies, or the division of his estate, until his debts shall have been paid, leaving the rules of law to govern in regard to what portion of his estate shall be first liable; and real estate descended, being liable to the payment of debts before personal estate bequeathed, the decree ought to have been for the defendants.

2. Because the costs of suit are decreed

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against the estate of *Jeremiah Gaithur, which, in effect, is a decree against the defendant, Jeremiah R. Gaithur, personally, who has been in no default whatever; whereas, it is respectfully submitted, that the decree being against the complainants, upon every claim made by their bill, except for partition of the descended estate, the complainants ought to pay the costs; otherwise,

as a bill for partition, the costs ought to be paid out of the estate to be partitioned.

McDowell, for the motion.
Boyce, contra.

PER CURIAM. We concur in the decree of the circuit court. Appeal dismissed.

JOHNSON, JOHNSTON and DUNKIN, CC., concurring.

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2 Rich. Eq. 273

L. BOOZER, Administrator, v. MARY M. ADDISON et al.

(Columbia. May, 1846.)

[Reported and annotated in 46 Am. Dec. 43.]

[*Husband and Wife* ⇐5.]

Where a sealed note was given to a married woman during coverture for money, the earnings of a school kept by her, and the husband never laid any claim to it; *held* that, upon the death of the husband, the note survived to the wife, even as against the creditors of the husband.

[Ed. Note.—Cited in McAfee v. McAfee, 28 S. C. 195, 5 S. E. 480.

For other cases, see Husband and Wife, Cent. Dig. § 11; Dec. Dig. ⇐5.]

[*Husband and Wife* ⇐223.]

Upon choses accruing to the wife during coverture, the husband may sue alone, or he may concede to the wife an interest in them and join her in the action; and if he make no exclusive claim by suing in his own name; or join his wife in the action, but die before judgment, or after judgment but before satisfaction; the chose, or the judgment, as the case may be, survives to the wife and becomes her property.

[Ed. Note.—Cited in McAfee v. McAfee, 28 S. C. 196, 5 S. E. 480.

For other cases, see Husband and Wife, Cent. Dig. § 759; Dec. Dig. ⇐223.]

Before Johnston, Ch., at Lexington, June, 1844.

The Chancellor. The questions to be decided between the parties still before the court, depend upon the following circumstances:

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*On the 17th of September, 1840, the defendants, John Meetze, Caleb Bouknight and Edwin J. Scott, executed their sealed note, whereby they jointly and severally bound themselves to pay to the defendant, Mrs. Addison, the sum of $1260.64, one day after the date thereof.

Mrs. Addison, the obligee, was at that time a femme couverte: her husband not having died till the 27th of October, 1841.

The note was delivered to the wife at its execution, and remained in her possession till the death of the husband, and ever afterwards, until it was settled and taken up by the obligors. This settlement took place the 8th of March, 1842, after administration to the husband had been granted to the plaintiff.

The settlement was entirely between the wife and Meetze and Bouknight, two of the makers of the note, the administrator having nothing to do with it: and it was effected by these obligors receipting and giving up to Mrs. Addison sundry notes and accounts, which the said Meetze alone, and the said Meetze and Bouknight, as partners, held against her deceased husband; to which were added the amount of a note given by said deceased to Mrs. Arthur; an account against him in favor of Meetze, Harman & Co., and sundry small accounts against Mrs. Addison herself: the whole amounting to $1891.13, at the date of the settlement. These were given for the sealed note held by Mrs. Addison.

It appears from the accounts of the administrator of Mr. Addison, that even if this sealed note be regarded as parcel of his intestate's estate, the assets will fall far short of satisfying the demands against it; and that after applying them to the bond debts, very little, if anything, will remain for the simple contract creditors.

Under these circumstances, the creditors at large, and especially the bond creditors of the intestate, (all being before the Court as parties,) have advanced the claim that the sealed note, held and given up by Mrs. Addison, as already stated, was parcel of her husband's estate, and should be added to the assets; and they contend that in the settlement, Meetze and Bouknight have received a greater amount, upon the demands which they held on the deceased, than they were entitled to receive, in a regular course of administration.

By a previous decree of Chancellor Dunkin, Mrs. Addison is exempted from all liability for having transferred the sealed note

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*to Meetze and Bouknight. The case remaining for my decision, concerns the two latter defendants, and Scott, the surety.

The first question is, whether the sealed note belonged to Addison or Mrs. Addison.

At law, no doubt it belonged to the husband; and this I do not understand to be controverted; but it is argued that, under the attending circumstances, equity will not so regard it.

The circumstances are these: Mrs. Addison had, for eleven or twelve years after her marriage, kept a school for young ladies, and this note included all her net earnings; which she had from time to time loaned out: the note having been taken for the entire sum, which at its date appeared to be in the hands of Meetze and Bouknight, the borrowers, (Scott being only their surety.) From an early period after their marriage, a well understood arrangement existed between Mr. and Mrs. Addison, that each was to pursue his own vocation: he to attend to his profession and his office, and she to her school. He was to be responsible for his accounts, and she for hers: and he was to have what he made in his business, and she what arose

from hers. Although the husband, upon a few occasions, attended to the wife's affairs, as her agent, he never commingled their accounts; but constantly declined, on the one hand to pay her debts, and on the other, to take her earnings. On every occasion he made known his full assent to her accumulating what she could by her pursuit, and enjoying the benefit of it; and as a proof of this, it is in evidence that he drew this very note and made it payable to his wife.

It is not the wife who is now before the Court, claiming to be protected in the possession of this note, nor is it her assignee; but I apprehend that the obligors who have taken it up, are to be regarded in as favorable a light as either; that is to say, that if Mrs. Addison could be supported in her claim, so may these defendants. But after a careful consideration of all that has been advanced in argument, I confess I do not see upon what ground this court can sustain them.

The point has been argued with zeal and much ingenuity, and with an extensive reference to authorities; but there are one or two positions which, in my opinion, are decisive of it.

The unity of husband and wife is the leading maxim of the doctrine. The husband is the head of the wife, and her capacity is merged in him. He is responsible for her necessary debts; and has a property in her, extending to all her exertions and all her earnings. Unless in some rare instances, as

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where he is ex*iled, or has abjured the realm, or has separated from her, or where she has, according to the statute, become a sole trader, she stands upon this footing.

"If," says Mr. Clancey, "the legal maxims, that the husband and wife are but one person, and that the property of the wife is vested in the husband by the marriage, were mitigated in no instances, but these just enumerated, a married woman would be one of the most helpless and unprotected objects in society. For, if her husband be resident within the kingdom, she is completely at his mercy and under his control; as he may desert her, or turn her out of doors, and, whatever fortune she may have brought him, he will be liable only for necessaries; and even of these he may deprive her; for he may be prodigal, and waste that fortune, or he may be unfortunate and lose it, and the law affords her no redress."

It is true, that a Court of Equity will, in some instances, interfere to prevent or mitigate the hardships which these maxims of law would otherwise produce. But the cases are generally confined to instances where property is given or conveyed to the wife, during coverture, for her separate use, in which instances, this Court will see that the intention of the gift or conveyance is fulfilled. Or if the husband is about to receive the equitable interest of the wife, without making an adequate settlement, he will be compelled to provide for her; and such like cases.

The Court, indeed, secures the rights of the wife in her separate property; and her savings out of her separate property, are hers. But this is not a case of savings from a separate estate.

The wife may, also, according to Clancey, (Book 1, ch. 3, p. 52, edit. 1819; p. 60, id.,) claim the benefit of an allowance made her by her husband, before or after marriage. But this depends upon circumstances. The provision is conclusive, as against the husband and his personal representative. But whether good against his creditors, depends upon another consideration: and that is, whether the provision was made before marriage, or afterwards, in pursuance of articles; or whether during coverture, without the foundation of ante-nuptial articles. If the provision is of the latter kind, it is regarded as voluntary, and fraudulent against creditors, and cannot be sustained.

Therefore, if even Mrs. Addison claimed her earnings in virtue of a written contract, executed by her husband in her favor, but entered into without ante-nuptial articles to support it, his creditors would have the right

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to avoid the instrument. Much *more are they entitled to do so, where every thing lies in parol. No marriage contract, according to the express enactments of our statutes, is valid with us, unless duly registered; which, of itself, destroys the validity of all parol agreements, such as that set up here, whatever consideration may be brought to sustain them.

I must, therefore, consider this case as standing upon the same footing as if these obligors had given the note to Mr. Addison in terms.

The case will be referred to the commissioner, and I have but few directions to give him for his government, in taking the account, as respects these defendants.

They will be entitled to discount against this note, all the demands which all the obligors, or any one of them, held against the intestate, at his death, but a demand in the name of any two of them, or any demand which was acquired after the death of the intestate, will not be discountable against it. I am to be understood, also, that it will be no obstacle to the discount offered, that any of its items may consist of the notes or accounts given up to Mrs. Addison, in payment of her note.

It will be no objection to the demand offered for discount, that it is of a class to which the assets in the hands of the administrator will not extend, because no man is bound to pay a single cent to an estate, while that estate is indebted to him. The sum which he really owes, is the balance which may be due after his own demand is satisfied.

The debts due by these defendants, will consist of the amount of this sealed note, which they have received, and other demands, which the intestate may have held at his death, against them; and against those, they will be entitled to discount any demands which they held against him at his death, accommodating the discount to the claim against which they offer it, so that the discount shall correspond to the nature of the liability to which it is opposed.

Other points are reserved until the report comes in.

Ordered, that the accounts be referred to the commissioner.

The defendants, Meetze, Bouknight and Scott, appealed from the decree, and moved to reverse or reform the same, on the following grounds, viz:

1. That the note was the property of the wife; was made payable to her, personally, for her separate use, by the act and with the consent of the husband, and if the legal title was in him, it was as trustee for his wife.

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*2. That such trust was not a fraud upon the husband's creditors, because the wife was induced to create the fund upon the husband's promise that it should enure to her separate use. It was not the appropriation of his estate to which his creditors were entitled, inasmuch as it did not exist when the husband's agreement was made.

3. If this was an agreement between husband and wife, after marriage, yet it cannot be regarded as a marriage settlement within the terms of the statute. It is respectfully submitted, that no contract can be held to be a marriage settlement, within the perview of the statute, which requires the same to be recorded, unless it embrace property in esse, whereof a schedule may be made.

4. There was valuable consideration; the husband was to be exonerated from the payment of the wife's debts, and the expenses of her establishment, which accordingly he always declined to pay. They were paid by her out of the proceeds of her own labor, which she consented to undergo, upon the faith that her earnings should be her private and separate estate.

5. It is an executed contract, and does not involve any element of fraud. The husband avowed it publicly, upon every occasion, and it would be a fraud upon those who dealt with the wife upon the faith of it, if the husband, while living, had been allowed to controvert it. It is respectfully submitted, that the husband's creditors only stand in his place, and that the obligors, creditors of the wife, occupy a stronger position than the wife herself.

W. F. Desaussure, for the appellants.
Boozer, contra.

Curia, per JOHNSTON, Ch. The reasoning of the decree rests entirely upon the assumption, that a bond or sealed note given to a woman during coverture, is, at law, the unqualified property of her husband, and if this assumption is sustainable, I do not perceive any error in the conclusions which the decree draws from it.

I assumed this position with the less hesitation, because it seemed to be conceded in the argument, and because it had been conceded in Herbemont v. Herbemont by eminent counsel, whom I endeavoured to draw into the discussion of it.

But it has been discussed here; and I am satisfied that the position, so far from being sustained, is contradicted by the best authorities.

The result of the examination is, that the

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husband's right of *property is qualified, and dependent altogether upon the steps he may take to assert it.

The right of the husband to the choses of the wife may be determined by considering the remedies which the law gives him in relation to them; and the incidents which pertain to the remedies he may adopt.

To the choses belonging to the wife before the marriage, the husband can lay no claim in his own name, or in his own right; but must join the wife in any action he may bring for reducing them into his possession. If he die before judgment, the chose survives to the wife; or if he obtain judgment and die before it is satisfied, the judgment enures to the wife as survivor.

Upon choses accruing to the wife during coverture, the husband may sue alone, or he may concede to the wife an interest in them, and join her in the action; and if he make no exclusive claim by suing in his own name; or join his wife in the action, but die before judgment, or after judgment but before satisfaction; the chose, or the judgment, as the case may be, survives to the wife, precisely as in the case of choses accrued to her before the marriage.

The only difference between ante-nuptial and post-nuptial choses, therefore, is, that the husband must join the wife in the action for the former, but has an option whether to join her, or sue alone for the latter. If he has not reduced them before his death, they both equally go to the wife by survivorship.

In this case, Mr. Addison neither sued in the one form nor the other; nor made any claim whatever to the sealed note, the subject of the decree;—and the consequence, (if the positions I have stated be true) is, that upon his death, it belonged, in law, absolutely to his wife.

For the truth of the positions, I might refer to two elementary writers, in common use.

Chitty, speaking of choses accruing after the coverture, says (1 Chit. Pl. 18) "where

the wife can be considered as the meritorious cause of action, (as if a bond or other contract under seal be made to her separately, or with her husband;) or if, in the case of her personal labour, there be an express promise to her, or to her and her husband, she may join with the husband, or he may sue alone; and it has been held, that she may be joined in all cases, upon an express promise to her."

"The effect" says he (Id. 20,) "of joining the wife in an action, when the husband

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might sue alone, is, that if the husband *die whilst it is pending, or after judgment, and before it is satisfied, the interest in the cause of action will survive to the wife, and not to the executors of the husband: though, if he sued alone, she would have had no interest."

Mr. Stephens (1 N. P. 744) lays down the same positions.

Premising that where the husband and wife join in an action, founded upon the services, &c. of the wife, and there is no express promise in the case, it must appear in the declaration that the services were rendered by her, so as to show that she is the meritorious cause of the suit; but that if the action is founded on a note or bond to her, or upon any other instrument importing consideration, no such averment is necessary, (1 H. Bl. 144; 2 M. and S. 393) I proceed to show from a few cases, promiscuously taken from both the law and equity jurisdictions, that the elementary writers already quoted are borne out in the propositions laid down by them.

It is true, that there are a few cases (Bunb. 188; 2 Eq. Ab. 1; 2 Bl. R. 1236) to the contrary: but the current of cases, especially those of later date, are with them.

Thus in Brashford v. Buckingham, (Cro. Jac. 77) it was assigned for error that the action was brought by husband and wife upon a promise made to the wife after coverture, in consideration that she should cure a wound; and it was insisted that the husband alone should have sued, it being a personal duty which accrued during coverture. Sed non allocatur, being grounded upon a promise made to the wife, upon a matter arising from her skill; so she is the cause of the action, and so the action in both their names is well enough: and such an action shall survive to the wife.

Philliskirk v. Pluckwell, (2 M. and S. 393.) Assumpsit by husband and wife on a promissory note given by the defendant to the wife during coverture. It was objected that the husband should sue alone, as it did not appear on the face of the note that it was on account of any meritorious consideration proceeding from the wife. Lord Ellenborough said the note to her imported a consideration proceeding from her; "and in Co. Lit. 120, a, and 1 Roll. Abr. Baron and Femme, H. pl. 6 and 7, mentioned by my brother Dampier, a difference is taken between a thing that is not merely a chose in action, and one that is: and, therefore, in case of a bond made to the wife, if the wife dieth, the husband shall not have it, without taking administration, because that is merely in action. So here the

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note is made to the *wife; and it imports consideration, unless the contrary be shewn." Bayley, J. concurred with him: and Dampier, J. held that the husband might join his wife in the action; and said "there must be some inaccuracy in Bidgood v. Way (2 Bl. R. 1236) in one part; because the court say that no promise to a married woman, either express or implied, gives her any interest; and yet they afterwards admit upon the cases, that where a promise is so expressly stated, the husband may assent to give the wife an interest in the contract and join her in the action. In Day v. Pargrave, according to my note, Lee Ch. J. said that where a bond is given to the wife during coverture, no action will lie for it by the wife, solely, but they may have a joint action during their lives; or the husband may bring such action during the coverture, in his own name; yet if he does not, it survives to the wife."

In Oglander v. Baston, (1 Ver. 396) it is said by the Lord Chancellor, "if there be a bond debt due to the wife, the husband may sue alone, without joining his wife; but in case the wife was joined in the action, and judgment is recovered, the judgment will survive to the wife."

Schoonmaker v. Elmendorf (10 Johns. R. 49.) Scire facias brought by the wife's executors to revive a judgment, which had been obtained by husband and wife on a bond given to both. The wife survived the husband, and it was held, that they had well joined in the original action; and that the judgment survived to the wife.

Coppin v. ———— (2 P. Wms. 496.) Bill by husband and wife: plea by defendant, and plea overruled, with £5 costs. Husband dies; held, that these costs survive to the wife. It was said in the argument, "that a bond given to the husband and wife, during the coverture, on the husband's dying first, did not survive to the wife." But "the Lord Chancellor denied this, and recte, for clearly it does survive to the wife, as all other joint choses in action do; though it is true in this case the husband may disagree to the wife's right to it, and bring the action on the bond in his own name only; but till such disagreement, the right to the bond is in both the husband and the wife, and shall survive."

I shall close this examination with the case of Nash v. Nash (2 Mad. R. 411, first Am. Ed.) decided in 1817, in which most of the cases are cited and commented on. The father of a married woman drew a cheque in her favour, upon his bankers, for

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*£10.000. The bankers gave her a promissory

note for the amount; which she delivered to her husband; and he received £1000 upon it, and continued to receive the interest on the remaining £9000 up to the time of his death. It was held, that upon his death, she was entitled to the note, as a chose in action which had survived to her.

It seems to me that these cases are sufficient to settle the question as to the right at law.

Still it may be said, that though the doctrine be as stated, as between the husband, or his representatives, and the wife, it must be otherwise as between the latter and the creditors of the former. That it may lead to fraud:—for if a bond or note, executed in the name of the wife, be allowed to survive to her, it will be easy for the husband, when the consideration really proceeds from him, and not from the wife, to take the obligation in her name, and thus secure a benefit to her at the expense of his creditors. But there is no such danger. If the chose arises in truth, as in this instance, from the wife as the meritorious cause, there is no fraud in allowing her the benefit of it; and if it arises from the funds or property of the husband, the proof of that fact will demonstrate the fraud and prevent its being carried into effect.

It is ordered, that the decree be reversed, and the bill, pertaining to this matter, as against the defendants, Meetze, Bouknight and Scott, dismissed. The costs to be paid out of the estate of Mr. Addison before distribution.

JOHNSON and DUNKIN, CC., concurred.

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2 Rich. Eq. *283

*Dr. DANIEL LONG v. Dr. THOMAS WIER and Wife.

(Columbia. May, 1846.)

[*Wills* ⇐781.]

Testator bequeathed to his son, Dr. L. a slave named Amy. To his other children, of whom Mrs. W. was one, he bequeathed divers specific legacies, all of which, including the legacy to Dr. L., he directed should be appraised, with a view to ascertain the value of each; and he directed that the legacies should be equalized out of the sales of a portion of his estate. After the execution of the will, on the marriage of Mrs. W., he gave her the slave Amy. *Held*, that Mrs. W. was not bound to elect between the legacy to herself and the slave Amy, but that she was entitled to both.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2016; Dec. Dig. ⇐781.]

[*Wills* ⇐778.]

The doctrine of election is founded on the apparent intent of the testator, that the legatee should surrender some right in exchange for the legacy. To ascertain, therefore, its application in any particular case, reference must be had to the state of things existing at the time the will was executed, and not to subsequent contingencies, unless they are expressly referred to and provided for.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2004; Dec. Dig. ⇐778.]

Before Johnson, Ch., at Laurens, June, 1845.

The Chancellor. The late Robert Long, by his last will and testament, bequeathed to his son, this complainant, amongst other things, a female slave called young Amy. He also gave to his other children, of whom the defendant, Mrs. Wier, was one, divers specific legacies, all of which he directed should be appraised, with the view to ascertain the value of each, including the specific legacy to the complainant; and that the legacies of all should be equalized out of the sales of a portion of his estate. After the execution of the will, he gave the slave Amy to the defendant, Mrs. Wier, on her marriage; and the bill prays that the defendants may be compelled to elect between the legacy and the slave, and for her specific delivery, in the event of their electing to take the legacy, and for an account of hire.

The doctrine of election, as defined in Broome v. Monck, 10 Ves. 611, is where the testator gives what does not belong to him, but does belong to some one else, and gives that person an estate of his own, whereby a condition is implied, either that he shall part with his own estate, or shall not take the bounty. It is founded on the apparent intent of the testator, that the legatee should surrender some right in exchange for the

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legacy, and *can, therefore, never arise where the legatee had not, at the time of the execution of the will, any interest or right in the property devised. A will is said to be ambulatory until the death of the testator, and speaks in reference to that time. This is true, as to its legal effect—it can only operate upon things as they then exist; but in arriving at the intention, regard must be had to the state of things existing at the time, and not to subsequent contingencies, unless they are expressly referred to and provided for—1 Roper on Wills, 493, note, 1st Am. ed. Moggridge v. Thackwell, 1 Ves. 475.

The defendants here found their claim to young Amy, upon a parol gift from the testator to the wife. The evidence in support of it, refers to two distinct times and occasions. The witness, Jane Smith, testified that Amy was born in 1826, and was one of two children brought forth at the same birth, and that the testator said he would give her to the defendant's wife, his daughter, and the other child to another of his daughters; but there was no delivery, or other act indicating a consummation of a gift. But Elizabeth Long, one of the testator's daughters, testified that defendant and his wife lived in the house of the testator some time after their marriage; and when they were about to remove, the testator enquired of witness, if she knew what property the defendant's wife wanted as a portion, and the witness told him that she had understood that she wanted

young Amy, amongst other things. Testator replied that he had willed her to complainant, but that he had a right to do what he pleased with his property, and he would will complainant another; and when defendant removed he carried Amy with him, and has had possession ever since. These circumstances are universally considered as conclusive evidence of a gift.

The will is dated in 1830, and the testator died in 1842; but it does not appear at what precise time the defendant and his wife removed from the testator's house, that being the time when the gift was consummated. The evidence of Elizabeth Long shows, however, that it was subsequent to the execution of the will. It is impossible, therefore, that the testator could have intended to put the defendant's wife to elect between Amy and the legacy. In the state of things existing at the time of the execution of the will, there was nothing between which to make an election, for she had no property in Amy, nor is there any thing found in the will indicating an intention that it should operate,

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*in this respect, prospectively. The gift to the defendant's wife was an ademption of the legacy to complainant; and, as to that, operates as a revocation of the will. As to this question, the bill must, therefore, be dismissed.

The complainants appealed, and now moved this court to reverse the decree.

Irby, for the motion.
Young, contra.

PER CURIAM. We concur in the decree of the circuit court. Appeal dismissed.

JOHNSON, JOHNSTON and DUNKIN, CC., concurring.

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2 Rich. Eq. 285

THOMAS ANDERSON and Wife and Others v. JOSIAH H. SMOOT and Wife and Others.

(Columbia. May, 1846.)

[*Witnesses* ⟸98.]

Where a bill was filed by the remainderman against the administrator of the tenant for life of slaves, for a specific delivery of the slaves, and an account of their hire since the death of the tenant for life, *held*, that the surety to the defendant's administration bond, was a competent witness for the defendant on the reference in relation to the account for hire.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 342; Dec. Dig. ⟸98.]

Before Johnston, Ch., at Sumter, June, 1845.

In obedience to the order of reference heretofore made in this case, (see Sp. Eq. 312,) the commissioner proceeded to take the account of the defendant J. H. Smoot, for the hire of the slaves. At the reference, one

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Morris Murphy was offered as a *witness in behalf of Smoot. He was objected to as incompetent, on the ground that he was surety to Smoot's administration bond—he being administrator of Mrs. Rembert, the tenant for life of the slaves, which the complainants were entitled to as remaindermen. The objection was sustained by the commissioner, and his report was, on this ground, excepted to. His Honor the Chancellor, overruled the exception, and the defendant, Smoot appealed.

F. J. Moses and Haynesworth for the defendant.

W. F. DeSaussure, contra.

Curia, per DUNKIN, Ch. We are of opinion that the ground of appeal is well taken, and that Murphy was a competent witness. His testimony was rejected because he was surety on the bond of Smoot, as administrator of Mrs. Rembert, and had, therefore, as was supposed, a direct interest in the event of the suit. The liability of the surety is fixed by the terms of the bond to the ordinary. It is the duty of his principal, in the first place, to cause an inventory to be made of the goods and chattels of the intestate and then, after payment of debts, to distribute the same among the next of kin.

By the will of Manassah Michau, Mrs. Rembert had a life estate in the negroes, with remainder to the parties in this suit. On the death of the life tenant, the negroes were all forthcoming, were in fact divided among the remaindermen, and the partition has been affirmed by the judgment of this court.

But was the surety to Smoot's administration bond on the estate of Mrs. Rembert, in any manner liable for his conduct in reference to these negroes? He undertook for his faithful administration of Mrs. Rembert's estate—nothing more. The negroes of the remaindermen constituted no part of that estate, any more than slaves which she had hired by the year. As administrator, Smoot was liable for such goods and chattels as ought to be included in the inventory, to be returned to the ordinary. These, and these only, constituted the assets of the estate of his intestate, and form the measure of his responsibility, and that of his surety. If hired negroes were found on the place, or an estray, or any other property, which did not belong to the intestate, it would be his bounden duty to restore them to the rightful owner, and failing to do so, he would be responsible to the parties interested. But this is not a duty falling within the condition of his administration bond, or for default in which his

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*sureties would be responsible. So, for certain purposes, the tenant for life is held to stand in a fiduciary relation to those entitled

in remainder, but after the extinguishment of the life estate, the property can, in no view, be considered as assets of the estate of the tenant for life; and for these only is the surety to the administration bond responsible. These negroes could neither be included in the inventory of Mrs. Rembert's estate, nor could the administrator, as such, have maintained trover for them, either against the remaindermen, or any one else. For the conduct of Smoot, therefore, in relation to these negroes, the surety on his administration bond was, in no way, responsible, and his testimony should have been received.

It is ordered and decreed, that the report of the commissioner in relation to the account for hire of the negroes, be recommitted.

JOHNSON and JOHNSTON, CC., concurred.

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2 Rich. Eq. 287

DAVID FOREMAN v. JOSEPH NEILSON and N. G. W. WALKER.

(Columbia. May, 1846.)

[*Trover and Conversion* ⟸70.]

Plaintiff, without requiring the defendant to give security, under the Act, for the forthcoming of the property, brought trover for slaves, and recovered judgment. *Held*, that the judgment transferred the title of the slaves to the defendant, and that they might be levied and sold under executions against the defendant older than the plaintiff's.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 314; Dec. Dig. ⟸70.]

[*Trover and Conversion* ⟸70.]

At the common law, the title of goods is changed by the recovery of a judgment in an action of trover, and the right thereby transferred to the defendant.

[Ed. Note.—Cited in Floyd v. Ervin, 1 Strob. 440; Bush v. Bush, 1 Strob. Eq. 379; Williams v. Dobson, 26 S. C. 113, 1 S. E. 421.

For other cases, see Trover and Conversion, Cent. Dig. § 314; Dec. Dig. ⟸70.]

[*Trover and Conversion* ⟸70.]

[Cited in Rogers & Thompson v. Moore, Rice, 60, 64, to the point that the recovery of a judgment in an action of trover transfers the title of goods in issue to the defendant.]

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 314; Dec. Dig. ⟸70.]

The complainant brought trover against the defendant, Neilson, for the conversion of

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slaves. At Spring term, 1846, the *cause was tried and the plaintiff recovered judgment for about $800. Neither at the commencement, nor at any time pending the action, was the defendant required to enter into bond for the forthcoming of the property, according to the Acts of the Legislature. After the recovery in trover, the defendant, Walker, as sheriff, levied on the slaves, as the property of Neilson, under executions older than complainant's; whereupon this bill was filed, praying an injunction and a specific delivery of the slaves.

The motion for an injunction was made before his Honor, Chancellor Johnston, at Chambers, who, on the authority of the case of Norrill v. Corley, decided by the Court of Appeals, in Columbia, December, 1828, refused the motion.

The complainant appealed.

Patterson, for the appellant.

Bellinger, contra.

Curia, per JOHNSTON, Ch. The case of Norrill v. Corley(*a*) is decisive of this case: and although, if the question were now for the first time presented, that decision might not be made, the court is not prepared to overrule it. The decree must therefore be affirmed. Appeal dismissed.

JOHNSON and DUNKIN, CC., concurred.

(*a*) In the case of NORRILL v. CORLEY, the following is the opinion of the Court of Appeals:

[Ed. Note.—Cited in Floyd v. Ervin, 1 Strob. 440, and in Rogers & Thompson v. Moore, Rice, 63, as to the construction of act of 1827 relating to the action of trover.]

NOTT, J. The only question which it is necessary to decide in this case is, whether the title of goods is changed by the recovery of a judgment in an action of trover, and the right thereby transferred to the defendant, or whether there must first be satisfaction of the judgment. Judge Kent, who has examined the subject with his usual research, and cited the authorities on both sides, concluded with saying: "The latter is the more reasonable, if not the more authoritative conclusion on the question;"—and I think that upon the first view of the subject, the mind will always incline that way. But, upon a further examination, it appears to me that the weight of authority, as well as the most practical rule which can be adopted, will lead to a different conclusion. The authorities relied on by Judge Kent are, first, a dictum from Jenkins, that if one person recovers damages in trespass against another for taking his chattel, "by recovery and execution done thereon," the property of the chattel is vested in the trespasser. I have not access to that author, and cannot therefore undertake to judge how far that observation is applicable to the question now under consideration. It is, indeed, a declaration that the property is changed by judgment and execution had thereon, but that does not necessarily authorize the inference, that it would not be changed by a judgment without execution. And in Shep-

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*pard's Touchstone, 227, title Gift, it is said: "where one doth take my goods as a trespasser, and I recover damages for them upon a suit at law; in this case the law doth give him the property of the goods, because he hath paid for them." Now this is a mere loose dictum, introduced in illustration of a distinct subject having no relation to the question before us. It is a very equivocal expression at best, and leaves the question, in my opinion, precisely where it was before. The last authority relied on, is the opinion of Lord Ellenborough in the case of Drake v. Mitchell, 3 East, 251. The substance of that case is as follows. The plaintiff declared on a covenant against three. The defendants pleaded in bar that one of the defendants had given his note for the

amount, on which a judgment had been obtained. Lord Ellenborough said it was not averred that the note was accepted in satisfaction, and therefore the judgment recovered upon it was no satisfaction until it was paid. His Lordship observed that he had "always understood the principle of transit in rem judicatam to relate only to the particular cause of action in which the judgment is recovered, operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have." But these observations can be taken only as applicable to the case then before the court, and can be considered as throwing but very little light on this subject.

But on the other hand, the case of Brown v. Wootan, Cro. Jac. 73, is a direct authority upon the point. It is there said that "judgment recovered in trover may be pleaded in bar to a second action against a different person for the same cause without averring satisfaction." Wherefore, by all the court, nullo contradicente, it was adjudged for the defendant. And in that case a distinction is taken between a tort and a contract,—because in the latter, said Justice Popham, every of them is chargeable and liable to the entire debt; and therefore a recovery against one is no bar against the other until satisfaction. And Fenner, Justice, said, "in case of trespass, after judgment given, the property of the goods is changed so as he may not seize them again." And in Adams v. Broughton, the Court of King's Bench decided that "the property was entirely changed by the judgment obtained in trover, and the damages recovered were the price thereof." Andr. 18. Here there are two decisions directly on the point in issue, declaring that the property is altered by the recovery of the judgment; opposed to two or three very equivocal dicta to the contrary. The weight of authority therefore is unquestionably in favor of that position.

But it is said that the other is the more reasonable doctrine. Let us then examine the subject with a view to that question. That would seem to me to be the most reasonable doctrine which furnishes the remedy at the same time the right is determined.

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*The judgment in trover affords the plaintiff no remedy if the defendant has no property except that in contest, unless it is changed by the recovery of damages. Because he must have execution of the goods of the defendant, and not of his own; and if the right be not changed by the judgment it cannot be taken in execution. The judgment in trover gives no specific lien on the property. Besides, if the plaintiff recover but half the value of the property, or rather what he might consider but half the value, he has it not in his option to take the property in satisfaction, which he might do if the property were still his own. The only practical doctrine, therefore, it would appear to me, is, that the title is changed by the judgment. It is true, the plaintiff may be subject to the interfering claims of prior executions. But that is his own fault. For by bringing an action of detinue, he preserves his right to the property, and has a remedy for the recovery of it. By bringing an action of trover, the plaintiff trusts to the personal security of the defendant, in the same manner as taking a note or bond in payment of the property sold. The property is changed even though the money should never be recovered.

By the Act of 1827, the property in contest is made liable to the satisfaction of the plaintiff's judgment in exclusion of other creditors, and, if the Legislature had not supposed the law to have been otherwise before, that Act would have been unnecessary. Indeed, the title of the Act is "An Act to alter the law in relation to the action of trover." But that Act can only operate prospectively, and cannot therefore affect this case.

The motion must be granted.

COLCOCK and JOHNSON, JJ., concurred.

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2 Rich. Eq. *291

*JOSEPH WILLIAMS v. N. G. W. WALKER et al.

A. P. ALDRICH v. WILLIAM NIMMONS et al.

(Columbia. May, 1846.)

[*Witnesses* ⇐322.]

Where a party, in order to make out his title, is compelled, by the rules of evidence, to call the subscribing witness to an instrument, and his testimony tends to invalidate the instrument, the party calling him may impeach his credit.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1095; Dec. Dig. ⇐322.]

[*Interpleader* ⇐21.]

The plaintiff to a bill of interpleader, should not only offer, by his bill, to bring the fund into court, but should obtain an order to that effect, and comply with it before proceeding with the cause.(*a*)

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 43; Dec. Dig. ⇐21.]

Before Johnston, Ch., at Barnwell, February, 1846.

The complainant in the case first stated, filed his bill against the defendant, Walker, sheriff of Barnwell district, A. P. Aldrich, assignee of Allen M. Odum, and others, creditors of George R. Odum, praying an injunction to restrain the defendant, Walker, from selling certain slaves which had been levied on as the property of George R. Odum, under executions. It appeared that in March, 1843, Allen M. Odum assigned to A. P. Aldrich a mortgage of the slaves in question, in trust, for the payment of certain debts. The mortgage was executed by George R. Odum, and bore date the 9th March, 1842. John Matheney was the subscribing witness thereto. The slaves were sold by the assignee under the mortgage, in April, 1843, and the complainant claimed under a purchaser at the sale, he having bought the purchaser's interest at sheriff's sale. The several executions against George R. Odum, under which the levies were made, were lodged between the 18th April and the 15th November, 1842.

The bill in the case of A. P. Aldrich v. Wm. Nimmons et al. was filed by the assignee of the mortgage, praying that the several claimants of the fund in his hands, arising from the sales of the mortgaged property, might interplead.

At the trial of the case first stated, the

(*a*) Vide Drewry on Injunctions, 324–5; 36 Law Lib. 215.

complainant offered to prove the mortgage from George R. to Allen M. Odum, by a witness who was not the subscribing witness

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thereto. This was *objected to, and the objection was sustained. John Matheney, the subscribing witness, was then sworn for the complainant. He proved the execution of the mortgage, and testified that it was antedated; that it was executed and delivered in January, 1843. Z. G. Graham was then offered as a witness for complainant, to impeach the credit of Matheney. This testimony was objected to, and the objection was sustained.

Many other matters were contained in the pleadings and the evidence, but they are not material to the questions, in reference to which, alone, the case is reported.

Per Curiam. On hearing the bill and answers, exhibits, evidence and argument, it is ordered and decreed, that the injunction heretofore granted in this case, be dissolved. The other questions and matters in the case, reserved for further hearing.

The complainant appealed, on the following grounds:

1. Because, under the circumstances of this case, the complainant ought to be permitted to impeach the credit of the subscribing witness to the mortgage from George R. Odum to Allen M. Odum, by evidence of general character.

2. Because the complainant having purchased the slaves in question, at public auction, for a full and fair price, without notice of any lien or claim on the part of the creditors of George R. Odum—and the price so paid by him being in the hands of a party defendant in the cause, not in his own right, but as a trustee for whoever may be entitled to the same, and subject to the order of court, the complainant has an equitable right to have the consideration money paid by him as aforesaid, applied to the extinguishment of the said lien pro tanto, and thereby quiet his possession of the slaves in question.

Patterson, for the appellant.

Bellinger, contra.

Curia, per DUNKIN, Ch. The first ground of appeal arises out of the refusal to admit testimony impeaching the general character of the witness, John Matheney.

In tracing the complainant's title under the sheriff, it became necessary for him to prove the mortgage from George R. Odum to Allen M. Odum, purporting to have been executed and delivered on the 9th March, 1842. Matheney was the subscribing witness. The complainant's solicitor stated to the court, that the character of the witness was such as not

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to entitle him to *credit, and proposed to prove the deed by other testimony. This was objected to by the defendant's solicitor, on the ground that the subscribing witness was in court, and was the highest evidence. The objection was sustained by the court. Matheney was then put on the stand for the complainant, and testified that the mortgage was executed and delivered at a subsequent period from the date thereof. The complainant thereupon tendered testimony to impeach his general character. The court ruled the testimony to be inadmissible, on the ground that a party should not be permitted to repudiate his own witness.

Although the determination of the case does not depend on the question thus submitted, it is deemed proper to express some of the views entertained by a majority of the court on this subject. There is no doubt about the general rule, or the propriety of it. But when a witness to a paper is called on to prove it, and his testimony tends to invalidate the instrument, such testimony is necessarily received with anxious jealousy. In Howard v. Brathwaite, 1 Ves. & Bea. 208, Lord Eldon reports Lord Mansfield to have "often said, that he would hear such witnesses, but would give no credit to them; and that Lord Kenyon followed him in that." Lord Eldon thought that "if they were heard, their credit should be duly examined; but their testimony is to be received," says he, "with all the jealousy, necessarily, for the safety of mankind, attaching to a man who, upon his oath, asserts that to be false, which he has, by his solemn act, attested as true." This language was used in reference to the testimony of a subscribing witness to a will, who impeached the sanity of the testator, about which he should have been well assured, before he attested the act. Certainly, such testimony might, or might not, be less open to animadversion when it relates to the date of the instrument.

But as a general rule, the subscribing witness must be produced. The inquiry is then presented, whether the party thus compelled to produce the subscribing witness, can, in no case, impeach his credit by proof of his general character. It is a familiar maxim, that where the reason ceases, the rule is inapplicable. No man should be permitted to attack a witness whom he has himself adduced to sustain his cause. But in a case like that under consideration, he may well be regarded as a witness of the law, rather than of the party. The complainant was no party to the original mortgage, whose authenticity

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it be*came necessary to establish. In 2 Ev. Poth. 266, a doubt is expressed whether the general rule, thus restricting the party who calls a witness, should extend to what are called instrumental witnesses; and the doubt is repeated by Professor Greenleaf in his treatise on Evidence, § 443. In Gresley's Eq. Ev. 119, it is said that, even in collateral issues, the subscribing witness to a deed must be produced, if he can be produced, and is capable of being examined. He cites the

anguage of Lord Ellenborough in Rex v. Harringworth, 4 M. & S. 350. "The party who would prove the execution of any instrument, that is attested, must lay the ground work by calling the subscribing witness to prove it." "His testimony, indeed," he continues "is not conclusive, for he may be of such a description as to be undeserving of credit, and then the party may go on to prove him such, and may call other witnesses to prove the execution."

"The only question is," says he, "whether the parties, who seek to prove the execution of this indenture, must not make their way, to what may be called secondary proof, through the medium of those witnesses who are the plighted witnesses to the transaction, by first disposing of their testimony." This, it appears to the court, is the true distinction, and that the complainant should, under the circumstances, have been permitted, in the language of Lord Ellenborough, "to shew that the subscribing witness was undeserving of credit." But we regard the other testimony in the cause, independent of Matheney's, as entirely satisfactory to prove that the mortgage was ante-dated, and would not, therefore, on that ground, disturb the decree of the Chancellor.

But the Chancellor, understanding that the complainant's case was rested entirely on the solution of this question, examined no further, but dismissed the bill. It is insisted in this court, that even conceding the antedating of the mortgage from George to Allen Odum, the complainant had other equities on which he was entitled to be heard, and which, it is admitted, were not considered by the Chancellor. The cause will be sent back for that purpose.

Some irregularity seems to prevail in regard to granting injunctions on interpleading suits, which it is thought a fit occasion to notice and correct. The complainant, in a bill of interpleader, should not only offer, by his bill, to pay the fund into court, but he should take care to have an order passed

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to that *effect, if he desires to protect himself from the liability for interest on the fund while it is in his possession. The rule is very explicit and well settled, that on a bill of interpleader, the plaintiff "must bring the money into court, before he takes any step in the cause:" 1 Smith Ch. Pr. 476. And in Pauli v. Von Melle, 8 Simons, 327, an order for an injunction in an interpleading suit was declared to be irregular, "if it did not make the issuing of the injunction dependent on the payment of the money into court."

From the proceedings before us, it does not appear that any order has been heretofore passed for the payment into court of the funds in the hands of the complainant in the bill of interpleader, and provision to that effect will be now made.

It is ordered and decreed, that the injunction heretofore granted, be continued until the hearing on the merits, or the further order of the court.

It is further ordered, that the complainant in the bill of interpleader, pay into the court the money in his hands, according to the prayer of his bill, and that the commissioner report to the court, or one of the Chancellors, a proper mode of investing the same, pending the litigation.

JOHNSON and JOHNSTON, CC., concurred.

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2 Rich. Eq. *296

*ELISHA CARSON and Others v. JAMES R. LAW, WILLIAM LAW and JOHN ROBINSON.

(Columbia. May, 1846.)

[*Fraudulent Conveyances* ⇐29.]

J. R., a bidder at sheriff's sales, when a lot of nine negroes was offered, announced to the crowd that he would "give one thousand dollars for the negroes and send them home to Mrs. L.," the wife of the defendant in execution. No other bid was offered, and the negroes were knocked down to J. R. at that price, which was much below their value. The sales of the defendant's property did not satisfy his execution creditors. *Held* that, although the motive of the bidder was one of benevolence towards the debtor's family, yet the sale was fraudulent, as against his, the debtor's creditors, the announcement of the bidder being intended to prevent competition and having produced that effect.

[Ed. Note.—Cited in Barrett v. Bath Paper Co., 13 S. C. 158; Herndon v. Gibson, 38 S. C. 360, 17 S. E. 145, 20 L. R. A. 545, 37 Am. St. Rep. 765; Ex parte Cooley, 69 S. C. 155, 48 S. E. 92.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 81; Dec. Dig. ⇐29.]

[*Execution* ⇐214.]

At the same sale, J. R., who was a large judgment creditor of the defendant in execution, when a tract of land was put up for sale, announced to the crowd, that whoever purchased the land would have to pay the price forthwith in cash. The biddings proceeded, and J. R. became the purchaser of the land at the price of thirteen hundred and five dollars—the land being worth from three to five thousand dollars. *Held*, that J. R. being a creditor, had the right to make it known that he would insist on the price being paid in cash, and, therefore, that the sale was valid.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 641; Dec. Dig. ⇐ 214.]

[*Judicial Sales* ⇐20.]

[Cited in Reagan v. Bishop, 25 S. C. 591, to the point that at a public sale a mere bid by one person will not prevent a setting down of the property to several.]

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 44; Dec. Dig. ⇐20.]

Before Johnston, Ch., at Sumter, June, 1845.

The principal object of this bill was to set aside the sales of a plantation and nine slaves, sold, in January, 1842, by the sheriff of Sumter district, under executions, as the

property of James R. Law. The complainants were creditors of Law whose executions were not reached by the sales of his property, and the defendants were John Robinson, the purchaser of the property at the sale, and a member of the firm of Robinsons and Caldwell, James R. Law, the defendant in the executions, and William Law, his brother, who purchased the property from Robinson shortly after the sale. The case turned principally upon the testimony taken at the hearing. The pleadings, however, showed that Robinsons and Caldwell were judgment creditors of James R. Law,—the amount of their judg-

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ment being between four and *five thousand dollars. That the property of the defendant, James R. Law, sold by the sheriff, consisted of a plantation and thirty-three slaves; that the plantation and nine slaves, the sales of which were impeached by the bill, remained in the possession of James R. Law, and continued in his possession up to the trial of this case, and that on the day of the sale and the day after, William Law borrowed from James R. Law five hundred and fifty dollars, three hundred and forty dollars of which he paid Robinson in part payment of the nine negroes. The complainants charged "that John Robinson had made an engagement that he, Robinson, should allow William Law to have any property which he, Robinson, should be enabled to purchase at a sacrifice at the sheriff's sale for the benefit of James R. Law—and that he, Robinson, was to allow William Law to have such property upon a long credit. And your orators expressly charge that thirty-three negroes and the tract of land whereon James R. Law lives, were valued, at the time of the sale, at seventeen thousand dollars—that James R. himself held the plantation aforesaid at between five and seven thousand dollars—that he had asked that price for it, of persons who had applied to him to purchase, but a short time previous. That when the deputy sheriff announced that he would proceed to the sale of the property of James R. Law, he held in his hands a list of the property, designating the different lots, which should be successively put up. That the deputy sheriff formally announced to the crowd, that he would first sell the negroes of James R. Law, and that after the sale of the negroes, he would proceed to sell the plantation aforesaid; that the sale proceeded —that a lot of nine negroes was put up on the table at one time, and your orators expressly charge that this unusual number, not being of the same family, were put up in one lot at the request of James R. Law, John Robinson and William Law. That John Robinson and William Law held in their hands a counterpart of the list and directions which the deputy sheriff had; that when the lot of nine negroes was put up, John Robinson announced to the crowd that he would give one thousand dollars for them, and send them to Mrs. Law. Your orators charge that the market value of those negroes was, then, from twenty-five to twenty-seven hundred dollars; that by this false pretence, announced at the moment of sale, he checked the bidding; that the deputy sheriff did not cry the bid for more than one-fourth of one minute, and knocked them off to the said

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John Robinson. That the said *Robinson then called out to the deputy sheriff "now put up the land"—that the deputy sheriff obeyed him, and thus, by his interference, he, Robinson, practiced a deception upon the public and the creditors, who were awaiting the sale of the land in its regular order. That as soon as the deputy announced the sale of the land, in obedience to his directions, he, Robinson, exclaimed in a loud voice "if any man bids on, or buys that land, he shall pay down the cash instantly," and that he would give one thousand dollars for it—that the bidding proceeded until he, Robinson, had bid thirteen hundred and five dollars, and that then he cried to the deputy "knock it off," which he immediately did.

"And your orators charge that by this deviation from the order of sale announced, some of the creditors of James R. Law, and the public, were deceived; that the land was worth more than thirty-five hundred dollars; that there were various persons on the ground that day who would have given that sum—and that the creditors themselves would have run it up to that price, had Robinson's interference not precluded them. That in the interval of Robinson's making the announcement 'that he would make the purchaser pay the cash instantly,' James R. Law was making private signals to persons not to bid."

"That in accordance with the said understanding between the said James R. the said William, and the said Robinson, made previous to the sale, Robinson made titles to William Law for the said plantation, for the benefit of James R. Law, who has ever since resided upon it, using it in all respects as his own. That on the night following the sale, Robinson transferred to William Law his bid for the lot of nine negroes, and gave to said William an order to the sheriff to have titles made to him; that on that night, James R. Law placed in the hands of the said William, the sum of five hundred and fifty dollars, for the purpose of carrying out the understanding with Robinson, to purchase the property for his benefit, at a sacrifice. That William Law, of the five hundred and fifty dollars placed in his hands, paid John Robinson three hundred and fifty dollars, in part payment for the nine negroes bid off under the circumstances above stated; and paid the sheriff two hundred dollars of it for some negroes which he, the said William, had bid off for the benefit of James R. Law."

"And your orators charge that the property, to wit, the nine negroes transferred by

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Robinson, and four other negroes pur*chased by William Law, returned immediately into the possession of James R. Law, and have ever since continued in his possession as his own."

"And your orators charge that by the interference of John Robinson, a fair marketable price was not obtained for the property. Your orators and the public would have given the sum of twenty-five hundred dollars for the nine negroes aforesaid, and three thousand five hundred dollars for the plantation; and now offer to give that price for them."

The defendant, John Robinson, in his answer stated that he attended the sale, solely to look after the interests of Robinsons and Caldwell, as plaintiffs in execution; "that he met at the sale William Law, a brother of the defendant, and the defendant himself; that he did not agree with William Law to let him have any property which he, this defendant, should be enabled to purchase at a sacrifice, for the benefit of James R. Law, or of any other person, and that he should have it upon a long credit. The only understanding that existed previous to the sale, between William Law and this defendant, respecting any of the property in question, real or personal, is as follows, and was to the following effect viz: Mr. Wm. Law, on the morning of the sale, and previous thereto, expressed his apprehension that the whole of his brother's property would have to be sold; that he would willingly assist his brother's family in this hour of their distress, if he could do so, but that he had no money to enable him to purchase at a sheriff's sale, and seeing that they would be left entirely destitute, he enquired of this defendant whether, if he became the purchaser of a certain lot of nine negroes, (hereafter mentioned) at a price that might be approved by him (William Law) and Mr. Geo. W. Cooper, he, this defendant would allow him, the said William Law, to have them, or some of them, for the paper of himself and Cooper, and in that case, what terms of payment would be acceptable: this defendant answered, that he would do so if he became the purchaser of the negroes aforesaid, upon receiving one half the purchase money in cash, and the other on the 1st of January following. This defendant certainly did suppose that the object of William Law in this arrangement, if the same was carried out, was one of humanity and benevolence towards Mrs. James R. Law and her children, and he would feel not less regret than surprise, to find that any principle of jurisprudence in South Carolina shall condemn the object, or the bona fide execution of it. In the con-

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versation *just recited, and the understanding arising out of it, James R. Law had no participation, so far as this defendant was or is informed. The sale proceeded, and a lot of nine negroes was offered by the sheriff, (being the cook and her family, as this defendant understood at the time,) but he denies the allegation of the bill that he was any how concerned in procuring the sheriff to offer the whole of them together, which seems to be alleged in the bill as matter of complaint, although this defendant would submit that it could hardly be deserving condemnation, that the sheriff should, of his own accord, or that he should be by others advised, if his own sentiments of humanity did not prompt him, to sell a family of negroes together. This defendant purchased them, and when offered for sale, he did say, that if he purchased them, they would be sent back to Mrs. Law, and then bid one thousand dollars; that the bid was cried long enough to admit several other bids, if any one had desired to make them; how long this defendant cannot state, but whatever the period was, it was not prescribed by him nor the matter influenced by him; this defendant neither meant nor saw any thing unfair, or any indecent haste, in the transaction. After the sale, Mr. Wm. Law received an order from this defendant to the sheriff, to make him (Law) a title to the negroes, he having paid in cash only three hundred and forty, instead of five hundred dollars, and given the note of himself and Geo. W. Cooper, at twelve months, interest from date, for six hundred and sixty dollars; the negroes in question were in fact, as this defendant has understood, sent back to Mrs. Law, by Mr. William Law and Mr. Cooper, and how, therefore, the announcement, as above stated, that if the defendant bought them they would be sent back to Mrs. Law, was a "false pretence," must appear only to the wisdom, as it has been invented by the charity, of some one else. Certainly this defendant did not make a dollar by the transaction, but must have lost a good sum, if the negroes were worth 2500 to 2700 dollars, for the truth is, he merely transferred his bid to the aforesaid friend of Mrs. Law, and gave him a credit for a greater part of the sum. This defendant wholly denies that he did any thing to prevent any one from giving more for the negroes, if so disposed. The sheriff cried the bid as long as he thought proper, and was under no instigation from this defendant to exclude others. How the cash, above mentioned, that was paid this defendant, was procured, he knows not."

"And this defendant further answering,

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says: that he denies *the allegation that he exercised any control, or attempted it, over the sheriff, in the manner, the order, the time, or the parcels of property sold by him; that he saw a paper, and probably occasionally referred to it, handed to him on the day of sale, exhibiting estimates (by James R. Law, as he understood,) of the val-

ne of the property to be sold, in parcels, or by classification, made he knows not by whom, probably by James R. Law. He deemed the estimate quite too high, and had no agency in prepairing the paper or in procuring the sales to be made according to its classification, if in fact they were so made; neither did he order the sheriff as to putting up the land, or as to knocking it down, as represented in the bill, nor "proclaim in a loud voice, if any man bids or buys that land, he shall pay down the cash instantly;" or, (as the charge is afterwards varied) "that he (this defendant) would make the purchaser pay the cash instantly." In short, this defendant denies distinctly and specifically all and every variety of imputation and insinuation contained in the bill, that he either individually or in conjunction with any other person or persons, did in fact or sought to deceive, by word or deed, or to use the sheriff or his deputy to deceive or mislead any body, in relation to the sale of the land or any other property. He denies that he made any contract or agreement concerning the land, previous to the sale of it, with William Law or James R. Law, that he should buy it for them, or either of them, or on their account or for their benefit. This defendant said and says, that he should have to rely on the land to cover the balance of his claims in judgment, and stood ready to run the land up to that point, and no farther; that if he bought it for less, he did not want to retain it, but aimed only to secure from it the balance of his demands; the whole object and purport of this conversation, was to explain his purpose as a creditor, and not to make any stipulation, expressed or implied, with anybody, still less to withhold a bidder or prevent the fullest competition. He bid fairly and repeatedly for the land, was opposed by the agents of other creditors, the competition lasted for some time, he did nothing nor said anything intended to restrain or terminate it, and the property was finally knocked down to him at $1305; still at least a balance of more than one thousand dollars was left unsatisfied on the executions of Robinsons & Caldwell, and after the sale, Robinsons and Caldwell, on receiving the paper of William Law and Geo. W. Cooper, for the amount of the bid aforesaid, and for the balance of

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their claims on execu*tion, transferred the land to William Law. The result was, that they took the paper of the parties aforesaid, for about three thousand dollars, which remains unpaid, and they have not made a cent upon the transaction. This defendant knows nothing of the private signals betwen Jas. R. Law and the sheriff, as imputed in the bill, and denies all "understandings," or concerts, or combination, such as imputed to him in the bill, or any other of an unfair character, or any whatever of any character, except as set forth above, with James R. Law, William Law, or with any other person. He again repeats, that he attended the sale of his own mere motion, for the sole end of endeavoring to save the debts of Robinsons & Caldwell; that he aimed to do this only by fair competition in bidding on the property; that he employed no other means; that he availed himself of circumstances occurring in the fair prosecution of that end, and while he did not contrive to bring it about, to enable a friend of Mrs. J. R. Law and her children, assisted by the name of Mr. Cooper, to endeavor to save something for her and her family, on a resale of property bought by this defendant, by extending a long credit to that friend, for about three thousand dollars; that he sincerely hopes the object of the said friend may be accomplished; and that this is the whole extent of his offence."

The answers of the defendants, James R. Law and William Law, in relation to the sales of the property, were substantially the same as that of Robinson. They stated that James R. Law held possession of the property as a loan from William Law, and that he, William Law, had the right, at any moment, to control the possession. It was admitted also by James R. Law, that only seven of the nine slaves were of the same family;—two of them, a girl and boy, being of a different family.

The evidence taken at the hearing was as follows:

Plaintiffs' Evidence.

Langdon H. Dinkins—was the deputy who sold the property. On the morning of the sale, Jas. R. Law took him out, and pulled out a list of negroes, on which were nine, whom he represented as one family, and said he wished them sold together; that they were going to be bought in for him—that he wanted witness to favor him in selling the negroes; witness made no reply to that. J. R. L. said he wanted witness to do something for him that day, and he would do something

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for witness here*after; witness said he could not put up the nine negroes in a lot, unless instructed by the sheriff; J. R. L. then went off. The list shewn by J. R. L. had little stars opposite the nine negroes; witness never sold as many as nine in one lot before or since. The nine were not at the head of the list—thinks the preceding had been sold (thinks all the preceding) when the nine were put up; thinks ("is not certain) John Robinson said "now let us put up the nine;" they were thereupon put up—Robinson said "he would give $1000 for them and send them to Mrs. Law." Col. Moses was standing in front of witness, and S. Mayrant on witness's right: Moses asked witness 'what is that;' witness repeated Robinson's words, and Moses turned right round and left the crowd. Witness spoke loud enough to Moses for the whole crowd to

hear, and wanted them to hear him; witness did not cry them long, but long enough for any bids to have been made. Saw clearly after the announcement there were to be no other bids. Cannot say whether he sold the land before the sale of the negroes was completed or not. Thinks (is pretty confident) Robinson called up the land, and said whoever bought the land, should pay the cash down for it. Davis Heriot and several others bid against Robinson; witness saw James R. Law go up to Heriot and say something to him, and Heriot bid no further. In the morning, thinks J. R. L. said that he was expecting R. (who had not arrived) to be there that day to help him out. If J. R. L. had not said what he did in the morning, and if Robinson had not said what he did at the sale of the negroes, and if witness had not seen the effect it produced on the crowd, witness would have cried the negroes longer. Cross examined. There was a large crowd at the sale. The sale took place in regular hours—before and after 12 o'clock—had large sales to make that day; no one objected to the nine being put up together; Mayrant bid off two negroes. Thinks Abbott, a creditor, was there at the sale. Witness would not have put up the nine without the sheriff's direction; does not recollect his directing him, but as witness put them up, infers the sheriff did direct. The negroes were two parents and children, from 12 years downwards; witness thought them parents and children; got more for this tract of land than for any other he ever sold at sheriff's sale.

D. B. McLauren—was present at the sale part of the time, and saw the nine negroes sold; witness wished to buy a boy, (not one of the nine,) Robinson bought a boy selected

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by wit*ness; witness went to him to get him from him, and he asked $100 advance. Robinson, when the nine were put up, said he would give $1000 for them and send them to Mrs. Law, or that he bought them for her, not certain which; they were not cried over two minutes. The sale was so rapid as not to admit of a deliberate examination of the property. After the land was put up thinks Robinson used some expression about the payment of the money—does not recollect what it was. Cross examined. The negroes were in the gaol yard some hours before the sale; witness examined them there, and saw others doing so. No one exhibited a disposition to bid for the nine. No one requested time to examine, or that the sheriff should pause. Thinks he heard (after the adjournment of sale from November to January,) that the property would be sold partly for cash and partly for credit.

Re X.—Witness did not bid for the boy he wanted; preferred to get Robinson's title, as he had heard of some doubt of Law's title; some claim.

Geo. Morgan—was at the sale of the 9 negroes; they were put up and knocked off very soon. It was after 11 or 12 o'clock when they were put up; Robinson said he would give $1000 for them, and send them to Mrs. Law. The crier repeated what Robinson said. The sheriff then said $1000 once, $1000 twice, $1000 three times, and knocked them down. It took him about half a minute to do so. That morning, after breakfast, witness called on James R. Law for a small debt of witness's father, and he said he had money, but wished to employ it in saving his property: his words were to that effect.

X.—Thinks no one bid in consequence of Robinson's expression; witness (and others who expressed themselves to witness,) regarded it as a gift from Robinson; did not know of any one who intended to bid, but thought the negroes were worth more. Robinson made his bid after the negroes were put up and offered; he used the words, I will give $1000, and send them to Mrs. L., without a better bid.

Tyre J. Dinkins—was at the sale; thinks deputy sheriff announced he would sell the negroes and then proceed to sell the land; when the nine negroes were put up, Robinson said he would give 1000 dollars, and send them back to Mrs. L. Witness's impression was, it was to be a gift: they were knocked down very quick, not over half a minute, he thinks, from the time the sheriff began to

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cry R's bid till he knocked them down; *witness was not attending till R. made his bid. The deputy then repeated what R. had said, and cried $1000 once $1000 twice, $1000 three times, and knocked down. Never knew as many put up together. If they had been put up separately, would have sold better; upon the nine being sold, is pretty certain Robinson called for the sale of the land. At the beginning of its sale Robinson said whoever bought the land should pay the cash right down. It was bid up to $1300, Robinson bid $1305, and upon that being cried some time he said "no more bid, knock it down." Witness did not see any manifestation of disposition to bid. Either Stuckey or Dixon bid the $1300. Heriot bid at first, but desisted; the land is worth four or five dollars per acre; said to contain 1300 acres. Moses came back after the land was sold, and asked sheriff when the land was to be sold; sheriff replied, it was already sold. Thinks the negroes worth 2500 dollars. X. Thinks that but for R's interference, the land and negroes would have sold for more. Neither Robinson or either of the Laws told witness or any one else, so far as he knows, that R. was buying for Mrs. L., or intended as a gift. Has seen land bring tall prices at commissioner's sales. Stuckey, when he bid $1300, said he would give $1 an acre. The nine negroes constituted the 4th or 5th lot, he thinks. Then the land, then other negroes;

did not know of any one intending to bid, who was deterred.

John W. Stuckey—was present for a time. The nine negroes were despatched very quick. Mr. R. said when they were put up, he would give $1000 and send them to Mrs. Law. Witness bid on the land; was wanting land at the time; while the land was selling, R. said the person who buys the land will have the cash to pay; witness, after the bidding had gone on some time, bid $1300, and said it was worth $1 an acre any how. J. R. Law shook his head at him gently; witness taking it for a sign that some arrangement had been made, bid no further.

✕. Witness intended to bid more; witness might have misunderstood J. R. Law; he said nothing to witness.

Re ✕. Desisted from friendly motives.

Defendants' Evidence.

John Bradley—was at the sale; remembers nothing of the sale of the land; saw a lot of negroes put up; when they were put up, Robinson said, "I will give $1000 for them,

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and if I *buy them at that price, I will send them back to Mrs. Law;" saw no undue haste.

T. J. Wilder—was present at the sale of the nine negroes. They were put on a platform and offered; Robinson said, I will give $1000 for them, and if no one gives more, I'll send them home (or present them, one or the other.) to Mrs. Law. The sheriff proclaimed it, and asked if any one would bid more; he then cried the bid, and knocked them down.

The Chancellor. I do not deem it necessary to precede the judgment which I am now prepared to deliver in this cause, by a methodical statement of the pleadings and the evidence. The circumstances are well understood by the parties interested, and by all others who witnessed the trial; and in case of an appeal, I shall content myself with a direction that the pleadings and the notes of evidence be made a part of the brief, and be prefixed to the decree.

The principal subjects of discussion at the hearing, were the purchases made by the defendant, Robinson, at the sheriff's sale, and transferred by him to his co-defendant, Wm. Law.

These purchases were assailed on the ground that, by a combination of circumstances, stated in the bill, and supported, with some modification, by the proofs in the cause, the usual competition of a sheriff's auction was diminished: so that the property was knocked down to Mr. Robinson at a sacrifice, to the injury of the execution creditors interested in the proceeds of the sale.

The questions applicable to such cases were extensively argued in two important cases in the Court of Errors, Hamilton v. Hamilton, and Martin and Walter v. Evans,*(a)* so recently as to preclude the necessity, and indeed, almost the liberty of investigating them here.

From the fact, I suppose, that I did not concur in the results of these cases, counsel were encouraged to a more liberal examination of positions supposed to have been ruled in them, than, probably, they would otherwise have made. But though I would rather invite than repress a free investigation of decided cases, it is clear that such examinations are legitimate only when directed to the object of ascertaining the proper interpretation to be put upon them. It is need-

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less to observe, that whatever doc*trines and principles are found, upon such review, to be decided in the appellate tribunals, are concluded in this forum.

For the satisfaction of counsel, however, as well as because it may serve to exhibit more clearly the grounds upon which I shall decide this cause, I shall as briefly as I can, intimate the leading reasons which forbade my concurrence in the results of the two cases referred to: and when I have done so, it will be seen how far they would have affected such of the principles drawn into discussion there, as are applicable to the case before me.

Although it does not appear in their judgment, a majority of the court decided the case of Martin and Walter v. Evans, upon the ground of mala fides. In this determination, I could not concur, because it did not appear from the circuit decision, that any such impression had been produced on the mind of the circuit court, nor could such an inference be fairly drawn from the facts reported in the decree of the Chancellor. It is true, that in a preliminary stage of the case, I had, myself, made an interlocutory order, founded solely on the ground of fraud. But that was upon the bill alone, and not upon the case, as made out upon the hearing, and if the statements of the bill had been fully sustained by the proofs, there would have been no diversity of judgment among us. In the other case, there was no surmise of intentional wrong.

The two cases presented the naked question of public policy, and should have been decided with reference to that question alone. The allegation was, that fair competition had been obstructed, and that involved the question, "what is fair competition?"

In every public sale, as there are but two leading interests, so there are but two parties: those engaged in vending, and those proposing to purchase the property. These are necessarily antagonists, because their interests are directly contrary, the one to the other. This is so well understood by all practical men, that all their expectations

(a) Vide these cases reported in the appendix to this volume. [2 Rich. Eq. 355, 368.] R.

have reference to it, and no man of the least experience or penetration is surprised when he sees these opposing interests in full play at every public auction. It is the interest and well understood intention of the vending party to sell as high, and of the purchasing party to buy as low as possible. Neither party expects, nor has a right to expect, that his opponent shall make any provision to advance his interests, or forego any bona fide arrangement calculated to promote his own interests, for the sake of en-

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hancing his antagonist's, nor in *any way to sacrifice any right which he has, in favor of an opposing right, which is neither more just, nor more sacred in the eye of the law than his own.

It is the function of public policy to secure each of these classes, and not one at the expense of the other. It simply requires that each, in the promotion of his own interests, and in the exercise of his own rights shall act fairly. A fair competition will be enforced for the benefit of the vendors. No trick, no circumvention will be allowed to prevent it. On the other hand, the bidder will be secured against all imposition. All this, public policy requires, but no more.

It is upon this principle, of leaving each party to the fair exercise of his own discretion for the promotion of his own interests, —and upon no other principle,—that, as the vendors may, on the one hand, put up the property in whatever lots or quantities they please, in order to enhance its price,—so on the other, the bidders may, (as all the authorities acknowledge) combine in any numbers, so as to make the purchases advantageous to them, although it is palpable that in so doing, competition, so far as it might have operated between the confederate bidders, is incidentally destroyed. The amount of the principle is this, and no more: that each party shall be indulged in every means adopted bona fide for the promotion of his own interests; but he shall resort to no trick for that purpose. This is really what, among practical men, is meant by fair competition, and it is all that practical men expect can be possibly secured by all the adjudications of all the courts upon earth. You may strait-lace society by rules more sublimated; but then society will not act. All energy, all enterprise, all commerce cease, where a liberty suitable to our nature, and subservient to our interests, is denied. If a code prescribing the purity and disinterestedness of angels could be devised by human wisdom, men must be transformed into angels, and translated to another sphere of existence, before they could or would fully conform to it.

In the two cases to which I refer, the acts complained of as diminishing the competition, consisted of a combination of bidders; an agreement of two bidders to unite against other competitors. Nothing more can be fairly made of the cases. In the case of Hamilton v. Hamilton, the only offence of the bank was that she provided a bidder with means to attend the auction, who, for aught that appeared, would not have been a bidder without that assistance; unless, indeed, it con-

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cerned the other *parties, and was an injury to them, that she did this upon terms advantageous to herself. Her only offence was, that so far from obstructing, she added to the competition. Then as to the bidder thus furnished,—he indeed did agree with other bidders to unite with them:—and this was, in truth, the only ground upon which the purchases made by him could be assailed. The facts were these. Adger and North, who were unpreferred, or junior creditors, of the party whose property was to be sold, had determined to run the property up to a certain amount, conceiving that if they could get it within that limit, they might make their debts out of it. Gourdine, the new bidder, conceiving that he could get the property at $30,000, agreed with them to bid to that extent, and that if he got the property he would pay their demands:—but it was expressly a part of the agreement, that if the biddings were carried beyond the $30,000, they were to attend to their own interests, and bid for themselves. Now, I was ignorant of the existence of any principle of reasoning, and insensible to the obligation of any principle of law, by which more could be made out of this than a mere union of bidders, within the limit of $30,000. What was the offence? Was it the displacing of Adger and North from the list of competitors? It will not be pretended, that they were precluded from selling their claim, because by selling it they deprived themselves of their sole incentive to bid. Their debts were as just and as sacred in law, though not as well secured as those to be subserved by the sale; and there was nothing in justice or in law requiring them to keep up a competition for the benefit of the latter, at the expense of the former. Fair competition is that competition which springs from the interests of the bidders; to such competition alone are vendors rightfully entitled, and although it might be for their interests that it should be carried farther, equal justice, (which is always true policy,) demands no such unreasonable sacrifice. To be sure, it is not quite accurate to say, that Adger and North made a sale of their debts to Gourdine. That is, the sale was only conditional. If he got the property under $30,000, the sale was effected, if not, then there was no sale. But what difference could that make? Beyond the limit mentioned, there was no agreement whatever, and of course nothing to disturb the competition. Within the limit, he stood in their place to meet every competitor, actuated by all their motives to pre-

vent any such competitor from getting the property under the $30,000, and impelled by no higher motives than incited them to get it

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at *a lower rate if they could. Thus, with regard to all other competitors, the matter stood in precisely the same situation after this agreement as before it. The only difference was, that the competition which might have existed between these parties, was extinguished by their uniting in their bids, and one of them becoming the bidder on their joint account, within a given limit. Now, there was not an authority quoted from the beginning to the end of the argument, but conceded that they might have combined their bidding to an indefinite amount; and what legal or moral offence they committed by limiting themselves in the exercise of their undoubted right, passes my comprehension.

In Martin and Walter v. Evans, there was nothing more than a combination of bids. The agreement was between two co-sureties, that one of them should bid on their joint account, and the profit or loss of the purchases was to be shared between them.

Now in these two cases, I thought that the public policy was inferred from too exclusive a regard to the interests of the vending party. Where a bidder is impelled to his purchase from the benefits he expects to derive from the ownership of the property, or from disposing of it towards satisfying a bona fide debt,—these are interests as fairly entitled to regard as those of the debtor whose property is sold, or those of the creditors selling it; and sound public policy requires that equal allowance be made for them: and, after all, nothing, in my opinion, would have a greater tendency to destroy the fair competition so necessary to vendors, than to disregard the bona fide (though it be the opposing) interest of purchasers.

But even if my opinion had prevailed in the Court of Errors, still that opinion might have left room for a distinction, which I shall proceed to state with much diffidence, but which, if sound, is calculated to shake the purchase made by Mr. Robinson of the 9 slaves in this case;—and I feel persuaded on the other hand, there is nothing in it nor in the judgment of the court, in the two cases referred to, to shake his purchase of the tract of land.

I shall attend to each of these in the order in which I have mentioned them.

There are several grounds taken in the bill, and referred to in the evidence, calculated to affect the purchase of the slaves; but while I doubt the soundness of the distinction alluded to, I prefer, on the whole, to put my decision upon it, (thus obeying the judgment of the Court of Errors, with the modification

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necessarily *arising from that distinction.) I shall, therefore, put my decision upon the single ground, that Mr. Robinson destroyed the competition to the injury of the selling creditors, and that he did this, not incidentally, and in subservience to his bona fide interests as a purchaser or creditor, but intentionally, and with a view to make a voluntary disposition of this property at the expense of others. Or, to put the position in other words: the end which he designed avowedly to accomplish, was to make a provision for the debtor's family out of his property. This design was to be accomplished at the expense of creditors, by suppressing competition at the sale; and this was to be brought about by appealing to the sympathies of the bidders. When I say that he destroyed competition, I mean that he adopted means calculated to effect that end, and which did effect it. I do not hold that a purchaser is to be deprived of his bargain merely on the ground that his competitors have retired, without regard to his intentional agency in causing them to do so. This would put the most innocent man in peril, and compel every purchaser to abide, not only the bona fides of his own conduct, but to run the hazard of the stupid misconceptions of all around him;—than which nothing could more effectually destroy all competition and all sales—for no man would dare to purchase under such risques. But while I do not maintain a doctrine so absurd, so dangerous, and at the same time so destructive of the end intended to be secured; I hold, as all human tribunals must hold, that where a man employs means adapted to an end, he must be presumed to have intended the effect which naturally follows from them; and if the end be wrong, he should be responsible for it.

When I say that this defendant suppressed competition, with a view to make a voluntary disposition of the property, at the expense of the creditors, I am as fully persuaded that there was not the least taint of corruption in his motives, as I am very sure every by-stander was, who witnessed and was affected by his conduct at the sale. On the contrary, I venerate his motives, while I am compelled to pronounce them mistaken. While I honor his charity, I cannot exonerate him from the charge, that it conducted him, through the common infirmities of our nature, to an act of injustice.

He had no more right to make a provision out of the debtor's property, for the debtor's family, at the expense of creditors, than the debtor himself;—and this being his motive, no process by which he impressed upon the transaction the forms of a purchase for a consideration which was only nominal in

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order to effect his end, can be effec*tual in law. There is an infinite difference between this case and the two cases in which I have endeavored to explain my opinion—between the right of a vending creditor to throw off a loss immediately arising from the bona fide efforts of a purchaser or creditor to subserve

his just interests and indubitable rights, and to shift that loss upon one as well entitled to protection as himself—between such a case as that, and a case where the wrong to be relieved against, consists in an attempt to secure property against creditors in those very hands, where the law declares it shall be liable to them.

The testimony of every witness on both sides, seven in number, is substantially the same on this point of the case. According to every one of them, when the nine negroes were put up, Mr. Robinson said he would give $1,000 for them, and send them back to Mrs. Law. One of the witnesses remembers his words more distinctly than the rest, and says they were. "I will give $1,000, and send them back to Mrs. Law, without a better bid."

Now, it is true that Mr. Robinson neither requested nor compelled any competitor to desist: nor is such a palpable method of obstruction often resorted to, nor if resorted to, effectual: but that there was something in the very announcement by Mr. Robinson, of such a purpose, calculated deeply to affect every one who heard it, we cannot doubt until our nature is changed and generosity is banished from the bosoms of men. Here—surrounded by the austerities of the judicial forum, and all those subduing forms which are supposed to chill our sensibilities,—even here we feel its influence and pay it homage. What, then, must have been its effect when it broke fresh upon the assemblage who heard it? It is upon such occasions, and under the influence of such appeals, that the vices of our apostate nature are subdued—even avarice and cupidity, the basest and most indomitable of them all. Even the sterner virtues relax and surrender the heart to the sway of the gentler affections. The august functions of justice are supplanted by the sweeter offices of charity. And it is precisely in mixed and unsophisticated assemblies, such as usually attend a sheriff's market—that such emotions have their fullest scope. They borrow strength as they fly with a ready sympathy from breast to breast, until they become supreme, and bow the multitude as one man.

And this is precisely the effect which the announcement of Mr. Robinson's intention did produce. Every witness testifies, that from the moment it was made, its effect was

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palpable and *indubitable. Not the slightest expectation could be entertained, that any counter bid could be got, although it is clear, from the testimony, the property had not reached its marketable value. An universal deference was manifested for the humane intention expressed, and the property was knocked down at once, and so strong was the repugnance to any competition, that one of Mr. Robinson's witnesses, even at the trial, declared that after Mr. Robinson had announced his intention, he would have preferred the imputation of the pettiest of all offences to being caught in bidding against him.

If I do not mistake the principles applicable to such a case, I may venture the following positions: That except in cases falling within the technical grounds of surprise or accident, (which had no place in either of the cases I have referred to, and have none in this case,) a sale will not be set aside on the score of a mere diminution of competition irrespective of any intention on the part of the purchaser to produce it.

That such an intention is not to be ascribed to a bidder, unless his acts bear reasonable evidence, according to the sound apprehension of mankind, of such a motive.

Nor will it be ascribed to him, when the diminished competition arises incidentally and naturally from his efforts to promote his own bona fide interests; in which case it should be presumed that he was actuated exclusively by an honest and fair desire to secure his own rights.

As the interest of purchasers and vendor are equally just, and are always, in the very nature of things, opposed to each other, and no reasonable man can be surprised or entrapped by their conflict: public policy but subserves her ends when she stands indifferent between them, interfering only when there is trick on one side, or imposition on the other. Whatever effort is successfully made by either party to benefit himself, must necessarily derogate from the interests of the other party. Each party has a right, and is expected to act for himself; and when he has succeeded, the true inquiry is, not what loss the other party has sustained, (for there must be such loss incidental in every case,) but whether the success has been obtained fairly in the advancement of interests recognized by law as fair and legal interests.

But when there is proof, as in this case, of an actual destruction of competition, resulting from acts well calculated to produce it, which were designed to accomplish a pur-

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pose of charity at the *expense of creditors, and were not prompted by the incentives of any real interest in the purchaser as purchaser or creditor, I am constrained (at least, since the judgment of the Court of Errors,) to avoid the contract of sale.

It is needless to say that Wm. Law, to whom Mr. Robinson transferred his bid, and who took the sheriff's title, must stand upon the same level with Robinson himself. He will, however, be entitled to put in his claim, when the proceeds of a resale of the negroes come to be distributed, to be reimbursed for the sum advanced by him, or rather by Robinson, on the score of this purchase, and which was applied to the demands of the creditors. I incline to the opinion that he will be entitled to repayment, notwithstanding he may have borrowed the money from James R. Law: but as this point was not argued, I prefer to leave it

open to further investigation, when the mode of distribution, which I refer to the commissioner, comes to be reported upon.

The next point relates to the land purchased by Mr. Robinson, and transferred by him at an advanced price to Wm. Law.

Mr. Robinson is charged with having induced the sheriff to transgress the order in which the property was to be sold, by selling this land before he had closed the sale of the negroes, and there is some evidence of it, but from the doubt expressed by the witnesses of the correctness of their recollection, I do not feel at liberty to conclude that the sheriff had established such an order of sale as is stated in the bill, or of course that he departed from it at Mr. Robinson's instance. Neither do I find evidence of the confederacy charged in the bill between the defendants. I must acquit both Wm. Law and Mr. Robinson of so much of this charge as relates to them.

The ground upon which this purchase stands is this: that while the land was under biddings, Mr. Robinson observed, that whoever purchased it would have to pay the price forthwith in cash. It is not said in the proofs, that this announcement did, in fact, deter any bidder. One bidder says that he stopped in consequence of a look or shake of the head from James R. Law, which he interpreted into a sign that some arrangement had been made, but not on account of what Mr. Robinson said. The biddings were continued after Mr. Robinson's observation, and were at last closed in his favor, at a very advantageous price, but not remarkably under the selling price of land at sheriff's sale.

I do not feel at liberty to avoid the sale on this ground. I do suppose that some of the bidders might have expected or desired

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*the accommodation of a few days to complete the payment; but the law of the sale was cash, and Mr. Robinson had a right to insist on it. The creditors, of whom he was one, had put up the property under the law, and none of them could alter the terms, without the concurrence of all. None of them (and they are the parties complaining,) have a right to object that their own terms were insisted on; nor to complain, even if the fact had been made out that a competition was excluded, which competition could or would only have taken place upon other terms. In this purchase, Mr. Robinson had all the interests of a purchaser (for he bought for himself,) and of a creditor, and although he may have acted with rigour, I cannot say that he transgressed strict justice. Certainly he did not transgress law, nor did he act for the attainment of an illegal purpose, as in the other purchase, but for the advancement of his peculiar interests as a purchaser.

There is but one point more in the case, and it relates to the slaves, Elsey, Clinton, Cyrus and old Elsey, bought by Wm. Law for $220. From the age and character of the negroes, which rendered them, I suppose, of very little value, this part of the bill was not insisted on, and I shall consider it as abandoned.

It is decreed that the sale of the nine slaves (Hester, Job, Susan, Ned, Harriet, Maria, Tom, Rose, and Jack,) be set aside, and that they with their increase after the sale, if any, be sold by the commissioner, after due advertisement, for cash, or upon such terms as may be agreed on in writing by all the creditors, and that the proper distribution of the proceeds be ascertained by him upon a reference, and reported to the Court for its final order. Ordered, that the rest of the bill be dismissed. I understood it to be agreed that the costs should be paid out of the fund, and it is accordingly so ordered.

The complainants appealed, on the grounds:

1. Because the Chancellor erred in not decreeing that the sale of the real property of James R. Law be set aside.

2. Because the Chancellor erred in decreeing that John Robinson should be refunded the amount paid by him for the personal property.

3. Because the Chancellor erred in supposing an agreement amongst parties in regard to the costs, and in ordering them to be paid out of the fund.

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*The defendant William Law, also appealed, and moved a reversal of so much of the decree as sets aside the sale of the nine negroes bought by John Robinson, and transferred by Robinson to him.

Preston and Desaussure, for complainants.
Wethers and Dargan, contra.

Curia, per JOHNSTON, Ch. This court concurs with the Chancellor, in the result of his decree, upon the merits of the case.

It appears the Chancellor misconceived the counsel with regard to the costs. But for this misapprehension they would have been allowed to follow the decree.

It is therefore ordered that the decree be affirmed; and that the defendants pay the costs.

DUNKIN, Ch. I concur in this result. Subsequent reflection has only served to confirm my conviction of the soundness of the principles settled and announced in Hamilton v. Hamilton.

The points ruled in this cause conflict, in no manner, with the principles thus established. It is hardly necessary to add that a concurrence in the result involves no concurrence in the reasoning of the Chancellor, either in reference to the matter decided, or on any other questions which he may have deemed it proper to discuss.

JOHNSON, Ch., concurred.

2 Rich. Eq. *317

*JAMES J. THURSTON and Others v. JANE C. DICKINSON and Others.

(Columbia. May, 1846.)

[*Tenancy in Common* ⇐29.]

A tenant in common, who puts improvements, as buildings, &c., on the land, is not entitled to charge either the land or his co-tenant with the value of the improvements or the expenses incurred in making them.

[Ed. Note.—Cited in Williman v. Holmes, 4 Rich. Eq. 476 note; Smith v. Brown, 5 Rich. Eq. 299; Corbett v. Laurens, 5 Rich. Eq. 315; Buck, Hefflebower & Neer v. Martin, 21 S. C. 592, 53 Am. Rep. 702; Johnson v. Pelot, 24 S. C. 264, 58 Am. Rep. 253; Sutton v. Sutton, 26 S. C. 39, 1 S. E. 19.

For other cases, see Tenancy in Common, Cent. Dig. § 92; Dec. Dig. ⇐29.]

[*Life Estates* ⇐17.]

The same rule applies to a tenant for life; he cannot charge the remainder-man with improvements made on the land.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 38; Dec. Dig. ⇐17.]

Before Johnston, Ch., at Barnwell, February, 1846.

The facts of this case will be sufficiently understood from the decree of the Court of Appeals.

Bellinger, for the appellants.

Patterson, contra.

Curia, per JOHNSON, Ch. The case for the consideration of the court, may be thus stated. The late Mrs. Thurston was, during her coverture, seized of a free-hold estate of inheritance in fee in a certain tract of land, for the partition of which this bill is filed. Her husband survived her, and, whether before or after her death is not stated, nor is it material, he sold and conveyed all his interest in the land to a person not named in the brief, and he, the purchaser, sold and conveyed the same interest to Josiah Dickinson, deceased, under whom the defendants claim as his heirs or distributees. The complainants are the children of Mrs. Thurston and claim as her heirs or distributees.

There is no question about the relative rights of these parties. According to the Act providing for the distribution of intestates' estates, on the death of Mrs. Thurston, two thirds of the land descended to the complainants, her children, and the remaining one third to her husband, to which the defendants, his alienees, are entitled. But the defendants, or those from whom they derive their title, have made improvements on the land in the form of buildings, &c., and the question raised is, whether they are entitled to be paid for those improvements.

The general rule clearly is, that if one of several tenants in common, make improvements on the common property, neither the property nor his co-tenants, are chargeable

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with their value, *or the expenses incurred in making them. Thompson v. Bostick, McM. Eq. 75. In that case the tenant in possession had erected a cotton gin on the premises, and it was held that his co-tenant was not chargeable with any portion of the value. The question was very fully considered in Dellet v. Whitner, Chev. Eq. 213, in which the rule is distinctly recognized. The case ex parte Palmer, 2 Hill Eq. 215, is referred to as conflicting with these decisions. There the testator devised the premises, an unimproved lot in the city of Charleston, to his wife for life, remainder over, after her death, and appointed Palmer his executor, who, after the death of the testator, married his widow, by which he became tenant during the joint lives of himself and wife. It was wholly unproductive in the condition it was when he entered, and he improved it by erecting buildings thereon at considerable expense, and the court held that he was entitled to the value of the buildings in the condition they were at the termination of the life estate; but the case is put expressly on the ground that the improvements were made before Palmer had any interest in the property, and that as executor he was justified in making such permanent improvements as would render the estate more valuable to all concerned, and therefore the expenses were chargeable on it. But the rule that neither the estate, or the remainder man, is chargeable with the expenses of improvements made by a tenant for life, is distinctly recognized.

But it is said that the indiscriminate application of the rule would often operate as a hardship, and there may be some such cases, but it is impossible to frame a rule that would meet the particular justice of every case. Men will readily accommodate themselves to any certain and well known rule. No one can accommodate himself to those which are locked up in the breast of the Judge, until the occasion shall call them forth; and upon examining the principles, it will be found that the rule which now prevails, is not so unreasonable as it would appear from a superficial view. I will take the case of tenant for life to illustrate it. That estate can only be acquired by purchase or devise. If by purchase, the tenant knows that he is not to be reimbursed for any improvements he may make; and if they are necessary to render the estate productive, in making his purchase, he estimates the value accordingly, and takes the risk as to the duration of the estate, and of the amount of the profits, and whether he make a profit or a loss, he must abide it, as the result of a spec-

ulation, which he has voluntarily entered

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into. Let us look *at the other side of the question, and suppose the tenant entitled to improve and charge the expenses on the estate. The improvements might be such as the remainder-men did not desire; so inferior in quality as to render others necessary in using the estate for the purposes to which he desires to appropriate it, or they might be of so great value, that the remainder-man might not be able, and thus force him to sell the estate to pay it, against his will. The same results follow if the estate is acquired by devise. The tenant for life is not bound to accept if he cannot render it profitable, unless at the expense of the remainder-man, and if he can do that, the remainder-man would be at his mercy. The case of the tenant in common, is even stronger against the tenant in possession, and such is the case here. He can, at any moment, obtain a severance, and use his own portion as he may think fit, and if he will expend money in the improvement of the common property, he is in no more to be favoured, than one who wilfully spends money in improving his neighbor's lands, without his consent.

It is therefore ordered and decreed that so much of the circuit decree as declares the defendants entitled to compensation for the improvements, be and the same is hereby reversed.

DUNKIN, Ch., concurred.

2 Rich. Eq. *320

*JAMES ENGLISH and A. WESTBROOK v. ROBERT MILLER and Others.

(Columbia, May, 1846.)

[*Courts* ⇐507.]

The Court of Equity of this State cannot enjoin the collection of an execution issued from the United States Court.

[Ed. Note.—Cited in McCullough v. Hicks, 63 S. C. 545, 41 S. E. 761.

For other cases, see Courts, Cent. Dig. § 1412; Dec. Dig. ⇐507.]

Before Dunkin, Ch., at Chester, July, 1845.

In December, 1843, the defendant, who is a citizen of Kentucky, recovered judgment against the complainants, on a promissory note, in the court of the United States for South Carolina. In February, 1845, the complainants filed this bill, praying an injunction to restrain the Marshal from collecting the execution issued on the judgment.

The Chancellor. If the complainants had any peculiar equitable ground of relief against the judgment rendered at law, their application should have been made on the equity side of the court which rendered the judgment. This court has certainly no authority to enjoin the proceedings of the Federal court. See McKim v. Voorhies, 7 Cra. 279, [3 L. Ed. 342;] 2 Story Eq. 186.

On appeal to this court the decree of the circuit court was affirmed.

JOHNSON, JOHNSTON and DUNKIN, CC., concurring.

Eaves & Thomson for the motion.

Gregg & Gregg, contra.

IN THE COURT OF ERRORS

PRESENT,

HON. DAVID JOHNSON,
" WM. HARPER,
" JOB JOHNSTON,
" B. F. DUNKIN,
" J. S. RICHARDSON.
" J. B. O'NEALL,
" J. J. EVANS,
" D. L. WARDLAW,
" EDWARD FROST.

BUTLER, J., absent holding the circuit court in Charleston.

2 Rich. Eq. *321

*Dr. HENRY D. VAN LEW v. MARY PARR and DAVID F. MYERS.

(Columbia. May, 1846.)

[*Vendor and Purchaser* ⇐114.]

A purchaser of land, who has accepted a conveyance and is in the undisturbed and unquestioned possession of the property, cannot, where there is no fraud or mistake, sustain a bill to rescind the contract, on the mere ground that there is an outstanding paramount title in another, by which the purchase may at some time be defeated.

[Ed. Note.—Cited in Garvin v. Cohen, 13 Rich. 153, 155; Palmer v. Richardson, 3 Strob. Eq. 20; Maner v. Washington, Id. 181; Buist v. Dawes, 4 Rich. Eq. 424; Bouknight v. Brown, 16 S. C. 170; Leroy v. City Council of Charleston, 20 S. C. 78; DeLeon v. Barrett, 22 S. C. 422; Lessly v. Bowie, 27 S. C. 200, 3 S. E. 199; Munro v. Long, 35 S. C. 359, 14 S. E. 824, 28 Am. St. Rep. 851; Hunt v. Nolen, 40 S. C. 286, 18 S. E. 798; Coleman v. Whittle, 79 S. C. 216, 60 S. E. 523, 128 Am. St. Rep. 841; Godfrey v. E. P. Burton Lumber Co., 88 S. C. 138, 70 S. E. 396, 397.

For other cases, see Vendor and Purchaser, Cent. Dig. § 204; Dec. Dig. ⇐114.]

[*Assignments* ⇐103.]

The obligor of a bond *held*, by asking and procuring indulgence, payment of interest and other circumstances, to have waived his equity, as against the assignee, to be relieved from the payment of the bond.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 179; Dec. Dig. ⇐103.]

[*Partition* ⇐12.]

Where property is devised to tenants for life, with contingent remainders to persons not in esse, the court of equity has the power, for the

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purpose of *partition, on the application of the tenants for life before the coming into existence of the remaindermen, to order a sale of the fee, and thereby bar the remaindermen. Per Dunkin and Harper, CC., and O'Neall and Wardlaw, JJ.

[Ed. Note.—Cited in Bofil v. Fisher, 3 Rich. Eq. 5, 55 Am. Dec. 627; Moseley v. Hankinson, 22 S. C. 329; Hunt v. Gower, 80 S. C. 83, 61 S. E. 218, 128 Am. St. Rep. 862.

For other cases, see Partition, Cent. Dig. §§ 38–51; Dec. Dig. ⇐12.]

[*Vendor and Purchaser* ⇐310.]

[Cited in Benson v. Coleman, 8 Rich. 49; Evans v. McLucas, 12 S. C. 64, and Lessly v. Bowie, 27 S. C. 199, 3 S. E. 199, to the point that damages for breach of covenant could be set off against a claim for purchase price.]

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 771, 902–916; Dec. Dig. ⇐310.]

[This case is also cited in Williams v. Holmes, 4 Rich. Eq. 492, and distinguished therefrom.]

Before Johnston, Ch., at Richland, June, 1845.

The Chancellor. This is a bill for the perpetual injunction of a judgment and execution at law, obtained by the defendant, Mary Parr, upon certain obligations given by plaintiff to her co-defendant, and assigned to her: and that the said obligations be surrendered and canceled; and for general relief upon the case stated in the bill. It appears that on the 15th of November, 1836, the plaintiff, Van Lew, purchased from the defendant, David F. Myers, a valuable tract of land in Union District, together with the corn crop of that year on said plantation, and the farming utensils thereon, for which he gave his five several bonds with sureties, each for the sum of $2000, and payable, with interest from the date of said purchase, on the 15th of November, 1837–8–9–40 and 41. The said vendor executed and delivered to him his deed in fee, with full warranty for the land, and by way of further securing the purchase money, Van Lew gave him a mortgage of the same, and thereupon took possession of the premises, which he still holds. On the 16th of December, 1836, David F. Myers assigned the bonds and mortgage, for valuable consid-

eration, to his mother, Phalby Myers, to be held by her as guardian of her daughter, Nancy Myers; and on the 11th of May, 1838, the said guardian assigned them to Joseph D. Allen, who had married her said ward. On the 30th of June, 1838, (the first of said bonds having been paid off by Van Lew, and the interest on the four others having been paid up to the 15th of the preceding November,) Allen assigned and transferred the last four and the mortgage, to the defendant, Mary Parr, in purchase of a valuable house and lot in the town of Columbia. On these bonds thus acquired by Mrs. Parr, Van Lew continued to pay the annual interest regularly and without objection, until the beginning of the year 1843, when he began to complain that the title to the land for which the bonds had been given, was questionable.

Upon this the bonds were put in suit against him and his sureties, and their defences being overruled, judgment was obtained and execution issued. The grounds of objection taken in the bill are:

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*1st. That at the time of the purchase, the vendor, David F. Myers, assured the plaintiff (as the bill alleges) that there were 1100 acres in the tract, and conveyed accordingly; whereas it turns out that there is a deficiency of about 100 acres.

2d. That he also assured him that there were between three and four hundred acres of forest in the tract, ("a principal element in its value, considering its extent and condition,") whereas he has since ascertained that there are not more than 150 acres of woodland.

3d. The third ground is to be gathered from dismembered parts of the bill, which I shall extract and put together, that it may appear in the words of the plaintiff himself.

"He received title deeds for the land with full and general warranty on the part of said Myers, and went into possession, not doubting that his titles were perfect, according to the warranty of said Myers. He has, however, since ascertained that the said Myers, notwithstanding his warranty, had no title to the land in fee simple, but only a life estate, whereby your complainant is liable to be dispossessed whenever the remainder attaches."

"The said Myers did represent to and assure the complainant that his title was indefeasible and in fee; without which complainant would by no means have entered into the possession."

"The suspicions of complainant were first excited, and he was put upon inquiry as to his title, by hearing that sales made by said Myers, under similar circumstances, had been set aside, as fraudulent and void; and it turned out, and so this complainant alleges the fact to be, that the tract purchased by your orator was a portion of the estate of the late Col. David Myers, devised by him to certain persons for life, with remainder over in fee."

"Your complainant, it is true, has understood and believes that some order or decree in equity had been obtained for the sale of the land; but he is advised that such order can only apply to the life estate; the remaindermen not being in esse, their rights could not be adjudicated. The pretended sale, therefore, of the fee simple to your complainant was fraudulent and void."

"And this complainant further shews that the consideration agreed to be paid by him was full and ample for the fee simple: that the title in fee simple alone induced him to make the purchase; and that but for the representations that the title was thus full, he would not have entered into the purchase."

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*We have now before us the several grounds taken by the plaintiff in his bill, and I shall briefly dispose of the first two of them before stating the case made out at the hearing in relation to the third; which indeed involves the merits of the case.

1. There is no other evidence respecting the representations made by Myers of the aggregate contents of the tract of land, than what is contained in the deed, which is a conveyance of 1100 acres, more or less: nor is there any evidence that there is, in fact, less than 1100 acres in the tract. Therefore, without adverting to the principle, that the court of law was competent to have made an abatement for the deficiency, if any, and that its judgment concludes this court on that point, it is apparent, that if the point were open, and if evidence were admissible in the face of the deed, the allegation in the bill is unsupported and must fall.

2. There is evidence that the defendant, Myers, represented the tract to contain about three hundred acres of forest. Whereas the surveyor, Gibbes, has ascertained that there were but 116. But the plaintiff does not, in his bill, put this upon a ground entitling him to a rescission. He says that considering the extent and condition of the land, the woodland it was represented to contain, was an important element in the value of the tract; and this may be true, while at the same time it might not form the inducement to the contract. That it did not, in fact, form the inducement, and that Dr. Van Lew did not consider such a proportion of land in woods essential to the tract, is proved by the fact, that after he took possession and was enabled to form as accurate an opinion of the extent of the forest as his vendor, and had as good reason to know that there was less than even 200 acres of it, he himself cut down 81 acres, and reduced the woods to 35 acres. The retention of possession after these discoveries, and especially this waste, is a waiver of the ground of disappointment; for surely it will not be contended, indeed it

was not contended at the hearing, that a purchaser shall be at liberty, after deliberately destroying more than two-thirds of what he considers an essential part of his purchase (and of which his complaint is that there was already too little) to throw the bargain back upon the hands of the vendor.

Under these circumstances, the most that could be made of this deficiency, would be an abatement of the price. Even that could not be had; because all the representations and stipulations which the parties intended

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to bind them, are included in *the deed, and which alone, and not parol, is the evidence of the bargain. Nor is this all. The abatement, if one were claimable, is concluded by the judgment at law.

I would just observe, although it does not concern us here, that if we could have taken notice of this matter of abatement, the sum to be allowed for it could not have been measured, as the witnesses seemed to measure it, by the value per acre of the woodland now left, but by considering what value the 300 acres (the number represented) would have imparted to the tract, and what injury the deficiency has occasioned to the whole body of land. We all know that the relative value per acre of woodland to the rest of the tract is enhanced just in proportion to the extent of the clearing. The 116 acres of forest which Doctor Van Lew found on his purchase were worth, probably, double per acre what they would have been, if there had been 184 more by the side of them, so as to make up the 300 which he expected: and to allow for the 184 which were lacking at the rate per acre of the 116 which were found, would, in that case, amount to paying the purchaser twice over for his disappointment. The truth is, that when a tract has reached the point of being over cleared, while the value of the remaining woods is enhanced per acre on the one hand, by every acre that is afterwards cut down, that of the cleared land is diminished on the other. These two items are to be set off against one another, and the result is the measure of the loss; and it may be that it may not be so great as one might suppose. Certainly, the value of the remaining woods is not the test. The true question in all such cases is, what injury the land has sustained by the deficiency of woods; and that requires a calculation based upon all the circumstances. These observations would be of more use in a court of law, where cases often occur of part of the purchase being taken off by older title, than in this court. There I think the test of the reduction should be rather the loss which the tract sustains by the abstraction, than the relative value per acre of the part abstracted to the rest of the land.

3. The third is the great point in the case, and it is one of real difficulty. The conclusions to which I have attained, after much and anxious reflection, are not perfectly satisfactory to my own mind; and if more time were allowed me, I would gladly employ it in further examining the bearings of the case. As it is, the exigencies of this tribunal require that I should decide, and leave myself open to any modification which my

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opinion *may undergo when I shall have the assistance of my brethren, and the light of another argument, in the Court of Appeals, to which I think the importance of the case, and the principles involved in it, require that it should be carried.

It appears that this tract of land was parcel of the estate of the late David Myers, and embraced in the residuary clause of his will, which is very long, and in the following words:

"All the rest" of my estate "I give and devise to my children, Mary Clendenin, Claiborne Myers, Elizabeth O'Hanlon, David (F.) Myers, Nancy Myers, and Robert Myers, for life, and no longer; and after their decease, to their children respectively, that shall attain the age of 21 years. That is to say, to each of my said children one-sixth part of the whole of my" (residuary) "estate for life, and after the death of any one of them, the said Mary, Claiborne," &c. "to his or her children then living, that may attain the age of 21 years, (the income to be applied to their education during their minority, but the principal and all accumulations" &c.) "to survive to such as may attain the age of 21 years of age, and to vest in such, whether one or more, at the age of 21 years absolutely." "But in case any one of them, the said Mary, Claiborne," &c. "should die without leaving issue that shall attain the age of 21 years" "I give his or her part" "aforesaid, to such of them, the said Mary, Claiborne," &c. "as may be then living, and to the issue of such as may have left issue then living, to and for the same estates," "and subject to the same limitations as the original shares:—(the issue of a deceased child to take in the order of representation") "and if but one of them, the said Mary, Claiborne," &c. "should leave issue that shall attain the age of 21 years, I give all the said residue of my estate to such issue, whether one or more, at the age of 21 years" "forever."

"And it is my will that the child or children of a deceased child of any of my said children, within the period of the foregoing limitation, shall take the share which the parent would have taken, in case such child or children be living at the time such share would have vested in the parent if living;" "and that if any one of my said six children should die leaving," the child or children of a deceased child, the share which such deceased child would have taken if living, shall vest in "its" "issue at the age of 21 years, and not sooner."

"In case my said children Mary, Clai-

borne," &c. "should all die without leaving issue that shall attain the age of 21 years as

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*hereinbefore mentioned" "I give all the rest" "of my estate to my cousin, Henry Myers, his heirs." &c. "forever."

In May, 1835, a bill was filed at Columbia by the late Mr. Blanding, in which Hemmingway (who had married Mrs. Clendenin) and his wife were plaintiffs, and the executors and the other five children of the said testator above named, were defendants. In this bill, the whole will of the testator was set out, and a decree was prayed for the sale of the whole residuary estate, (including, of course, this tract of land,) and that the proceeds be invested, with permission for the six children of the testator above named, to receive the income for their respective lives, and then to attend the limitations over; or if any of said six children should be permitted to receive any part of the capital, "good and ample security may be given to preserve the rights of the remaindermen," &c.

Under some order of reference, which was not produced at the hearing, Mr. Clark, the commissioner, on the 19th of November, 1835, made a report recommending that a number of tracts of land be sold; and among them, that the one in question be sold at Union Court House, on the 14th of the succeeding month; a consent of the parties in writing, being indorsed on the report, it was confirmed by Chancellor DeSaussure on the same day.

The land was accordingly sold on the day appointed, to one Wm. Infurger, for $2600, by Mr. Clark, who reported the sale, and it was confirmed by Chancellor Harper.

Infurger conveyed to David F. Myers, and he to the planitiff, as I have already stated. What disposition has been made of the proceeds of the sale, was not shewn at the hearing. David F. Myers resides out of the State, and was stated to be insolvent. I do not think it necessary to enquire whether the contingent remaindermen, who were not and could not be parties before the court, will be barred by the judicial sale of their interests, even if it had been made distinctly to appear, as I suppose the fact to be, that the sale was of the fee, and included their interests; such an enquiry could only be necessary for the purpose of ascertaining whether the title of David F. Myers was perfect, and in the view I take of this case, that is an immaterial point; besides, an opinion expressed here of the goodness or insufficiency of the title, would answer no valuable purpose. It would not make it good or the contrary. The remaindermen would not be concluded by anything I might think or say, and as I could

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*pronounce no effectual judgment, I would not willingly be instrumental in deceiving any purchaser (should it eventually become necessary to order a sale of this land) by expressing an opinion that the title is good, when it may be bad, or in injuring the marketable value of it, by expressing an opinion that it is bad, when it may turn out to be good.

Whatever may be the result, one thing is clear, that the court is in no wise responsible for the loss of the fund arising from its sale, if indeed if has been lost; for it is perfectly palpable to every man of experience, whether belonging to the profession or not, that it is in vain to expect of any human tribunal, a vigilance that shall be able to detect or arrest proceedings carried through by the consent of all parties before the court. I tremble, whenever I see in progress what is called a family arrangement; and I have struggled for 15 years, with an anxiety and with a sincerity of effort which I feel has not been appreciated, to so regulate the enterprise of counsel, and the impatience of interested parties, as to prevent losses to widows and orphans interested in estates, from causes to which their eagerness has blinded them. It cannot be done; and the result of this case is calculated to shew the value of that rule of practice, which declares that orders taken by consent, are not the orders of the court, but of the parties who take them; that they must be responsible for them, and must not venture to take any, the consequences of which they will not be content to abide by. It is plain, from the bill which led to the sale, that the able and conscientious solicitor who filed it, had prepared a scheme, which, while it would have subserved the pressing interests of the life tenants, would, had it been caried out, in all human probability, have effectually secured those of the remaindermen. But, as I suspect, the fund was intercepted before it reached the court; and, if so, put in jeopardy. My hope is that there were some further proceedings in that case, which were not brought to my view at the hearing, (because not necessary to this case) which may furnish the means to this plaintiff and his sureties, or to the remaindermen, to recover whatever loss they may sustain from those who received or divided the proceeds of the sale.

The case of either of the real parties before me, is one of great hardship. But with that I can have nothing to do. I must decide the case upon general principles: such as I think are sustainable by the law, and calculated in their bearings to produce just consequences.

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*The plaintiff has gone into possession under an executed conveyance; and both his title and his possession are and have been undisturbed, and may ever remain so.

He has materially affected the value of the land by nine years culture, and by clearing away two-thirds of its forest, which, according to his own opinion and that of the witnesses, was already too scanty.

If his occupancy was taken, and his culture carried on, in ignorance of the defects of his title, as they may have been, still the utmost that could be made of the circumstances would be that they raised an equity on his part to be relieved of his purchase. But this could never be allowed to the injury of the opposite parties, or at the expense of an equal equity on their part.

It is not enough, that one who has gone into possession, and especially one who has accepted a conveyance, may have been ignorant, or was actually ignorant, of any flaw in the title. If he had the opportunity to investigate, and did not investigate it, this is pretty clear evidence that his reliance was upon the warranty in his deed, and he cannot reasonably complain that his remedy should be restricted to the relief which can be obtained from the actual form of his contract. In this case, it appears that the plaintiff had lived for a number of years in the neighborhood of the land, and must have known that it was parcel of Col. Myers' estate. It was a question which common prudence dictated, to enquire how David F. Myers became entitled to it; and if he neglected to do so, or if, having done so, he disregarded the information, or drew the conclusion from it that the title was good—in neither of these cases has he any right to ask the interference of this court, to give him a better remedy than he selected for himself, in the warranties of his deed. There is nothing in the bill which necessarily imports that the plaintiff was ignorant of the state of the title which he bought. What he alleges is that he has lately been led to suspect the validity of his title, by hearing that similar titles have been avoided. The strict import of this is, not that he was ignorant of the state of the title when he purchased, but that circumstances have led him to doubt the correctness of the opinion formed upon it. It may have been the united opinion of Infurger and Myers and the plaintiff, composing all the persons who have held under the judicial sale, that the sale carried all the interest in the land, and created a good title in fee. There is no ground from the bill to suspect that Myers had any bet-

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ter knowledge of the legal inva*lidity of his title than the plaintiff, or that in affirming that he had a title in fee (as indeed he had from Infurger) he was guilty of mala fides.

These questions were discussed in Stuckey ads. Whitworth, and in Briggs v. Gillam, although my concurrence in the former of these cases was upon the ground that the objection to the title was invalid, upon the plaintiff's own shewing; so that it is not clear that there was a majority of the court upon the other point; yet the more I have considered the matter, the more have my doubts tended to give way to the reasoning of the Chancellor who delivered the opinion of the court, and to the authorities cited by him, (and which I need not refer to here,) and although I am not yet fully satisfied, my persuasion is sufficient to govern me, at least upon the circuit.

If, therefore, the case solely concerned the defendant Myers, I should feel constrained (but reluctantly in that case) to dismiss the bill. The plaintiff would not be entitled to any remedy outside of the warranty of his deed; and especially would he not be entitled to throw back his bargain in its wasted condition.

But the case stands somewhat better for Mrs. Parr. It is in proof, that when the bonds were tendered to her, she caused her agent to consult a gentleman very intimate with the plaintiff. That she was assured the transfer would be not only unobjectionable, but desirable to Dr. Van Lew. And although it does not appear that this gentleman had any authority to contract for the doctor, it is in testimony that he made certain stipulations for him, without which the bonds would not have been purchased; and that the doctor, upon being informed of them, acknowledged them to be binding on him, and conformed to them. Besides all this, it must be borne in mind that Van Lew had been then in possession of the consideration of the bonds for one or two years, and had paid off one of the bonds, and the interest on the others.

These were circumstances to produce the impression on Mrs. Parr, that the bonds were good; notwithstanding the acknowledged doctrine, that as assignee of unnegotiable instruments she must take them subject to all the equities between the original parties.

But after Mrs. Parr received the bonds, the plaintiff continued to pay the annual interest for five years. This again must have tended to lull her into security.

Upon the whole, I conclude that the bill

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cannot be supported, *and it is ordered that the injunction heretofore granted, be dismissed, and that the bill be dismissed with costs. But as it may become necessary upon some future occasion to agitate this matter between the plaintiff and the defendant Myers, in connexion with other persons, it is ordered that, as to him, it be dismissed without prejudice.

The complainant appealed, on the following grounds:

1st. Because the Chancellor erred in not perpetuating the injunction.

2nd. Because his Honor should have ordered the bonds of the complainant to be cancelled.

Waddy Thompson and Caldwell, for the appellant.

W. F. DeSaussure and Tradewell, contra.

Curia, per JOHNSTON, Ch. This cause has been extensively argued both in the Court of Appeals in Equity and in this Court, and

has received that deliberate consideration which its importance demands; and if any doubts remain in the mind of the Court, they relate to points not necessarily affecting the result of the case. The duty has been assigned me of stating the conclusions to which a majority of my brethren, in this court of ultimate resort, have come: and I enter upon it with unfeigned diffidence, as well on account of the difficulty of the questions, as the shortness of the time allowed for discussing them in the judgment I am about to deliver.

There are three great questions involved in this appeal;—in the argument of which, counsel have accumulated cases to such a degree that if the court should undertake to notice them all specifically in its judgment, the task would be overwhelming and oppressive, and would effectually exclude the other causes before use from that share of our consideration to which they are justly entitled. All that can be expected, is, that we should carefully attend to principles deducible from the cases quoted;—occasionally glancing at such of the cases, themselves, as seem to be most prominent in their respective classes, and to indicate most clearly the doctrine to be gathered from the current of decisions. And let it be remembered that it is not from anomalous cases;—cases pressed to an extreme on the one side or the other;—or led, by particular circumstances, out of the general range;—that the leading doctrines of law are to be learned. It is the broad current which carries the acknowledged principle.

The questions for our consideration are: 1, Whether the title of David F. Myers, who

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conveyed to Van Lew, was a good title *in fee. 2, If not, then, whether its defects are such as, upon general principles of equity, entitle Van Lew to a rescission. 3, If, upon general principles, he is entitled to this relief; then whether he is entitled to the relief he seeks against Mrs. Parr.

These three questions will be taken up in their order.

1. Had David F. Myers a good title in fee? In the opinion of a majority of my brethren the case will eventually turn on the two remaining questions, and, therefore, we do not deem it necessary to conclude any thing on this point; although we have been pressed by both parties to determine it. The plaintiff who has purchased a title, one of whose links is a decree of the Court of Equity, insists, that if that link is defective and the chain broken, the same court which, as he conceives, imposed the grievance upon him, is bound to relieve him from it. On the other hand the defendants contend that consistency requires at the hand of the court that it should uphold its own decree, and declare the title good.

But it is a plain misapprehension to suppose that the court is at all responsible for the effect or operation of its decree: or that it is at liberty, upon any consideration whatever, to pronounce it either more or less effectual in law than it really is. The question is as to the legal validity of the title: and every link in the chain is to be decided upon as a court of law would determine: and when the question arises in a case proper for equity cognizance, and is necessary to be decided in the case, her courts are bound by the plainest principles and the inexorable obligations of duty,—let the consequences be what they may,—to adjudicate it according to law and the truth.

There are members of this court who believe the title good: and, perhaps, may express that opinion:—and if they do, it will be found that their reasons and the authorities upon which they rely are very strong. Certainly they are sufficient to produce doubts in our minds, and to restrain us from coming to an opposite conclusion. But while it would afford us the utmost pleasure if we could unhesitatingly declare that the decree of 1835 carried the fee to the purchaser;—we do not see enough to satisfy us that such declaration would be found true when the contingent remaindermen under David Myers' will come to put it to the test.

This is a question which we do not intend to discuss, because we would not unnecessarily disparage a title which may possibly

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*be found good. But we may be permitted to offer a very few observations to justify the doubts we entertain: and to shew why we cannot relinquish them.

The general rule is undoubted, that a decree or judgment binds none but the parties before the court and their privies: and, of course, where property is sold under such adjudication, the purchaser acquires nothing beyond their interests. The parties before the court in this instance were the life tenants under the will; but the contingent remaindermen, (according to the averments in the bill,) were not in esse, and, of course, were not parties. There are cases in which parties not before the court, and even not in esse, may be bound by its judgment: but those are cases, it seems to us, where there is a privity of estate between the actual parties and those excluded from the records in virtue of which the former,—being clothed, for the present time, with the interests of the latter,— may be held to represent them;—as in estates tail, and the like. But, in the case before us, there was no privity of estate whatever, between the life tenants and remaindermen. The latter were to take nothing from the former by inheritance; but were to derive all their interests in the property immediately from the testator as purchasers.

These observations might be extended, and

other views of the subject might be taken; but, as I have said, it is not our intention to discuss the point under consideration.

But if we could overcome our doubts and pronounce the title good, that would terminate this cause, without relieving the plaintiff from the grievance of which he complains. We could not make such an adjudication without committing the identical fault which, in his apprehension, vitiates the decree of 1835. If the contingent remaindermen are concluded by that decree, then his title is good, and he has no need of the relief he seeks. But if they are not concluded by that decree, on the ground that they were not parties to the suit, the same objection would apply in this case and would deprive our decision of judicial authority. He would be left in the same condition as before. It is necessary to his case, therefore, that the title under which he holds should be defective and invalid. For the purpose, therefore, of considering the remaining questions in the case, it will be assumed that his vendor held under a defective title. And this brings us to the next question in the case; which is—

2. Whether, upon a supposition that his title is invalid, the plaintiff has a general equity to be relieved of his bargain?

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*This is a case of conveyance with warranty actually executed and accepted, and possession taken and retained by the purchaser, who ever has been, and still is, in the undisturbed and unquestioned enjoyment of the property bought by him: and the question is whether he is entitled to a re-cision of his bargain on the ground of danger apprehended from the defects of his title.

This is the question for the more authoritative decision of which this cause was removed into this court. The court has formed a conclusive opinion upon it; in which, my former doubts being removed by the argument,—I am enabled to concur.

It is believed that no precedent can be found, in any quarter to which we are accustomed to look for authority, where a party, in the full enjoyment of the property purchased by him, has been relieved, in equity, from an executed contract, untainted by fraud, or such mistake as amounts to fraud, in the equity sense of the word.

This is not a case of executory contract (many of which have been quoted to no purpose,) where the purchaser is in possession, under circumstances not amounting to a waiver of objections to the title; and where, if the vendor comes for a specific execution of the contract, the purchaser is entitled to an inquiry into the title before he accepts it.

It is needless to inquire what circumstances have been held to be evidence of a waiver of objections in such cases. Generally, if the possession is taken in pursuance of the contract, by the terms of which the inquiry into the title is nevertheless kept open, it is no waiver. So, again, if notwithstanding the possession the parties continue to treat of the title. The subject is discussed by Sir Thomas Plumer, in Burroughs v. Oakley, (3 Swanst. 168.)

But the material point is, that it has been repeatedly held that even where the contract is still executory, the purchaser may, by his acts, be deemed to have waived his right to object, and be compelled to accept such title as the vendor can make, without inquiry into its sufficiency. This is recognized in the case of Burroughs v. Oakley already referred to. In Fleetwood v. Green (15 Ves. 594.) where, upon an agreement to convey realty, stipulating that the purchaser should be let into immediate possession and pay the purchase money at the expiration of 12 months, he was let into possession accordingly and an abstract of title furnished him, to which he made no

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objection, *but retained the possession, treating the premises as his own, for upwards of four years, without fully satisfying the interest accruing on the purchase money: a reference as to the title was refused, and a specific performance decreed against him. In Margravine of Anspach v. Noel (1 Mad. R. 316) the circumstances were very similar. The purchaser was let into the possession, in pursuance of the terms of the contract, within a short time after its execution, and received an abstract of title within a month afterwards, to which he made no objection until about two years after it was delivered to him. In the meantime he made alterations in the premises and let them; and had written a letter offering excuses for delaying payment of the purchase money. A specific execution of the contract was decreed, without inquiry into the title. The Vice Chancellor relies on the alterations and letting of the premises, and upon the defendant's letter, as presumptive evidences of his approval of the title: and observes "It is true, the defendant by his answer says he did not mean to waive his objections to the title: but if a party acts in a manner from which it may be implied he does not mean to object to the title, he cannot afterwards, at a distance of time, when evidence, perhaps, is lost, insist upon objections to the title. Objections to a title should be made with due diligence. Here there are many acts from which an implied consent to the title might be inferred:—the correspondence—the alterations—and the letting of the premises."

These two uncontradicted cases, out of the many which have been quoted, may suffice for the principle. Grounding themselves upon these decisions, the counsel for the defendants pressed the inquiry, which was not answered in the argument, and, it seems to us, cannot be answered:—is not a purchaser as much bound to abide by a title, the conveyance of which he has actually accepted, as to

put up with it when the conveyance is forced upon him on the mere presumption that he has waived objections and agreed to accept it? Is a party more bound by his agreement than his acts?

It may be permitted us to ask upon what ground does the court, in the cases of executory contracts, of which we have been speaking, compel the purchaser to take the vendor's title? Certainly upon no other than that he has agreed to take it. It was his bargain. And when the court compels him to perform it, and to accept the conveyance, whether the title be good or bad, is this done, to the intent

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that he is to depend upon the cove*nants for which he stipulated, as his selected means of redress for any loss he may sustain:—or is it done, (as the principle of this bill imports,) with a secret reservation in the mind of the court, that the identical defects in the title, into which it will not even look, when it compels the purchaser to take it, may be immediately used by the purchaser as a ground to rescind the contract, to reverse the decree and to return the title? As said by Chancellor Harper in Whitworth v. Stuckey (1 Rich. Eq. 407) "such an absurdity in the law can hardly be supposed, as that a party should be compelled, by the court, to execute a contract, when he might sustain his bill to rescind it, if it were already executed."

Having seen what inferences should be drawn from the cases of executory contracts, let us now come immediately to those upon contracts executed.

The discussion might be rested on the case of Whitworth v. Stuckey, just mentioned:—to which nothing can be added on the score of reasoning, and very little on that of authority.

The case of Bumpus v. Platner (1 Johns. Ch. 213.) The bill was for an injunction against proceedings to foreclose a mortgage. The premises had been purchased by the mortgagor who received a conveyance, and mortgaged the premises to secure the purchase money: and the ground of the bill was that there was a total defect in the title, and a failure of consideration which entitled him to relief. He was still in the possession. There were allegations of fraud in the case, but they were not proved to the satisfaction of the court. Chancellor Kent observed, "It is said to be very difficult to extract from the books what the rule of equity is upon this point of failure of consideration, after the agreement is executed; (1 Fonbl. 363.) but I apprehend it may be safely said, that there is no case of relief on this ground, when possession has passed and continued, without any eviction at law, under a paramount title. Platner conveyed to the plaintiffs with covenant of warranty, and he is bound to defend their title at law: and non constat that he is not able and willing to do it. There was a case under Lord Nottingham (2 Ch. Ca. 19, Anon.) in which the purchaser was relieved from the payment of the purchase money; but he had already lost the land, by eviction, under a better title. If the title fails in this case, the plaintiffs can resort to the covenants in their deed for their indemnity. I consider an eviction at law an indispensable part

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of the plaintiffs' claim to relief here, on *the mere ground of failure of consideration. The proof is that they have been in possession of the land ever since the purchase from Platner, (and which was near 20 years ago,) under that title and no other. It would appear indeed that McDougal, under whom Platner claimed, had previously sold to one Weatherwax, whose estate was afterwards forfeited to the people of this State. That may be the better title; but it cannot be tried here upon this bill." "It would be without precedent, and dangerous in principle, to arrest and bar the recovery of the debt, while the purchaser is still in possession under the purchase deed, and there has been no eviction at law."

In Abbot v. Allen (2 Johns. Ch. 519) the same point was again brought under discussion, and the Chancellor re-examined the doctrine with an extensive reference to the authorities. He said "If there be no fraud in the case, the purchaser must resort to his covenants, if he apprehends a failure or defect of title, and wishes relief before eviction. This is not the appropriate tribunal for the trial of titles to land. It would lead to the greatest inconvenience, and perhaps abuse, if a purchaser in the actual enjoyment of land, and when no third person asserts, or takes any measures to assert, a hostile claim, can be permitted, on suggestion of a defect or failure of title, and on the principle of quia timet, to stop the payment of the purchase money, and of all proceedings at law to recover it. Can this court proceed to try the validity of the outstanding claim, in the absence of the party in whom it is supposed to reside, or must he be brought into court against his will, to assert or renounce a title which he never asserted, and perhaps, never thought of? I apprehend there is no such practice or doctrine in this court: and that a previous eviction at law is, as a general rule, indispensable." "The case of fraud is an exception: and it seems to be admitted by Mr. Butler (note 332 to Co. Lit. 384, a,) that if the purchaser was imposed on, by any intentional misrepresentation or concealment, he may have redress here, in addition to and beyond his covenants." "I know of no case in which this court has relieved the purchaser where there was no fraud and no eviction. All the cases I have looked into proceed on the ground of failure of title duly ascertained." "To sustain the injunction would be assuming the fact of a failure of title, before eviction, or trial at law: and which this court, as not possessing any direct jurisdic-

tion over legal titles, is not bound or authorized to assume. This court may, perhaps,

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try title to land *when it arises incidentally: but it is understood not to be within its province, when the case depends on a simple legal title, and is brought up directly by the bill. The power is only to be exercised in difficult and complicated cases, affording peculiar grounds for equitable relief."

For the cases referred to by the Chancellor in support of his opinion, we refer to his decision, as reported.

No case of our own has been pointed out in which equity has ever undertaken to rescind an executed contract, while the purchaser was in the enjoyment of the premises, on the mere ground of defect of title. It is said that there are cases on our records where that court has refused to rescind under such circumstances; but the research of the bar has not made them accessible to us. It is enough that no case exists among us in which a rescission has been decreed, under the circumstances stated.

Nor is it known that there is a precedent for such a decree in England. We have seen that it is opposed to principle and to the test of American authorities on the subject. It is but reasonable, then, to conclude that the practice and doctrine contended for by the plaintiff is unknown to equity jurisdiction, unless some clear precedent be produced to support them. The plaintiff's counsel, feeling the force of this, has undertaken to produce two English cases, but neither of them sustains him.

The first is the case of Edwards v. McLeay (Coop. Ch. R. 308: S. C. upon appeal 2 Swanst. 287.) referred to by Chancellor Harper in Whitworth v. Stuckey, and by Chancellor Kent in Abbot v. Allen. The case was put upon the ground of fraud alleged and proved: and so it has ever been understood.

The case was that the vendors sold and conveyed to the vendee in fee simple a messuage, stables, coach-house, lands, &c., at Clapham, representing themselves to have full power and authority to dispose of the fee simple and inheritance. Soon after the completion of the purchase, the vendee discovered that part of the fore-court, and of the driving-way, or road leading up to the house, together with the whole of the ground upon which the coach-house and stables stood, had been formerly part of Clapham common, and were many years before enclosed and taken for the common. The bill charged, and it was proved to the satisfaction of the court, that the vendors were aware of these circumstances, which the vendee could not have discovered from the abstract, and concealed it from him. Sir Wm. Grant said, "It has never been laid down, that, on the subject of

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title, there *can be no such misrepresentation as will give the purchaser a right to claim relief to which the covenants do not extend." "Whether it would be fraud to offer as good a title which the vendor knows to be defective in point of law, it is not necessary to determine. But if he knows and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser." "The defendants object to the relief sought by the bill, that the plaintiff is premature in his application, inasmuch as he has not yet been evicted, and may never be evicted. But I apprehend that a court of equity has quite ground enough to act upon: and that it ought now to relieve the plaintiff from the consequences of the fraud practised upon him." Upon the appeal, Lord Eldon affirmed the decree, and observed, "The case resolves itself into this question: whether the representation made to the plaintiff was not, in the sense in which we use the term, fraudulent? I am not apprised of any such decision: but I agree with the Master of the Rolls, that if one party makes a representation which he knows to be false, but the falsehood of which the other party has no means of knowing, this court will rescind the contract." This case needs no comment.

The other case is that of Hitchcock v. Giddings (4 Price R. 135; 2 Excheq. R. 55,) decided by L. C. B. Richards. The purchaser bought the interest of his vendor in a remainder in fee, expectant on an estate tail. At the time of the contract, the tenant in tail had actually suffered a recovery, of which both parties were ignorant till after the conveyance had been executed and an absolute bond given for the purchase money. The court rescinded the contract, on the ground of mistake, although there was no fraud from knowledge, or concealment of the fact, on the part of the vendor:—resting the decree on the equity that the vendor had no interest in the subject matter at the time of the sale.

This case has been much relied on in argument here, as proving, 1st. That mere failure of consideration is ground for a rescision in equity, and 2dly. That the rescision will be decreed before eviction. But such a construction perverts the plain principles of the case.

The case is put expressly by the judge and the counsel for the plaintiff in the cause, upon the ground of mistake, amounting in the equity sense of the term to fraud. The court admitted, that if the agreement had been for

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a mere contingency, it might not *be disposed to assist the plaintiff. But its interpretation of the contract was that the parties "agreed for the sale of the remainder, subject to the subsequent possible contingency of there being no recovery suffered." The parties manifestly contemplated the fact that a contingency existed at the time of the contract: and were mutually mistaken in that fact, upon which the whole bargain rested. Then, as to the eviction: the objection is merely

verbal. Eviction means the ousting of a party from the actual possession of property of which he is in the enjoyment: but this purchaser, from the very nature of his interest, never had, and never could have, the possession, and never could be evicted: and to require eviction, as the prerequisite of a recision in such a case, would be a palpable violation of the spirit of the rule.

Now, here are the cases which are supposed to disprove the generally received doctrine, that a party shall not be allowed to rescind a contract while in the actual enjoyment of its benefits, unless there has been a plain mistake in the case, or he has been deceived and defrauded. And it may be safely asked, do they disprove it? Would it be wise or safe, upon such authority to break down a doctrine clearly recommended by justice, and more clearly by sound policy? And what objection can be urged to the doctrine? Why should it be set aside? It has never been denied that men should be allowed to make such lawful contracts as they please: and surely when they have contracted fairly and understandingly, truth and integrity, justice and law require that they should abide by them. There is no dispensing power in this court, nor in any other, to set aside the obligation of fair and lawful contracts; and as the purchaser, when he has received his title can insist on it and hold it against the vendor, however unwilling the latter may be; so he also should be compelled to abide by his own bargain.

Arguments were drawn by counsel from a very extensive and critical examination of the law decisions of this State, to shew that as the law courts, in certain cases, allow damages upon breach of the covenants of deeds conveying land, where there has been no previous eviction; equity should rescind the contract when the remedy at law is incomplete. No less than seventeen cases at law were quoted; and it is plainly impossible to analyze them here. Our brother O'Neall will give his exposition of them, and endeavor to shew, that there is nothing in their doctrines inconsistent with the rule in equity as announced by us. The law courts seem to have been struggling, for

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years, to *get clear of the early decisions allowing recoveries on the ground of failure of title without eviction: and they appear to have settled at last in this result: that in actions brought for the purchase money, the purchaser may make a clearly subsisting outstanding title the ground of abatement for the contract value of such part of the premises as it may cover. It has been proposed, as a just inference from this, that where, from the remoteness or contingency of the outstanding title, law cannot give damages, equity should interfere and rescind the contract. But apart from the incompetency of a court of equity to try the validity of the outstanding title, is it not obvious that the remoteness and contingency which render it inappreciable at law, must necessarily make it equally uncertain what degree of importance should be attached to it as a ground for recision in equity? If the defect of title be such as authorizes a court of law to interfere; be it so. That is one of the advantages of his covenants to which equity leaves the purchaser. But, if it be of such a nature that law declares him entitled to no relief in virtue of the security he has himself selected, as was the case in this instance, it seems a strained inference that that declaration entitles him to relief elsewhere.

If the general doctrine, that a purchaser is entitled to relief on the score of failure of title, before eviction, has been found so pernicious at law, as to induce her courts to narrow it down to special instances, excluding such as the present, this proves that it should not be extended to equity by giving her cognizance of the repudiated cases. The plain truth is this; there is no conflict of views between the courts on this subject. When a party has a case for damages he resorts to law upon his covenants: and when he has a case for rescission, (which is a very different thing) and brings it in equity, he will be relieved.

There is but one more consideration under this head. It has been attempted to be shewn that unless there be fraud or mistake in this case, this plaintiff is not entitled to maintain his bill. Then, is this a case of either fraud or mistake?

The remark was made in the circuit decree that no charge of fraud is made in the bill. The charge, as observed by Chancellor Harper, in Whitworth v. Stuckey, "seems somewhat evasive." It is a clear rule of pleading that he who charges fraud, should so set out the facts as that the fraud may be inferred from them. It is not said in the bill that the vendor concealed from the purchaser, or that he, the purchaser, was in

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fact *ignorant, that the will of David Myers, with the decree for the sale of the property, constituted the vendor's title: and if he knew of these, "it is immaterial that either or both of the parties put a wrong construction upon them: or if the vendor represented to the purchaser, in the strongest manner, that his title was good, only expressing his own opinion or conviction on the construction of the papers, this would be no fraud." There was no proof whatever on the subject.

Then, as to mistake. None was alleged, and none proved. Was the plaintiff ignorant of the will and the decree? It is not so alleged: and from the facts appearing at the trial, it is not probable that he was. And if he was not, what other mistake could there be in the case except a mistaken conclusion as to the operation of the instruments? It is well settled that the means

of knowledge are considered in law as amounting to knowledge. Parties must be diligent; and if they indolently neglect to look into and attend to their own interests, it will require strong circumstances to entitle them to relief from the consequences of their negligence. No other rule can be safely substituted in law. It was Van Lew's duty, as it was his interest, to look to his vendor's title before he accepted it. Abstracts of title are not in use among us: but no prudent man takes a conveyance without satisfying himself that there is either an unbroken chain of title or equivalent statutory possession. He who looks to an abstract is bound, if he accepts a conveyance under it, to abide by all the defects apparent on the abstract: and the same must be the rule if he looks to the title deeds. It is true he is not bound by defects extrinsic to them: but the defect complained of in this case was in the chain of title itself, and not extrinsic.

3. The remaining question in this case relates to the relative equities of the plaintiff and the defendant, Mrs. Parr: and there is scarcely a division of opinion among us on this point.

When this defendant became the purchaser of the bonds, she was not merely ignorant of the existence of any equitable defence, but she had evidence of those circumstances which are usually regarded as waivers of objection. The plaintiff had taken a conveyance and was in possession; treating the property as his own, and even devastating it by clearing and culture. He had made considerable payments of the purchase money. When applied to through Mr. Caldwell, who, although not authorized at the time, had un-

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dertaken to represent him, he did not *disavow his agency, but affirmed it by conforming to his stipulations. Here was an opportunity for making known his equities, and Mrs. Parr had a right to infer the non-existence of equities from his silence. Then, he applied for and obtained further indulgence; —the effect of which is stated in Burroughs v. Oakley and Bumpus v. Platner. It may have been his misfortune not to know the defects of his title during all this time; but neither equity nor justice require that his misfortune should be transferred to one equally entitled to protection with himself. Add to all this;—he has the covenants of his deed to resort to;—but the loss, if it should fall on Mrs. Parr, must be borne by her without redress.

It is ordered that the decree be affirmed and the appeal dismissed.

HARPER and DUNKIN, CC., and WARDLAW and FROST, JJ., concurred.

DUNKIN, Ch. Concurring entirely, as I do, in the opinion of Chancellor JOHNSTON on the points adjudicated, I desire merely to express my own views on a question, elaborately discussed at the bar, but which it was not deemed necessary to determine.

I think that, under the decree of 1835, and the sale made by the commissioner in pursuance of it, the purchaser took a good marketable title to the premises purported to be conveyed. This is all that is necessary, and all that can be required. Absolute invulnerability can hardly be affirmed of any man's title.

There can be no doubt that, in making the decree of 1835, the court proceeded advisedly. The will of David Myers and all the interests created by it, immediate or contingent, were brought distinctly to the notice of the court. If all the parties necessary to enable it to make a full disposition of the property were not made, it was the result of a deliberate error in judgment on the part of the distinguished counsel who conducted the cause, and the able and experienced magistrate who pronounced the decree. The rights, especially of the contingent remaindermen, were obviously contemplated, and precautions were adopted to secure and protect them. If those measures shall have proved fallacious or unavailing (of which this court has yet no satisfactory evidence) it is a result greatly to be regreted, but which no caution or foresight in the administration of justice can always anticipate, or if anticipated, certainly prevent.

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*The court supposed that all the necessary parties were before it, and the error, if it exist, was not without high authority for its sanction.

In Giffard v. Hort, 1 Sch. and Lef. 408, the practice is thus stated by Lord Redesdale; "Courts of Equity have determined, on grounds of high expediency, that it is sufficient to bring before the court the first tenant in tail in being, and, if there be no tenant in tail in being, the first person entitled to the inheritance, and, if no such person, then the tenant for life; and as Courts of Equity constantly act, on these parties being before the court, in any thing relating to the whole estate, I do conceive that the decree in the Court of Exchequer, decided against the rights of Sir Duke Giffard and his son Thomas, a minor, and that that is a decision binding the right." "Where all the parties are brought before the court, that can be brought before it, and the court acts on the property according to the rights, that appear, without fraud, its decisions must of necessity be final and conclusive."

This doctrine was afterwards incorporated into the elementary books on pleading. In Cooper, 36, it is said that "where there is a suit respecting real estate which is settled or devised to one for life, with remainder to the first and other sons in tail in the common way of limiting estates, all the persons interested, as far as the first tenant in

tail in existence, must be made parties. But a remainderman expectant upon the estate tail need not be made a party." "It has been repeatedly determined," says this author, "that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remaindermen are barred, and this is now considered the settled rule in equity, and of necessity."

No case, and no dictum, has been cited, which controverts or calls in question the authority on this point of the eminent equity pleader, Lord Redesdale.

In cases of partition it is very well known that the practice of the English Chancery differs from our own. Partition is there effected by directing conveyances to be made by the parties themselves, and where an infant is a party, as the court has no authority to compel an infant to execute a deed (except an infant trustee under the statute of Anne) the conveyance is necessarily delayed until he becomes of age, and he is allowed a day to show cause. But our practice resembles rather the proceedings at law, where the judgment in partition, with possession,

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constitute, *of themselves, a judicial title. It has never been the practice to allow a day to the minor after he becomes of age to show cause against the judgment in partition. In Pell v. Ball, 1 Rich. Eq. 361, a sale was ordered for the purpose of partition of the entire real estate, against the remonstrances of the guardian of the infant, and the judgment was sustained by the Court of Appeals.

Gaskell v. Gaskell, 6 Simons, 643 (9 Eng. C. C. R. 448) was a very recent decision of the English Court of Chancery (1836) in which eminent counsel were concerned for the parties. The plaintiff, Milnes, was tenant for life with remainder to his first and other sons in tail of an undivided moiety of certain estates. Gaskell was tenant for life with remainder in the same manner of the other moiety. The plaintiff had no issue. An agreement for partition of the premises had been made between him and Gaskell, which it was the object of the proceedings to carry into effect. It was held after consideration, and upon authority, that "the partition might very well be carried into effect, notwithstanding the plaintiff was tenant for life only;" that the decree would be binding on the sons when in esse; but the court directed a reference to the master to inquire and state, whether it would be for the benefit of the future issue of the plaintiff, that the agreement should be carried into effect.

It is said, with apparent plausibility, that no court should undertake to dispose of rights, however remote, or contingent, unless all the parties were before them. But the court undertakes to act on the property, and to dispose of it, and makes every provision for the rights of parties, which it is practicable to make. An inflexible adherence to any different rule, is inconsistent with the practice of judicial tribunals in any country, and would fetter estates to a degree entirely inconsistent with the policy of our laws and the habits of our people. Has it ever been doubted since Taltarum's case, 12 Edw. 4, that a tenant in tail, by suffering a recovery, may dock the entail and cut off all contingent remainders? Yet Giddings v. Hitchcock, 4 Price Exch. Rep. 135, (cited for another purpose at the hearing) arose out of the fact that a contingent remainderman had sold his interest, when it was afterwards ascertained that he had, at the time, no interest, because, entirely without his knowledge, the tenant for life (between whom and himself there was no privity either in blood or estate) had suffered a recovery. No one questions—all the authorities concur, that the Court of Chancery may dispose of the fee, having before it only the first person

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who has an estate *of inheritance in the premises. According to this familiar practice, neither the contingent remaindermen, nor their rights, are before the court. Yet it is believed, that the validity of such proceedings or their conclusiveness, has never been questioned. From the earliest period in the history of our equity jurisprudence, it has been the practice of the court to dispose of the real estates of testators, when it became necessary to resort to that fund, for the payment of debts. In most of such cases, contingencies are contemplated by the will not to arise for many years, contingent remaindermen are provided for who are not in existence, and who may peradventure never come into existence. It has never been supposed that these circumstances would suspend the action of the court, or invalidate the title made under a decree for sale.

The case illustrates the principle. Suppose it had been necessary to resort to the real estate of Col. Myers in the possession of his several devisees for the payment of his debts. Must the creditors wait until the contingent remaindermen, not yet in esse, have arrived at twenty-one years of age, before they can subject the real estate to the satisfaction of their demands? Without the aid, without the action of this court, they are entirely without remedy. A judgment against the executor would be of little avail, when the land has already been held for years by the heirs or devisees in their own right. See Jones v. Wightman, 2 Hill, 579; Bird v. Houze, Speers' Eq. 250. Any attempt to levy their execution on the lands of one, would, on familiar principles, entitle him to come into this court. It is true the devisee and heir are both liable at law for the debt. But would a judgment at law against a devisee for life authorise the sheriff to sell the fee simple? That remains to

be decided. Unless this court had authority to dispose of the fee simple of the estate for the payment of the debts, it is quite clear that it could not be reached. If it had the authority not having the contingent remainder-men before the court, the validity of the title executed by the officer of the court, is not open to objection. But if the court can make a good title for the payment of debts, if it has authority, in any case, to dispose of the fee, not having those in remainder before it, the exercise of that authority in cases of partition, or for the change of property, becomes a question of discretion, and not of jurisdiction. It is hardly necessary to say that the vigilance of the court should be more wakeful and anxious, and its interfer-

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ence more cautious in all cases of this *character; nor is it perhaps too much to add that its discretion has been sometimes unwisely exercised. But this is not an argument against the authority of the court, or its jurisdiction.

But there is much reason to conclude, from the language of Col. Myers' will, that he himself contemplated a sale of the estate. It is substantially provided that his six children should hold in severalty, their respective shares of the residuum of his estate, of which these premises were a part. This estate was situated, in very different proportions, not only in several districts of the State, but in three or more different States. In order to make partition among the six different devisees a sale was, obviously and indispensably, necessary. If there was no sale, there could be no partition. The tenants for life alone, were in esse. All the tenants for life, all the heirs at law of the testator, except those expressly excluded by his will from any interest in his estate, were made parties to the proceedings. All persons having an interest, who could be made parties, were included. Gaskell v. Gaskell is a direct authority that under such circumstances, partition would be decreed which would bind the issue when in esse. In that case a reference was ordered to inquire if it would be for the benefit of the future issue. In the case of Hemingway v. Myers a reference was also ordered, which the court is bound to presume was of the same character. On the report of the master, or commissioner, a sale of the premises was directed, according to the uniform practice of the court in cases of partition under similar circumstances, and the title of the complainant is under that sale.

According to my best judgment, the court was well warranted by the practice of Westminster Hall in entertaining the proceedings, and by the laws and practice of this country in ordering a sale, and, therefore, the complainant has no cause to object to the validity of his title.

HARPER, Ch., and O'NEALL and WARDLAW, JJ., concurred.

O'NEALL, J. I concur fully in the affirmation of the circuit decree, on two grounds. 1st. That the decree of the Court of Equity ordering the sale of the land, renders the title of the complainant perfect, inasmuch as all the persons who had an interest in the land, who were then in esse, were (according to the statement in the bill) made parties. 2d. That Mrs. Parr, the purchaser of Van Lew's bond, purchased without notice of this defence, and indeed with his

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assent, and has recovered a judg*ment at law. Under such circumstances, the Court of Equity never will disturb her rights. For she has an equal, if not a superior equity to the complainant.

My present purpose, however, is more to explain the various cases decided, in the courts of law, on the question how far an outstanding title can be set up as a defence at law, than for any thing else.

The defence at law, before eviction, proceeds upon the ground that the covenant of seizin is broken by a want of title in the seller, and damages for this breach are allowed, as a discount. In the case of Mackey v. Collins, 2 N. and M'C. 186, [10 Am. Dec. 586,] it was held, that the warranty, in our deeds, drawn according to the Act of 1795, is both a covenant of seizin, and for quiet enjoyment, and that an action might be brought before eviction, on shewing an existing paramount title in another. This was in conformity to the previously adjudged and well considered case of Furman v. Elmore, then unpublished, and apparently unknown to the bench or bar, but which was most fortunately brought to light and published in a note to Mackey v. Collins, 2 N. and M'C. 189, [10 Am. Dec. 586.] The same principle was affirmed in Biggus v. Bradly, 1 M'C. 500, with this qualification, that a purchaser in possession should not be allowed to purchase an outstanding title, and sue for a breach of the covenant of seizin. In that case, and many others, there is a good deal said about an implied warranty arising from a full price, in the sale of lands, as well as in the sale of chattels: but it is manifest such a doctrine has no foundation in law, and was not necessary for the decision of the cases at law, when they rested on the covenant of seizin in the deed. The principle ruled in Mackey v. Collins was re-affirmed in Johnson v. Veal, 3 M'C. 449. But in that case, another very important principle, and safeguard to the application of the doctrine, was settled and fixed,—that as the action lay for a breach of the covenant of seizin, before eviction, by shewing that the grantor had not title at the execution of his deed, the statute of limitations began to run from the execution of the deed, and that in such a

case, four years would bar his remedy by action of covenant.

At law there formerly were three classes of cases, in which a purchaser could be relieved, in part or in whole, from the payment of the purchase money. 1st. Where there was a partial failure of consideration, as

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where part of the land sold and con*veyed was covered by a paramount title, which might, and in the opinion of the jury would so far deprive the party of the benefit of his purchase. This is essentially matter of discount, and, as is decided in Farrow v. Mays, 1 N. and M'C. 312, can be given in evidence only under a notice of discount filed, and served on the opposite party. In such case the measure of damages to be allowed to the party on his covenant of seizin, is the pro rata value of the land covered by the paramount title, estimated by the purchase money and interest, and the relative value of the land thus taken off in the purchase, to the land remaining. Furman v. Elmore, 2 N. and M'C. 199 to 204, note. The 2d class is where the grantor when he sold had, or at the trial has, no title to the land. In such case, the vendee, having acquired no title, has of course no consideration for his promise, and hence if the action be on a parol contract, it may be regarded as a nudum pactum, and the vendee thus relieved at law. In such a case, as is said in Farrow v. Mays, the defence may be given in evidence under the general issue. But in an action on a specialty, as is explained in Hunter v. Graham, 1 Hill, 370, before the Act of 1831, the failure of consideration must have been specially pleaded, or set up by way of discount. That Act merely lets the party into his defence under a notice instead of a plea. In a suit on a specialty, therefore, it would seem the more prudent course for a defendant, (and the most consistent with legal rules) to regard his covenant of seizin as broken to the whole extent of his purchase money and interest, and to claim damages accordingly by way of discount. In such a case, if the jury should be satisfied, that in fact as well as in law the purchaser took nothing by his title, and that he will be ousted by the paramount title, they may find a verdict for the defendant, not on the ground that the failure of title is a rescision of the contract, but that the damages, on the covenant of seizin, are exactly equal to the purchase money and interest. In such a case there is no necessity for an appeal to equity to put the parties in statu quo. For the vendor's deed conveys no title to the vendee. Neither can the vendor claim an account for rents and profits. For his vendee is liable to the owner of the paramount title for the rent of the land during the time he may be in possession. Taylor v. Fulmore, (1 Rich. 52.) Both of these classes of cases have always been and still are regarded as constituting legal defences examinable and relievable in a law court. The 3d class of cases, where there was a

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good title in part and *in whole conveyed by the vendor to the vendee, and the object of the vendee's purchase was defeated, either by a part failure of the title, or the failure of some incident to the purchase, represented by the vendor, or shewn by the title, as resulting from the purchase, the purchaser formerly was held to be relievable at law, although he might be in possession, by a rescision of the contract. The case of Gray v. Handkinson, 1 Bay, 278, which seems to have been the beginning of this doctrine, held that a mill seat was the principal inducement to the purchase, and that being taken away by an older title, entitled the vendee to a rescision of the contract. In that case the Judges speak of the defence as a kind of equitable one, which was allowed now in a Court of Law as well as in Equity, on the ground of fraud. So far as fraud is concerned, I have no doubt the defence is good anywhere. But there is no fraud, where both vendor and vendee are alike ignorant of the defect: and that was the case in Gray v. Handkinson. In a note to that case, the rule of the decision is ascribed to the doctrine that a sound price warrants a sound commodity. It was followed by the case of the State v. Gaillard, 2 Bay, 11, [1 Am. Dec. 628.] In that case, the defence rested upon the ground, that when the land was sold, a plat was presented, which represented a fine copious stream of water running nearly through the centre of the tract, with a mill seat upon it: and that these advantages were the principal inducements to the purchase: that they had failed, inasmuch as the supposed stream was a dry gully three-fourths of the year. In that case, the doctrine, that a sound price warrants a sound commodity, was applied to land as well as to personalty, and that by the general terms of our discount law, a defence predicated of it, could be set up. In that case, the verdict of the jury rescinded the contract, notwithstanding the contract was executed both by the execution of titles and the delivery of possession to the vendee. It is possible that that case might stand upon the fraud resulting from the misrepresentation at the sale, without resorting to the wild doctrine, that there was an implied warranty from the price paid, in addition to the legal covenants of seizin and quiet enjoyment. These two cases were followed by many others, where from misrepresentation, or a failure of consideration, in part, which defeated the purchaser's object, in making the purchase, the contract was rescinded. The extravagant results to which we were conducted, may be illustrated by the case of the

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Com*missioner in Equity v. Robert R. Pear-

son et al. In that case, the land had been sold under a decree in equity in the case of Delilah Perry by her committee v. The Executors of Aaron Cotes, dec'd., and purchased by the defendant, Pearson, at a great price. He received titles,—was in possession for years. He made several payments on his bond. At last, when sued, he succeeded in shewing that there was an outstanding title to an undivided share of about one eighth of the land, in persons who were not parties to the case under the decree in which the land had been sold. The constitutional court, against the finding of a jury, allowed the defence: and the vendee was permitted to rescind the contract. At length, however, the court awoke to the mischievous consequences of allowing such defences, and in the cases of Carter v. Carter, 1 Bail. 217—Bordeaux v. Cave, 1 Bail. 250, and Westbrook v. M'Millan, 1 Bail. 259, undertook to retrace their steps. In those cases, they declared, that where the contract of sale was executed by the delivery of titles and possession to the purchaser, and he had not been evicted, that for a failure of title to part of his purchase, although it might defeat its object, the contract would not be rescinded in a Court of Law; and that the party must seek relief in a Court of Equity. The reason assigned, that a Court of Law could not restore the parties to their original condition, by compelling the vendee to convey the title, which as far as the vendor had title, conveyed a good legal estate to him, and to account for rents and profits to the extent of the vendor's title, were certainly true, and shewed that in such a case a recision at law could not take place. The rule of these cases was admirably explained by the only surviving member of the excellent court which pronounced the decisions in Carter v. Carter, Bordeaux v. Cave, and Westbrook v. M'Millan, in the case of Johnson v. Purvis, 1 Hill. 326. In that case, Johnson, J., said—"The first ground of this motion is founded on a misconception of the cases of Carter v. Carter, 1 Bail. 217, Bordeaux v. Cave, Id. 250, and Hext ads. Morgan, decided in 1829, and from what has occasionally fallen from the bar in reference to these cases, I am led to conclude, that the impression is not unusual that want of title in the vendor of land, either in whole or in part, is not a good defence to an action brought at law to recover the purchase money. But these cases inculcate no such rule: they maintain, however, that a Court of Law cannot rescind

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a contract *for the sale of land, on account of a partial failure of consideration, on the ground, principally, that a Court of Law has not the full power to do full and adequate justice to the parties." When these observations are understood as applying to an executed contract accompanied by possession of the land, they give a perfect exposition of the rule as settled by the Court of Appeals in 1829, and ever since inflexibly maintained by the Law Court.

According to this rule, I have no doubt, if Van Lew's title were defective, he could not have set it up at law. Unquestionably the title of David Myers conveyed to him the life estates of himself and his five other brothers and sisters. The defect in his title, if there be any, is that the children of the tenants for life who may attain to the age of 21 years upon the death of their respective parents, will be entitled to the estate in remainder. For if there had been a doubt as to the limitation over in their favor, on the clauses of the will cited in the decree the codicil removes it. The danger to his title was, therefore, altogether future. It could not be the subject of discount, in the Law Court, for the covenant of seizin was not as yet broken: and if it were, it would be impossible safely to estimate the damages. Hence, therefore, I conclude, that if the plaintiff could set up his supposed defect of title against Mrs. Parr, that it would be very properly examinable and relievable in Equity. For I take it, both parties, vendor and vendee, supposed the title good. In such case, there can be no objection to equity between the original parties, giving a relief by either rescinding the contract, and compelling the purchaser to re-convey, account for the rents and profits and for waste, or by refusing to rescind the contract, where the court can protect the purchaser, as was done in Thomson, adm'r of Moorman, v. The Ex'rs of Lewis, by perfecting the title: or, as might have been done in this case, if Myers had continued to hold the purchase debt, by compelling him to secure the purchaser against the future estate by leaving unpaid the principal sum, (the purchaser paying the annual interest,) until the future estates might arise. There are, however, many cases of fraud or mistake, where although the contract is executed, yet the Court of Equity will rescind the contract. But it is not necessary that I should pursue this branch of the case. The opinion delivered by Chancellor JOHNSTON has fully explained and enforced the doctrine applicable to it.

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*RICHARDSON, J. I concur fully in the decree, upon the merits of complainant's bill.

Dr. Van Lew has no grounds to set aside the judgment of Mrs. Parr: because she purchased his bonds, not only for a valuable consideration, but under a confidence, permitted, if not purposely raised, by Van Lew himself—that he had no defence to the bonds, and because she was ignorant of the contingent remainders, that may eventually take the lands in question from Van Lew. It follows, clearly, from such facts, whatever be the possible claims of Van Lew to an equitable defence to the bonds, if still in the hands of David F. Myers, that it would be

inequitable, and encourage unfair dealing, to permit him to succeed in such a defence, as against such an assignee of the bonds. Her judgment at law must, therefore, stand unaffected by the strife of Van Lew and Myers—and Van Lew be remitted to his warranty of title received from Myers, and relied upon at the time of his purchase.

2. Upon the question, whether Van Lew had or had not a good title to the lands against the contingent remaindermen, by reason of the sales ordered by the Court of Equity in 1835, i. e. whether such sales, being unconditional in terms, will bar the contingent remainders, although the parties interested in such remainders were not represented, I give no final opinion; as it is not essential to the decision of the case—and the court ought still to avoid deciding upon the possible future rights of such absentees. Let them first lay in their claims.

3. But upon the question, which I understand caused the appeal to the Court of Errors, to wit: whether it was necessary, as a principle of law, that before the purchaser, Van Lew, could recover, by reason of a title paramount to the one he received from D. F. Myers, he must have been actually evicted by force of such paramount title? Upon this question I cannot hesitate. It depends upon an important and clear principle, that ought not to be questioned in our courts.

The series of our decisions, enumerated and expounded by Judge O'Neall, which began in 1792, and continued ever since, has finally established this proposition in the laws of South Carolina: That whenever, in the sale of lands, the seller makes a general warranty of title, in the usual form of our conveyances of real estate, and a subsisting paramount title at law to the same lands belongs to a third person—as, for instance, an older grantee of the same lands; in such

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cases, the purchaser is not *obliged to wait until he shall have been evicted by force of such paramount title, but may recover against the seller, upon the fact, that such paramount title has been found in such third party. Because, such paramount title is, by our decisions, per se, a breach of the warranty of the seller, and co-effective with eviction. The seller warrants the purchaser's superior title.

Now, then, this being the law of such cases, it follows, that whenever a case is presented in equity, proper and suitable in all other respects for that jurisdiction, the bill will not be dismissed on the ground, merely, that the purchaser has not been actually evicted by force of such paramount title.

I admit that in an English Court of Chancery, and in many of the States, such a case would be dismissed, for the want of the actual anterior eviction of the purchaser. The principle of reasoning there, is precisely the same as for the converse decree in South Carolina; i. e. the same rule, "equitas sequitur legem," governs; and equity decides, as the rule of law has been established in the judicial forum of law.

For illustration: let us suppose that the English law Judges had, ever since the year 1792, adopted and established the South Carolina rule, or the Parliament had enacted it; would we, after such a change in the law of the warranty, hear of any estoppel, because there had been no actual eviction? and would not the title paramount be holden equivalent to actual eviction, wherever that rule had obtained at law? I think there can be no doubt of this.

The argument is not that other courts, and commentators on law, have drawn unjust or illegal conclusions from their premises, but that our courts cannot, without error, adopt the same conclusions from our own legal premises, that have obtained since 1792, and dispensed with the necessity of proving a prior eviction.

Perhaps I need not have thus briefly condensed the profound considerations and arguments of my brethren, or indexed the drift and conclusion from such arguments. But, in a case so calculated to introduce the understanding proper and conducive to decisions formed in the same fundamental legal premises, I would contribute my conviction after the very able argument, that this has become the law of such general warranty of lands in South Carolina, and must govern all our courts equally, as a settled principle of such warranties.

APPENDIX

IN THE COURT OF ERRORS.

2 Rich. Eq. *355

*HAMILTON v. HAMILTON.(a)

(Columbia. May, 1845.)

[*Judicial Sales* ⇐19, 37.]

The principle which governs all sales at auction, and especially judicial sales, is, that there should be full and fair competition. Any agreement or combination, therefore, the object and effect of which is to chill the sale and stifle competition is illegal, and no party to the agreement or combination can derive benefit from the sale.

[Ed. Note.—Cited in Carson v. Law, 2 Rich. Eq. 306, 307, 310, 316; Coleman v. Bank of Hamburg, 2 Strob. Eq. 288, 49 Am. Dec. 671; Holmes v. Holmes, 3 Rich. Eq. 65; Dudley v. Odom, 5 S. C. 138, 139, 22 Am. Rep. 6; Barrett v. Bath Paper Co., 13 S. C. 158; Reagan v. Bishop, 25 S. C. 590; Herndon v. Gibson, 38 S. C. 361, 17 S. E. 145, 20 L. R. A. 545, 37 Am. St. Rep. 765; Milhous v. Sally, 43 S. C. 324, 21 S. E. 268, 885, 49 Am. St. Rep. 831; Howlett v. Garner, 50 S. C. 12, 27 S. E. 533; Fairy v. Kennedy, 68 S. C. 254, 47 S. E. 138; Ex parte Cooley, 69 S. C. 155, 48 S. E. 92.

For other cases, see Judicial Sales, Cent. Dig. §§ 43, 75; Dec. Dig. ⇐19, 37.]

[*Mortgages* ⇐529.]

A plantation, worth at least $40,000, was ordered by the Court of Chancery to be sold to satisfy, in their order, four mortgages, given to secure debts amounting to $50,000. The first mortgage was owned by B, and secured a debt of $22,000, and the last was owned by N, his debt being $17,000. B also had an unsecured debt against the mortgagor of $16,000. N had determined, if necessary to secure his debt, to bid the property up to $50,000, and this coming to the knowledge of B, he proposed that if N would not bid against him, and, if he should purchase the plantation at or under $30,000, he would secure N's debt—the agreement to be at an end if the biddings went over $30,000. This was acceded to, and at the sale B bid off the property at $11,000. B had entered into an arrangement before the sale, if he became the purchaser, to sell the property, on credit, for $55,000, a sum sufficient to secure his own mortgage, N's mortgage, and B's unsecured debt. *Held*, on the application of the intermediate mortgagees, that the agreement between B and N was illegal, and the sale was set aside.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1513, 1537–1548; Dec. Dig. ⇐ 529.]

[*Judicial Sales* ⇐19.]

A and B, sureties of C, whose property was about to be sold at sheriff's sale, agreed not to bid against each other; that B should bid, and that, if the property was knocked off to him, the sureties of C should share in the benefit of a re-sale. A intended to bid at the sale, and, had it not been for the agreement, would have done so. The object of the arrangement was to indemnify the parties as sureties for C. On the day of sale, B met a judgment creditor of C, who attended "for the purpose of looking after his case," and telling him he need not bother himself, offered to buy, and did

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*buy, his judgment. At the sale B purchased property to a considerable amount, and at a considerable sacrifice. *Held*, on bill filed by the creditors of C, that the conduct of B in silencing bidders was illegal, and the sale was set aside.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 43; Dec. Dig. ⇐19.]

[*Fraudulent Conveyances* ⇐61.]

In 1827, E, who was then doing a prosperous business, but who was considerably indebted, invested a small sum of money in the purchase of a tract of land, and had the title made to his infant son, intending it as a gift. In 1843, E had become insolvent, and a bill was filed by some of his creditors, whose debts were not in existence in 1827, praying that the land might be sold, &c. There having been no actual fraud in the transaction, *held* that it could not be impeached after such a lapse of time, especially at the instance of junior creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 150, 154; Dec. Dig. ⇐61.]

[This case is also cited in Holmes v. Holmes, 3 Rich. Eq. 63, 64, and Orr v. Orr, 7 S. C. 383, as to the question of procedure.]

Before Harper, Ch., at Charleston, January, 1844.

Rice Hope, a plantation on Savannah River, containing upwards of 400 acres in a high state of cultivation, and worth at least $40,000, the property of General Hamilton, during his possession was mortgaged by him: 1. To Frederick Kohne. 2. To Thomas Hanscome. 3. To James G. Moodie and William E. Turnbull, trustees of Barbara Barguet. 4. To Ann Timothy; and 5. To Arabella North. The mortgages were successively recorded as they were made. The first and second mortgages were afterwards assigned to the Bank of Charleston.

In this suit, an inquiry was directed to ascertain the liens on Rice Hope, with their amounts, and the order in which they were payable.

In pursuance of this order, the creditors went in before the master with their several claims, and on the 1st March, 1843, he made his report, that the mortgages were payable in the foregoing order, and that there was due for principal and interest:

To the Bank of Charleston, S. C....	$19,450 00
To the trustees of Barbara Barguet, a colored woman.....	5,178 00
To Isaac Telfair, a resident of Ohio, executor of Ann Timothy.....	7,260 00
To Edward North, administrator of Arabella North.....	17,887 50
	$49,767 50

(a) [Syllabus here given is meant for this case and also for case of Martin & Walter v. Evans, pp. 368, 385.]

On the coming in of this report, the cause

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was heard by his *Honor Chancellor Johnson, and on the 16th March, 1843, he made a decree, declaring that Rice Hope had been purchased with trust funds, and should be held bound by the said trusts, subject to the foregoing mortgages; and ordered that those mortgages be foreclosed for the payment of the debts secured by them; and that the property be sold at such time, and on such terms, for cash or on credit, as a majority in interest of the creditors, under the direction and control of the master, should determine.

Afterwards, on the 25th March, 1843, an order was made, which, reciting that the parties had agreed on the time and terms of sale, and that Mr. Cruger had been appointed trustee, directed the expenses of the plantation to be paid out of the crop of the coming year, and then the interest on the mortgages; and that unless the amounts due on the several mortgages should be paid on or before the first of December next, the master should advertise and sell Rice Hope on the first Wednesday in January after, for one fourth cash, the rest of the purchase money in three annual installments, with interest from date, payable annually, to be secured by bond and mortgage; and all parties to deliver possession to the purchaser, with muniments of title, &c. And that the master apportion the bonds of the purchaser in such amounts as might be convenient for distribution among the creditors, and apply the cash, first, to pay the costs of suit, and then the mortgages, according to their priority, and deliver the bonds to the creditors in satisfaction of their demands, as far as the same would reach. The creditors holding the first mortgages to have the choice of the first bonds, and the others to receive the latter bonds, all according to their respective priorities.

Pursuant to these orders, Rice Hope was advertised to be sold at the Exchange in Charleston, by Mr. Gray, one of the masters of the court, on the 3d day of January, 1844.

The debt to Arabella North had been at first secured by a mortgage of Hamilton's wharf, and when the wharf was sold to James Adger, Rice Hope was mortgaged to her for the same debt; but how far the wharf continued to be bound, had never been determined between Mr. Adger and Dr. North. On the morning of the sale, it was ascertained by General Hamilton, and the Bank of Charleston, S. C., that James Adger had authorized Dr. North to bid 50,000 dollars for Rice Hope; and that there was an arrangement between them to protect their

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inter*ests. The Bank of Charleston then authorized Mr. Gourdin to see Mr. Memminger, the attorney of Dr. North, and make arrangements to prevent him from bidding. Mr. Gourdin saw Mr. Memminger, and they agreed that Mr. Gourdin should bid for the Bank of Charleston, and that Mr. Memminger should not bid against him; and if he bought the property for 22,000 dollars, or under that sum, the Bank of Charleston should secure the debt due on the mortgage to Arabella North, but if the bidding went over 22,000 dollars, the agreement was to be at an end.

With this agreement, the knowledge of which was confined to the parties, the sale took place. It was known to the attorney of Barbara Barguet, that the parties were to bid for the property to cover the mortgage of Arabella North, and relying on that knowledge, he did not attend the sale, neither did the attorney of Isaac Telfair attend. Mr. Gourdin bid 11,000 dollars, at which price he was declared the highest bidder, and by his direction the property was set down to the Bank of Charleston as the purchaser. The Bank of Charleston agreed with General Hamilton, in pursuance of a prior understanding, that the Bank would convey the property to the trustee of Mrs. Hamilton, upon the payment of the amount due on their mortgages, North's mortgage, and a debt of 16,000 dollars owing to the Bank by General Hamilton, for which they had no security. The purchase was made by the Bank at his request, and the Bank had authorized Mr. Gourdin to bid as far as 30,000 dollars.

Notice was given to Mr. Gray, in consequence of which he refused to make titles; and no money was paid, and he reported the sale as made to the Bank of Charleston at 11,000 dollars.

On 25th January, 1844, before the sale was confirmed, Mr. Mazyck, to prevent the sale from being confirmed, filed his affidavit, stating that he was the attorney of Barbara Barguet; that he knew that the parties interested in the mortgage of Arabella North, intended to bid; that he relied on that information and did not attend the sale; that if he had known of other arrangements, he would have attended the sale and bid to the amount of his client's debt. That the purchase by the Bank has operated as a surprise on him and his client, and he offers 28,000 dollars as a bid, and to make any deposit that may be required, if the property is again offered for sale. Mr. Middleton, executor of Arthur Middleton, one of the sureties on the bond of Ann Timothy, filed his affidavit, alleging surprise, and offering a bid of 31,000 dollars.

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*On these affidavits, it was moved in behalf of Barbara Barguet and N. R. Middleton, that the biddings should be opened, and an order was made, that Mr. Gray should

take evidence on the subject, who did so. (*b*) The Bank and Dr. North insisted that the arrangement was made for their own benefit, to avail themselves of the probability, that Barguet and Timothy, and the parties interested with them, would not or could not bid; and that they had a right to do so. And of this opinion was his Honor Chancellor Harper, who dismissed the rule by the following order:

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*Harper, Ch. This is called a motion to open the biddings upon the offer of an advanced price. I take it to be settled by the case of Young v. Teague, Bail. Eq. 13, following Gordan v. Sims, 2 McC. Eq. 158, that we have no proceeding similar to that of the opening of biddings in England. The former case was one in which the conveyance was executed and delivered, and stress seems to be laid on that circumstance by the reasoning of the court. But the principle on which the cases go is this, that by the falling of

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the auctioneer's hammer, and *the entry of the sale by the master in his books, the con-

(*b*) NOTE. The following is a copy of the testimony taken by Mr. Gray and reported to the court.

C. G. Memminger, sworn. Says there were three interests in the bond and mortgage of Dr. North. The estate of North represented two-thirds, the estate of Baron one-third, and Mr. Adger a contingent claim of reclamation against him, which grew out of an unsatisfied mortgage on Hamilton's Wharf, now Adger's. The parties representing these various interests had a meeting, and they desired to avoid bidding, or having any thing to do with the purchase, if the debt could in any other way be secured, as the interests were so frittered up, that the purchase could not be made advantageously. It was finally agreed that Dr. North should bid to the amount which would cover his debt, to fifty thousand dollars, and if it were put down to him, it was agreed, that he should sell immediately, and Mr. Adger would lose half the deficiency, and the other parties the other half. This conclusion, after various other previous conferences, was come to the day before the sale. On the day of sale, Mr. Henry Gourdin called on witness and asked if the parties he represented had any other interest than to secure their debt. Witness replied that the parties wished to have their debt secured merely, and anxiously desired not to purchase the plantation. Mr. Gourdin then stated, that the Bank of Charleston held the first liens on the plantation, amounting to somewhere about twenty-two thousand dollars, and they were willing to make an arrangement by which the debt witness represented might be secured, if they could agree. He asked if witness would be willing to take a mortgage of the property, for his debt, to come in after the Bank of Charleston, and to give time on that mortgage. Witness replied that time was of little consequence to his client, and such time would be given as the purchaser might require. Mr. Gourdin agreed to meet witness at his office in an hour afterwards, and witness had all the parties interested there at the meeting, viz: Mr. Gourdin, the President of the Bank of Charleston, Mr. Adger, Dr. North, and Mr. Ashby. It was finally agreed, that if the plantation sold for twenty-two thousand dollars, or under that, Mr. Gourdin or the purchaser was to give a mortgage to secure North's debt, on an extension of time

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from three to five years, to come in *after the liens of the Bank of Charleston. That if the property went over twenty-two thousand dollars, neither Mr. Gourdin nor the Bank of Charleston would have any more to do with it, and the parties were to protect themselves as well as they could. It was also understood, that as it was uncertain what course the thing would take, witness was to go to the sale, and act as he deemed best for the debt of North; and witness was prepared to act on the understanding of the day before, and to bid as high as fifty thousand dollars. That just before the sale, and while the company was assembling at the sale, witness met Mr. Gourdin, who told him that the Bank of Charleston had consented to extend the arrangement, so as to authorize a bid as high as thirty thousand dollars. Upon witness saying, that would not do, if North's debt was to be postponed to thirty thousand dollars, Mr. Gourdin said, no, the Bank was willing that North's debt should come in immediately after theirs, in case the property was knocked down to them at thirty thousand dollars, or under; if it went above thirty thousand dollars, witness was to take care of his debt. In the conferences it was spoken of as an uncertain thing, whether the intervening mortgagees would or would not bid. Reasons were assigned why it was probable or improbable that they would bid; such as the comparative smallness of their claims, the difficulty of raising the money, or managing the property—others thought they would bid. Witness says, as soon as Mr. Adger came in, he was willing to bid as high as fifty thousand dollars, whether the Bank of Charleston came into the arrangement or not: if Mr. Adger had not come, Dr. North would have felt perplexed about it, as Dr. North's claim was divisible among so many other persons. Witness had no conversation with General Hamilton on the subject.

Cross-examined. Witness says, in conversation among the parties the plantation was valued at about forty thousand dollars. Witness employed agents to make inquiry what would be its probable value, and the result was forty thousand dollars. As the sale resulted, Mr. Gourdin is liable for the debts of the Bank of Charleston and of North, amounting to thirty-nine thousand dollars, viz: twenty-two thousand dollars for the Bank, and seventeen thousand for North. Witness had no communication with the intervening mortgagees, and witness is not aware that they had any notice of

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the arrange*ment made. There was a large attendance of persons at the sale; it was a clear fine day. Witness says, the Norths did not come to him to consult about bidding; he had to send repeatedly to Dr. North to come, and thinks they would not have meddled with it, if witness had not taken an interest in the matter, on account of Mrs. Thurston being interested. The sale was perfectly open and fair. Remembers that Dr. King was present at the sale.

In reply. Says there were only two bidders.

Henry Gourdin, sworn. Says he was set down as the purchaser of Rice Hope. Witness purchased for Mrs. Hamilton and her family. General Hamilton owes the Bank of Charleston a debt, for which the Bank has no security, to secure which debt, and to assist the family in buying the plantation, they agreed to advance him money. General Hamilton was very desirous that the property should be kept in the family, and supposed that it would sell for considerably less than its value, and a negotiation had been going on between himself and the Bank for more than a twelve month, and it was finally agreed that the Bank would advance the money to enable him to buy it, upon condition that he would secure the uncovered

tract of sale is complete. Different from the English practice, according to which there is no contract till the biddings are reported, and the sale confirmed. With us, upon the falling of the hammer and the entry of the sale, the purchaser has a right to demand a title as a matter of course, and as of course the purchaser in the present instance would have received it, but for the interference of the parties to this motion.

Being a complete executory contract, I must seek for something which will authorize

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me to set it aside, and it seemed to *be agreed that the motion was to be decided on the evidence before me, as if a bill had been filed for that purpose. It is not an application to enforce an executory contract, in which case the court exercises a more liberal discretion, to refuse its interference. The purchaser of the land was entitled, as of course, to have the conveyance executed, and it would have been executed but for the interference of the intermediate mortgagees. As observed in Young v. Teague, "the commissioners are not limited to receiving bids or offers, but they are directed to sell to the highest bidder, and to

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execute titles." To authorize the *parties, however, to set aside, even as an executory contract, there must be, I suppose some ground of fraudulent surprise or mistake. The English cases sometimes purport to open the biddings after a confirmation of the sale, but these proceed upon similar grounds, and it is to be observed, that as the English legislature is not restricted from interfering with the obligation of contracts, courts may feel more at liberty to open or modify them than with us.

When it is said to be fraudulent for parties to agree not to bid against each other, at a public sale, or that one person should

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debt by a mortgage of the property. The whole amount of the uncovered debt was about thirty-two thousand dollars, half of which had been secured by a mortgage of Dr. Hamilton on Fife plantation, and the other half was to be secured by a mortgage of Rice Hope. The debt was to be secured by the following arrangement: Witness was to take the title and immediately assign it to Lynch Hamilton, in trust for Mrs. Hamilton and family. Lynch Hamilton was to have the management of the plantation, and the crops, after deducting between three and four thousand dollars for the expenses, were to be sent to the Bank of Charleston, to be applied to the payment of the debts on the plantation and negroes. Mr. Lynch Hamilton could not be made the purchaser, as he had been a co-partner in his father's house, and was liable for the engagements of that house; and to avoid all embarrassments arising from that fact, witness was to be the bidder. The plantation was to be mortgaged to the Bank, to secure the

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debt; the crops were to be *distributed among the debts rateably. There are one hundred and eighty negroes, including forty-five of Mrs. Hamilton's, all under mortgage except the forty-five. They were to be left on the plantation to assist in working out the debts. Two-thirds of the crops, after deducting expenses as before mentioned, were to be sent to the Bank, to pay the first mortgages held by the Bank, the uncovered debt, and North's debt, and one-third was to be retained by Lynch Hamilton to pay the debt and interest for which the negroes were mortgaged. Witness represented Mrs. Hamilton and family, but under the arrangement which had been made, witness and the Bank of Charleston had no interest to bid against each other. When witness saw Mr. Memminger on the day of sale, he mentioned to him that witness came as the friend of General Hamilton, to make the arrangement which is stated above; that the Bank had agreed to aid him, on condition that their uncovered debt should be secured. That up to one o'clock of the day before the sale, both General Hamilton and the Bank of Charleston thought there would be no bidders for the plantation for anything like its value, and that the parties holding mortgages would not be likely to bid much, as their claims were comparatively small, and the difficulties of settling Savannah River lands very great, in consequence of the climate. But about that hour, Mr. Adger came into Bank, and upon being asked by Mr. Conner, intimated that there would be bidders. The Bank knew that there was a contingent responsibility of Mr. Adger. It was not said who the probable bidders would be, some thought the Smiths, and some thought Mr. King. About half an hour before witness first saw Mr. Memminger on the day of the sale, he saw Mr. Adger, and then learned for the first time from him, who was to be the bidder, and in consequence of that information witness went to Mr. Memminger. Witness' object in going to Mr. Memminger was to prevent the Norths from bidding, as he was well satisfied that if they did not bid, the uncovered debt could be secured—if they did bid, it could not be secured. Witness proposed to Mr. Memminger to give the Norths a new mortgage on the property under the sale, to follow the two mortgages held by the Bank amounting to 22,000 dollars, and to come in before the uncovered debt. Mr. Memminger assented to that arrangement, and it was agreed that the

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Norths *were not to bid if the property went within the Bank debt; if it went beyond, then the Norths were to take care of themselves. The Bank subsequently agreed to extend their bid to thirty thousand dollars, the Norths' debt to come in as before after the 22,000 dollars.

Cross-examined. Witness thinks the plantation is worth about forty thousand dollars. Has not heard, however, of any person desirous to buy it. There is no rice mill on Rice Hope. The mill and settlement are on Pennyworth's Island, which is Mrs. Hamilton's. The purchase would be hazardous to any one who does not own negroes on Savannah River. The sale was advertised in Charleston, and a very full company was present at the sale. Recollects Dr. King was there. The sale was not hurried, but a fair open sale. Witness did not dissuade any one from bidding, except Mr. Memminger and Mr. Adger. Had no communication with Mr. Mazyck, or those who represented Telfair's debt, nor was he aware that they intended to bid, and thought it improbable that they would bid, as their claims were too small to admit of their being incumbered with the property. Witness neither said or did anything to prevent them from bidding; nor does he know that any other person said or did any thing to prevent them from bidding. The negotiation with General Hamilton had been going on between twelve and eighteen months, and the terms on which the Bank agreed, were to have the uncovered debt secured.

In reply. Knows only of two bidders at the

pay money to another not to bid against him,
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it is because such *conduct tends to prejudice the sale, to the injury of the owner, or perhaps of creditors having an interest in the proceeds; but if it appear that the agreement did not, and could not, have any such effect, the doctrine of course will not apply; but in the view which I take of it, the property sold for a higher price in consequence of the understanding between the Bank and the owners of North's bond: by that understanding, as taken from the testimony, in case the plantation should be bid off for less than 30,000 dollars, it would remain subject to the original mortgage to the Bank for about 22,000 dollars, to North's bond, 17,000 dollars, and to the uncovered debt, as it is called, 16,000 dollars, making in all 55,000 dollars. If North or Adger had bid, as the intermediate mortgagees say they expected them to do, and as at one time they intended to do, the plantation would have been bid off at 50,000 dollars, so that creditors have been secured to a greater extent than if that intention had been carried into effect, and the owner of the property (for whose protection such sales were chiefly intended) does not complain that the sale was injured, or the property sold at an inadequate price.

It was argued, however, that the liability for North's bond, as that was the bribe given by the Bank to effect its fraudulent purpose, as if one desirous of purchasing property at an under value, should pay another 1,000 dollars not to bid against him, this should not be counted as part of the price. But this is entirely inapposite. It assumes the fraud which is to be the subject of inquiry. When one bids off lands, subject to a mortgage, the mortgage is of course counted as a part of the price: so if he bids off under an agreement, to which he is a party, that the property shall stand pledged or mortgaged, this amounts to the same thing. The agreement of course will be enforced by this court. If one should bid off a valuable plantation at one cent, under an agreement that it shall stand pledged to its full value, would he be said to have got it for nothing? I do not very well understand why the uncovered debt to the Bank should not be counted as part of the price. Besides, so far as I have examined, the whole doctrine relied upon, applies to those desirous of purchasing property upon a speculation of inordinate profit, and not to creditors merely desirous of securing their debts.

The true objection in the present case, is not that the owner of the property, or creditors generally, have been injured; but that particular creditors have been injured and deprived of a priority, which they would
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have had. Now, suppose that the *Bank and the owners of North's bond, speculating on the chances of intermediate mortgagees failing to attend the sale, or their being unwilling to bid, or from their circumstances unable to purchase, had entered into the agreement in such event to bid off the property, as they have done, so as to gain the priority which they have gained, without doing anything to mislead or deceive the parties, or to deter them from attending or bidding, would there have been any thing fraudulent in this? I confess I do not see on what grounds. Creditors are not the guardians of each other. Each is at liberty to take care of himself as he best can. I do not see what obligation the owners of North's bond were under to bid for the benefit of the intermediate mortgagees. If they had bid as proposed, they must have suffered a great loss, most probably the loss of their whole debt; for if they had bid off at 50,000 dollars, and on re-sale the plantation had brought no more than 33,000 dollars, there would have been nothing left for their debt. Were they bound to submit to the loss, for the benefit of their prior incumbrance? In England, in case of several mortgages, if the owner of the youngest buy in the first mortgage, so as to invest himself with the legal title, the intermediate mortgagees will not be permitted to redeem without paying off the younger; yet by this, the owner of the junior mortgage jostles the intermediate mortgagees out of their priority, as effectually as the owners of North's mortgage have done in the present instance. Nor do I perceive any trick or artifice, or any characteristic or vestige of fraud, more in one instance than in the other; and shall we say, that that which the law allows and enforces is fraudulent, if done by the agreement of individuals?

So, with regard to the uncovered debt of the Bank: the Bank being the owner of the first mortgage, if the junior mortgagees had come to redeem, according to the English law, they would not be permitted to do so, without paying off that debt. This is said to be the first mortgagee's equity. The change which we have made in the character of the mortgages, renders this law inapplicable; but if the party can gain for himself that which but for this change, the law would have given him, shall we say that the previous law was the habitual instrument of fraud?

There being nothing fraudulent in the

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sale, witness as representing the Hamiltons, and Mr. Conner, President of the Bank of Charleston. The first bid was that of Dr. Hamilton for witness for $5,000; both witness and Mr. Conner bid to carry out the previous arrangement. Witness is a director of the Bank of Charleston, and was one of the committee of the Bank appointed to negotiate the matter: Mr. Conner and Mr. Trenholm and Mr. Adger were the other members, but Mr. Adger never acted.

C. G. Memminger called again. Says the creditors fixed the time for the sale of Rice Hope, some of them wishing the credit longer, and some shorter, and finally settling down on the time mentioned in the decree.

transaction itself, it is hardly contended that there was any artifice or fraudulent means practised to accomplish the object. Nothing was done to mislead or deceive the parties, or to deter them from attending or bidding,

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*nor anything omitted which the parties were bound to do. The fact of the Bank's finally agreeing to bid the property up to 30,000 dollars, is strong evidence of the absence of any fraudulent intention towards the intermediate mortgagees. If it had been bid off at that price, 8,000 dollars must have been paid to the intermediate mortgagees, and the owners of North's mortgage have lost their debt.

And there is as little room for setting aside the sale, on any ground of accident or mistake. They supposed that the owners of North's bond would attend and bid, and these had as good a right to suppose that the intermediate mortgagees would attend and bid. They were equally bound to do so for the protection of their own interests, and failing to do so, must take the consequence of their own laches: the owners of the bond did not intend to bid for the property until the day before the sale, when, in consequence of what may be called a casual arrangement with Mr. Adger, they determined to do so. If this arrangement had not been made, could you class the spontaneous and unfounded impression under the head of mistake?

The motion is dismissed.

From this order, the trustees of Barbara Barguet and Mr. Middleton appealed, on the following grounds:

1. That the motion before his Honor should be decided in the same way as if the purchaser of Rice Hope had come for a specific performance of his contract; and that the decision of this application should be made upon the contract, as it appears in the master's report, viz:—a contract for the sale of property worth upwards of 40,000 dollars, for 11,000 dollars. And it is contended, that the inadequacy of consideration, with the circumstances of surprise on the parties to this application, furnishes a sufficient ground to set aside such a purchase; a fortiori, to prevent this court from confirming it, which is equivalent to a decree for specific performance.

2. But if the decision proceed upon the consideration of the price which the purchaser is actually to pay, then it is insisted that the difference between the price to be paid to the master, and the real price to be paid by the purchaser, is the result of an underhand agreement between the mortgagor, the first mortgagee, the last mortgagee and the purchaser, to the injury of the intervening mortgagees, and for that reason void.

In support of which proposition, they maintain,

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*1. That the master is but the agent of the parties having an interest in the premises sold, viz: the mortgagor and mortgagees: and that the contract made by the purchaser in this case is such as would not entitle him to a specific performance against Barguet and Telfair. But if the master is not the agent of the parties, then he must be deemed the agent of the court: and the court must be considered the vendor. But if the court be the vendor, the mere proposal of such an offer, as that of the Bank of Charleston, would be a contempt of its authority and justice.

2. That if this contract could not stand in reference to an ordinary case, between vendor and purchaser, much less can it be supported in reference to a judicial sale; because it is in violation of the decree under which the sale was made. By that decree, Barguet and Timothy were to be paid out of the purchase money next after the mortgage debt due to the Bank of Charleston, S. C. By the contract which the court is called to confirm, they are not to be paid at all; and the purchase money which belongs to them, is to be appropriated by others.

3. That this attempt of the purchaser and parties, to set aside the directions of the court, as to the application of the purchase money, borrows no aid from the circumstance, that the purchaser is the assignee of the first mortgage. Because in this State the first mortgagee has no right at all to tack subsequent advances to his prior security—much less can the assignee of the first mortgage tack subsequent advances to the mortgage assigned to him, against the positive decree of the court. Nor is it allowed in this country or in any other, to a creditor who knows of an intervening incumbrance, when he lends his money, to tack the new debt to the old, or to better his situation by getting in the legal estate.

4. That upon principles universally recognized at law, as well as in equity, the parties to this application should be relieved against the contract made by the master with Mr. Gourdin, for the Bank of Charleston, S. C., either by setting aside the contract of purchase altogether, or by compelling the purchaser, out of the money which his Honor considers as the real price of the property, to pay the mortgages of Barguet and Timothy, according to their rank, as established by the decrees of 16th and 25th of March, 1843.

Petigru and Preston, for the appellants.
Bailey and Memminger, contra.

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*MARTIN & WALTER v. THOMAS EVANS, Sr. et al.

(Columbia. May, 1845.)

Before Dunkin, Ch., at Marion, February, 1844.

The facts of this case will be sufficiently understood from the decree of the circuit court, which is as follows:

Dunkin, Ch. This suit is on behalf of the creditors of Thomas Evans, Sr. The sheriff testified that he had exhausted all the property of Thomas Evans, Sr., and that there remained in his office unsatisfied executions to the amount of about twenty thousand dollars, and that he had Thomas Evans now in his custody, applying for the benefit of the insolvent debtor's law.

The principal object of the bill is to set aside certain sales of Thomas Evans' property, made by the sheriff on the 3d October, and on the seventh November, 1842.

It is proper to premise that the court has been unable to perceive any evidence of fraud, or even impropriety, in the conduct of Thomas Evans in relation to the sale of the 3d October, which seems to be the principal ground of complaint. All his real estate was under levy, and had been advertised for sale at the suit of various creditors, on the first Monday in October. The country was at that time in a state of great pecuniary difficulties. Money was scarce, and land entirely unsalable. The witness, Col. Durant, testified that he saw land repeatedly put up by the sheriff, but that no bid whatever could be obtained. On the 17th of September, the defendant, (Thos. Evans) wrote to Martin & Walters, stating that he had understood that their attorney, W. W. Harllee, Esq. was to bid on his land, that they no doubt would be able to obtain it at a great sacrifice, and promising from the growing crop to pay them $500 (about one-third of their debt.) Their reply of the 21st Sept. says: "That if they were sure that he would pay off this debt by the first of December, they would wait on him;" they proceed to state that "they would stop the sale on the first of October, and see how he got on, reserving the right of selling in November or December if they should see fit, and requesting him to shew this part

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*of their letter to W. W. Harllee, Esq." The letter was shewn to Gen. Harllee, but he had no authority to stop the sale, nor did he pretend to exercise such authority. The sale took place, because, (as the sheriff stated to the defendant, Evans,) there were so many executions pressing, that he was obliged to sell. Thomas Evans was not present at the sale except for a moment, when some question arose in regard to a small piece of land. Nor was there any evidence whatever, of collusion or misrepresentation on the part of the sheriff. It is deemed proper to say thus much in consequence of the allegations and inferences set forth in the bill, although they were not urged in the argument. But there are other objections offered to the sale of October, 1842.

The defendant, William Evans, was surety to his brother, Thomas Evans, for about twenty thousand dollars—Dr. Robert Harllee was also one of the endorsers of Thomas Evans, on a note in the bank, for about two thousand dollars. They met at the Court House on the Monday of the sale, but before the sales commenced. Both found they had the same objects in view, viz: to protect themselves if possible, by a purchase of Thomas Evans' property, if it should be sold low. William Evans said he thought the sureties of his brother ought to have an understanding; to which Dr. Harllee assented. It was then agreed that Dr. Harllee should not bid, and that if the property was knocked off to William Evans, the sureties of Thomas Evans should share pro rata in the benefit of a resale. Dr. Harllee was soon after called away. "In consequence of this arrangement, he made no other efforts, otherwise he would have instructed his agent (presuming the property would go very low) to see and bid, if he could get it at such price." William Freyer testified that he was an execution creditor of Thomas Evans. He was at the sale in October. He had come over to Marion Court House, as he stated, "for the purpose of looking after his case. Before the sale commenced, he had a conversation with Gen. Wm. Evans. Does not recollect who began the conversation. Gen. Evans said, you need not bother yourself; if you will assign your case to me, I will pay you the money for it. Gen. Evans paid him for it. Gen. Evans paid him on that day $100, and afterwards $200, and since then he has paid him in full, and he has assigned to Gen. Evans the execution." On his cross-examination, the witness said "he did not intend to have bid, if Gen. Evans had not bought his claim, as he understood there were elder

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executions *than his, and he had not funds to pay for the property if he bought any; that the Evans' did not know he did not intend to bid; that he kept that fact to himself. Gen. Evans did not request him not to bid." This comprises the most important testimony in relation to what passed, before and at the biddings. R. C. Hamer was also examined, subject to the objection to his testimony. Perhaps his testimony was not very material, but being an execution creditor of Thomas Evans, the court regards him as incompetent.

Under these circumstances, the lands were put up for sale by the sheriff. There was a very considerable crowd of persons in attendance, and some competition. The Alabama tract was knocked off to Hugh Giles for ten dollars. This tract (according to the witness, Col. Durant) was then worth in cash, fifteen hundred dollars. The John Gasque tract was bid off by Gen. Wm. Evans for ($644) six hundred and forty-four dollars. It was worth in cash, (says the witness) three thousand dollars. Two other tracts were bid off by other persons, at very inadequate prices, and the bids, including Giles', subsequently assigned, without valuable consideration, to the defendant, William Evans.

On the subject of public sales, the court can derive little aid from the English authorities. In regard to sales at auction, it is said, in Fuller v. Abrahams, 2 Brod. and Bing. 116, that if a purchaser, by his conduct, deter other persons from bidding, the sale will not be binding. The true principle which should apply to sheriff's sales, seems to be stated in Jones v. Caswell, 3 Johns. Cas. 30: "It is important," says the court, "that sales at auction, and particularly on legal process, should be conducted with good faith and without prejudice to any party." "The forbearance of bidding was the real consideration; and it is a consideration which ought not to be sanctioned in a court of justice. The law has regulated sales on execution with jealous care, and enjoined such proceedings as are likely to promote a fair competition; a combination to prevent such competition, is contrary to morality and sound policy. It operates as a fraud upon the debtor and his remaining creditors, by depriving the former of the opportunity which he ought to possess, and the latter of obtaining a full equivalent for the property which is devoted to the payment of his debts, and opens a door for oppressive speculation." Chancellor Kent (then a Judge of Common Pleas) agreed with the court, "that

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the attempt thus to si*lence bidders, was against public policy, and the interests of the original debtor, whose property was liable to be sacrificed by such combinations."

In Thompson v. Davies, 13 John. R. 114, Mr. Justice Spencer, approving Jones v. Caswell, says: "Whatever may have been the motives of the parties in making the agreement, and however upright their intentions, the question recurs, is not the promise made by the defendant void, as it contravened established principles of public policy? It has been urged that the party was not bound to bid; that," says the Judge, "is not the test of the principle. In none of the cases cited was the party bound to bid, but, being at liberty to bid, suffered himself to be bought off in a way which might prevent a fair competition. The abstaining from bidding upon concert and by agreement, under a promise of benefit for thus abstaining, is the very evil the law intends to repress; a public auction is open to every one, but there must be no combination among persons competent to bid, silencing such bidders, for the tendency to sacrifice the debtor's property is inevitable. The principle is of too salutary a nature to permit any refinements which go to sap or subvert it."

The foregoing were cases at law on notes given in consideration of forbearance to bid. But in Troup v. Wood, 4 J. C. R. 228–254, where there was an agreement by the owner of the execution with certain other persons to prevent the usual competition at a sheriff's sale, whereby the property was sold for a mere nominal price, it was held that the sale was void. In Rowe v. Cockrell, Bailey's Eq. 126, a purchase at sheriff's sale was set aside, but that decree was founded on circumstances of actual fraud in the party. In this case, William Evans was the surety of his brother, a stronger situation than that of a creditor. It seems to have been understood both by himself and the other sureties, that their only chance for protection was in purchasing the property low and taking the advantage of a re-sale on more inviting terms. Their object was not to speculate for the purpose of obtaining an undue advantage, but rather to seize a plank in the wreck. Whether under any circumstances the property purchased would more than indemnify the sureties, was a question not easily solved, but which the court does not deem it necessary to investigate or determine. In the language of Mr. Justice Spencer, whatever may have been the motives of the parties, and however upright the intentions, the conduct of the defendant in thus silencing those who

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were at liberty to bid, had *a tendency to prevent fair competition, and "contravened established principles of public policy." It is well known that property, particularly real estate, is usually sacrificed when sold by the sheriff under execution, yet the court has never regarded itself at liberty to interfere where the sale was regular, and competition open. In Stockdale v. Yongue, Rice Eq. 3, the defendant had purchased the land at a fiftieth part of its real value, yet the court held the principle as well settled, that mere inadequacy of consideration would not authorize the intervention of the court; that it would be particularly mischievous to apply a different principle to sales under judicial process, &c. But this is one of the reasons which has rendered it incumbent on the court to regard such sales with jealous care, and has induced the Legislature to establish safeguards for the security, as well of creditors, as of the unfortunate individual whose property is thus subjected to compulsory sale. If Hugh Giles had insisted on his purchase of the Alabama tract at ten dollars, it is not perceived that he could have been divested of his title. He appears to have known nothing of the arrangements made by the other parties. He bid with motives of benevolence, but he made no communication of his motives to any one; in the same spirit he transferred his bid to the defendant, William Evans. He can derive no more advantage from it, but stands in the same situation as if he were the original bidder. He takes it infected with the objection that competition was not full and free; and he is not permitted to avail himself of any advantage which may have resulted from the suppression of biddings. It was argued that Freyer did not intend to bid, but as is said by Judge Spencer, in Thompson v. Davies, "that is not the

test of the principle. He was at liberty to bid, and suffered himself to be bought off in a way which might prevent a fair competition." Freyer attended the sale for the purpose of looking after his execution. He may not have come with the intention of bidding; but when he saw the Alabama tract knocked off to Hugh Giles for ten dollars, who can say that if his interest had not been extinguished he would not have become a competitor. In the language of the same Judge, "the principle is too salutary to permit any refinements which go to sap or subvert it." The court is of opinion that the sales of real estate made on the first Monday of October, must be set aside, and that the same must be resold by the sheriff of Marion district.

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*It is proper next to consider the objections to the sales in November, 1842.

The sheriff had advertised for sale, under executions against Thomas Evans, amongst other things, nineteen negroes, also some horses, cattle, household furniture, &c. The defendant, William Evans, held a mortgage of the negroes dated 22d February, 1839. He had become surety on a bond of Thomas Evans to Elijah P. Coachman, for eighteen thousand dollars, payable in six equal annual instalments. The condition of the mortgage was, that if Thomas Evans should pay the bond the mortgage should be void. At the time of the sheriff's sale in November, 1842, the mortgage was forfeited; and ultimately the defendant was obliged to pay Coachman nine thousand five hundred and sixty-eight dollars, on account of his suretyship. William Evans attended the sale, and, when the negroes were offered, he forbade the sale, exhibiting his mortgage. The sheriff persisted, and they were knocked off to him for a nominal sum. After the case of the Bank against Gourdin, Holmes, et al., [Speers, Eq. 439,] decided at Charleston in February last, it is hardly necessary to say that the sheriff had no authority to make the levy, and that the sale was properly forbid. The legal title was in William Evans. If it is supposed that the property is more than is sufficient to indemnify him, the proper parties may still have their remedy.

No other objection was made to the sale in November which might not probably be urged against every sheriff's sale. No improper measures were resorted to for the purpose of supressing competition. It may be that the prices were inadequate. It was a kind of property not likely to sell advantageously at any time, and very likely to be sacrificed at sheriff's sales. There was nothing, however, to prevent creditors from protecting themselves; the defendant, William Evans, purchased the property and paid his money to the sheriff. It may here be necessary to remark, that any claim he may have had under the Foxworth execution had been already satisfied in full.

It is urged that William Evans, after the sales in November, suffered Thomas Evans to remain in possession of the property which he had thus purchased, and that, according to the rule in Smith v. Henry, 1 Hill, 22, this possession is per se fraudulent, not susceptible of explanation, and that the sale must be set aside. This is certainly a misapplication of the rule. Kidd v. Rawlinson, 2 Bos. & Pull. 59, and Watkins v. Birch, 823,

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*are both cited with approbation in Smith v. Henry, as entirely reconcileable with the rule therein indicated. In the former case the goods of A. were put up at sheriff's sale, and bid off by his brother-in-law, who, out of kindness allowed A. to retain the possession of the goods; in the latter case goods were bought and paid for at sheriff's sale, and then allowed to remain in the possession of the defendant, on rent, or hire. This, in both cases, was held to be no fraud. The distinction is fully stated by the court in Smith v. Henry, and it is not necessary to dwell further upon it. Chancellor Kent, in 2 Commentaries, 409, also cites the cases in which the purchasers of goods, seized on execution, have been protected, "though the goods were suffered to continue in the possession of the defendants, on the ground that the transaction was necessarily notorious to the whole neighborhood, and the execution notice to the world, and the cases, being free from fraud, in fact, were, under those circumstances, free from the inference of fraud in law." But in the case before the court, the delay in dispossessing the defendant can hardly be regarded as a circumstance in itself of any weight. The sale took place on the 7th of November, 1842, and these proceedings were instituted almost immediately afterwards; the bill being sworn to in January, 1843, and the injunction and conditional order for a receiver made on the 16th February.

Thomas Evans and Thomas Godbold had been the administrators of Thomas Godbold, the elder. The sale bill, dated April, 1821, amounted to $3,219.37. A bill was filed for an account and settlement of the estate; and at February Term, 1834, a report was made charging the defendants, Thomas Evans, with a balance of $5,294.47, and interest from the 1st February, 1834, and Thomas Godbold with a balance of $662.39, and interest from the 1st February, 1836; which report was duly confirmed, and an execution issued for the amount due to the distributees respectively, on the 14th July, 1834, and lodged on that day in the sheriff's office. It seems to be conceded that all the distributees were paid except Stephen Godbold, whose share was $1,391.40, with interest from 1st February, 1834. No credits are entered on the execution subsequent to 1st February, 1835. On the 6th September, 1842, the defendant, William Evans, on understanding, as he says, from Stephen Godbold, that his share

was unpaid, took an assignment of his interests, and gave him his note for two thousand dollars, or thereabouts, being the amount then due. In the settlement of William Ev-

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ans *with the sheriff for his purchase of the land, to wit, on the 4th October, 1842, the amount apparently due to Stephen Godbold on this execution was allowed. The bill charges that Stephen Godbold, as well as all the other parties interested in the execution, had been paid and satisfied prior to the assignment to the defendant, William Evans, and several circumstances are stated raising that inference. As to Stephen Godbold the bill is taken pro confesso. William Evans states that he knows nothing but as derived from Godbold. The answer of Thomas Evans states that he was indebted to Stephen Godbold in large sums of money, besides what was due to him on this execution, that, in making him payments, he took from him loose receipts, in some of which the above named case is stated, in others without any reference to the case; but simply for so much money, to be accounted for on settlement; that he has paid S. Godbold more than sufficient to satisfy his part of the execution if it were so applied; that it was his (defendant's) original intention, and he thinks the understanding between him and the said Stephen Godbold, that the said payments should be so applied on settlement, but as the application of the fund had not been actually credited on the execution, and his affairs becoming very embarrassed, he supposes that the said Stephen Godbold innocently thought he could control the application of said payments to either class of indebtedness, and, by crediting the same to claims against him not in judgment, might well secure the whole." When this statement of Thomas Evans is taken in connexion with the silence of Stephen Godbold, who had so strong an interest to repel the charge of satisfaction, and who was in fact in the Court House, during a part of the hearing, the court is driven to the conclusion that his claim under the execution has been extinguished, and that his assignment to William Evans passed nothing. The remaining question relates to the validity of the title of Thomas Evans, Jr., to what is called the Catfish land. The statement of facts is taken substantially from the answer, and the testimony of Thomas Evans, Sr.

The land was purchased at sheriff's sale by E. Leggett, for Thomas Evans the elder, who was then absent. The sheriff's deed to Leggett is dated in September, 1824. Leggett was a clerk for Thomas Evans, Sr., who was for many years in business at Marion Court House. In January, 1827, Leggett, being about to leave the employment of Thomas Evans, suggested that the title should be changed, and Thomas Evans, Sr., requested

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*him to make a deed of the land to his son, Thomas Evans, Jr., then a very young boy. This was accordingly done, and both deeds proved and recorded in March, 1827. The land cost Thomas Evans the elder, seven hundred dollars. He always has been in possession of the land; and his son, who is recently of age, has always resided with him. On the part of the complainants it is insisted, that this deed being voluntary, and the donor indebted at the time, it cannot be sustained. The general principles on this subject seem now very well established. Yet difficulties and doubts frequently arise in the application of them to the circumstances of the several cases. In 1821, Thomas Evans was embarrassed; in 1823, he was insolvent. In 1826 and 1827, he owned the house and lot on which he resided, and ten or twelve negroes; regarded himself, and was regarded by others, as prosperous; he was in mercantile business, kept stage horses for $2,500 per annum which was very profitable. Yet at this time, to wit, in 1826, 1827 and 1828, he was indebted, and executions stood against him in the sheriff's office. All these executions have since been satisfied. One was a judgment and execution in favor of John Gibson, on which a balance was due on the 12th April, 1832. On that day he came to a general settlement of his money transactions with John Gibson. Satisfaction was entered on the judgment, and he gave Gibson a new note for twelve hundred and fifty dollars, being the amount then due him on their entire transactions. On this note the administrator of Gibson obtained judgment against Thomas Evans, in March 1841, which is still due: But in 1827, Thomas Evans, as has been stated, was one of the administrators of Thomas Godbold, deceased. He was chargeable with the amount of the sale bill, (upwards of three thousand dollars,) which probably fell due in 1822. Proceedings were instituted for an account of his administration, and in February, 1834, by a decree of this Court, he was found indebted to that estate in the sum of five thousand two hundred and ninety-four dollars. This decree the Court has every reason to believe, has also been satisfied; but at what time it was ultimately paid in full does not appear. In November, 1834, a payment of five hundred dollars was made by Thomas Evans: but when he settled with the heirs of Foxworth, and with Stephen Godbold, his receipts would perhaps show. It would seem from his answer, that he has always been indebted to Stephen Godbold on some account, from the date of the decree until this time, and that he continues his debtor, in the language of his

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answer, * "by promissory notes and accounts." In February, 1839, Thomas Evans

became indebted to E. P. Coachman, in the sum of eighteen thousand dollars, and during that year to many other persons. Judgments to a large amount were obtained against him in 1840, 1841, and 1842, and which it is admitted could never be satisfied by the sales of his property, under the most advantageous circumstances.

In McElwee v. Sutton, 2 Bail. 130, the Court say "so too, if the donor at the time of the gift is indebted, but subsequently pays his debts, and is entirely free from debt, then such subsequent indebtedness cannot vitiate the gift; but not if the old debts are paid off by creating new ones," &c. So in Izard v. Izard, Bail. Eq. 237, "If a man were ever so much indebted at the time of the settlement, and should afterwards pay off his debts and become totally unembarrassed, these debts could not affect the settlement, though he should subsequently become insolvent. He has proved his solvency at the time of the settlement." According to these principles, when an existing indebtedness has been shown, it becomes incumbent upon those averring the validity of the gift, to prove that the donor subsequently became totally unembarrassed. But he has not ceased to be indebted to Gibson from 1822 until this time, and the execution of Gibson's administrator now claims payment of his estate; it is not shown that his liability to the heirs of Godbold was removed prior to 1839, when his heavy responsibilities were assumed. It must be remarked, too, that the onus was on him, and the evidence, if it existed, was in his power alone to produce. He was indebted at the time of the gift. He has not been shown to be clear of debt at any period since: whatever may have been the purity and integrity of his motives, the Court is obliged, as is said in Izard v. Izard, to lay down for themselves some "tests by which to form a judgment, and the making a certain inference, from certain appearances, becomes at length a subsidiary rule of law." The deed to Thomas Evans, Jr., must therefore be set aside, and the property subjected to the payment of the creditors of Thomas Evans the elder.

It is adjudged and declared, that the sales of the real estate of Thomas Evans, made by the sheriff of Marion District, on the sale day of October, 1842, were void; and also, that the deed to Thomas Evans, Jr., is void, so far as the rights of the creditors of Thomas Evans the elder are affected; and it is ordered and decreed, that the real estate

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first mentioned, be sold by the sher*iff of Marion District, and the proceeds be appropriated to the payment of the creditors of the said Thomas Evans, according to the priority of their respective liens, and the sheriff refund to the said William Evans any sums which he may have actually paid to the sheriff, on account of his purchases in October, 1842.

It is further ordered and decreed, that the real estate described in the conveyance from Ebenezer Leggett to Thomas Evans, Jr., dated 9th January, 1827, be sold by E. A. Law, Esq., commissioner in equity for Darlington District, on some convenient sale day at Marion Court House, after the usual notice; for one-third cash, the balance on a credit of twelve months, with interest; purchaser giving bond with approved personal security, and mortgage of the premises; and that the said commissioner hold the proceeds subject to the further order of the Court. It is finally ordered, that the complainants have leave to make the assignee of Thomas Evans, under the insolvent debtor's Act, party to these proceedings; and also, to apply for such further order or orders, as may, from time to time, be deemed necessary.

The defendants, William Evans and Thomas Evans, Junior, appealed, on the following grounds:

1. Because the sales of the real estate of Thomas Evans, Sr., made by the sheriff in October, A. D. 1842, were valid, and not infected by any agreement in fraud of the law, or in contravention of any principle of public policy, and his Honor on circuit should so have decreed.

2. Because an agreement (if proven) between two bidders to purchase jointly at a sheriff's sale, where there is other competition, and such agreement is bona fide, and unattended with actual fraud, and corrupt or oppressive combination, is not against any principle of public policy, and does not invalidate the sale: and his Honor on circuit ought so to have decreed.

3. Because the deed of conveyance to Thomas Evans, Jr., from Ebenezer Leggett, of the Cat-fish lands, under the circumstances and proof in this case, vested a good title to the same in the said Thomas Evans, Jr.; and his Honor on circuit should so have decreed.

4. Because no creditor of Thomas Evans, Sr., subsisting at the time of the execution of the deed to Thomas Evans, Jr., being a party to the proceedings in this case, and claiming to set aside the deed, nothing short of actual fraud on the part of Thomas Evans, Sr., in procuring said deed, can vitiate it so as to permit subsequent creditors to set it

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aside; and as no fraud on *the part of the said Thomas Evans, Sr., was proven, his Honor ought to have decreed in favor of the deed.

5. Because the recording and lapse of time, from the execution and recording of said deed, perfected in Thomas Evans, Jr., a good title to the lands in said deed named.

Sims, for the appellants.
Harllee & Pettigru, contra.

In Hamilton v. Hamilton, the opinion of the court was delivered by

DUNKIN, Ch. The court is of opinion, that in order to succeed in their motion, the appellants must present a case which would entitle them to the rescission of an executed contract. It is necessary, then, to inquire whether, on principle and precedent, the circumstances developed warrant the interference of the court. The brief details the facts, and they are substantially sustained by the affidavits which accompany it. A sale had been ordered by the Court of Chancery, for the satisfaction of the liens on Rice Hope, a plantation on Savannah river. The debts and priorities were established and fixed by the decree directing the sale. The plantation belonged to the trustee of Mrs. Hamilton, whose right had been judicially declared to be subordinate only to those of the lien creditors. Among these liens were two mortgages held by the Bank of Charleston, which were recognized and protected by the decree. The Bank had also a demand against Gen. Hamilton, amounting to about $16,000, for which they had no claim whatever on the land, any more than if it had been the property of a stranger, and which is described in the decree as their "uncovered debt." The trustee of Mrs. Hamilton was desirous of becoming the purchaser of the property at the master's sales; and, after a negotiation, as the witness stated, of more than a twelvemonth with the Bank, it was finally agreed that the Bank would advance the money to enable the trustee to buy the land, upon condition that he would secure the uncovered debt by a mortgage of the property. Up to one o'clock on the day before the sale, "it was thought," says the witness, "both by Gen. Hamilton and the Bank of Charleston, that there would be no bidders for the plantation for any thing like its value, and that the parties holding mortgages would not be likely to bid much, as their claims were comparatively small, and the difficulties of settling Savannah river lands very great, in consequence of the climate." The mortgage of Dr. North, securing

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*a debt of $17,000, was junior to those of the Bank of Charleston, of Barguet and of Timothy, which together amounted to $32,000. In order to reach and satisfy the lien of Dr. North, it was necessary that the land should sell for about $50,000. It was proved that Dr. North, aided by Mr. Adger (on whom there was a contingent liability for North's debt) intended to bid the plantation to that amount. It was also proved, that about one o'clock on the day previous to the sale, both the bank and the trustee of Mrs. Hamilton were informed that there would be competition. Upon further inquiry it was ascertained on the day of the sale, that the competition was on the part of Dr. North. In consequence of this information, the trustee went to the agent of Dr. North. "The object," says he, "in going, was to prevent the Norths from bidding, as I was well satisfied that if they did not bid, the uncovered debt would be secured—if they did bid, it would not be secured." The witness, Mr. Gourdin, was also a Director of the Bank of Charleston, and was one of the committee of the Bank appointed to arrange the matter. A negotiation accordingly took place, and an arrangement was ultimately made, by which, if the land did not sell for more than $30,000, it was to be bid off by the Bank, North's debt was to be secured by a mortgage of the property, to come next after the mortgage debt of the Bank, and his competition was to be withdrawn. The plantation was to be, in fact, held by the trustee of Mrs. Hamilton, who, after satisfying the mortgages of the Bank and of Dr. North, was to apply the net proceeds of the crops towards the discharge of the uncovered debt of the Bank of Charleston. The sale took place, and the plantation was knocked down to the trustee of Mrs. Hamilton for $11,000. The property was proved to be worth about $40,000. The direct effect, then, of the arrangement, was to withdraw from the market a competitor who was prepared to bid $50,000, and the result was that property, intrinsically worth $40,000, was knocked down to one who was a party to the arrangement, for $11,000. The price bid is insufficient to satisfy the mortgages of the Bank, and if the sale stands, Barguet and Timothy lose their debts. These are not all of the facts of the case, but they are all which it is deemed necessary to repeat, in order to render intelligible the judgment of the court.

The principle which governs all sales at auction, is that there should be full and fair competition. Any agreement, the object and effect of which is to chill the sale and stifle

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competition, is *illegal, and the party to the agreement can derive no benefit from the sale. Such is the doctrine recognized by the text writers, and well sustained by the authorities. Sir E. Sugden says that, in sales before the master, "although the report be absolutely confirmed, and the purchaser entitled to demand a conveyance, the sale will be set aside if the parties have agreed not to bid against each other." Sug. Vend. 38. So well understood is the rule in England, that in Fuller v. Abrams, 3 Brod. & Bing. 116, where, at a public sale by the assignees of a bankrupt, the purchaser proclaimed to the by-standers that he had a claim against the owner of the property, by whom, he said, he had been ill-used, and by thus exciting their sympathies, obtained the property at one fourth of its value, the Court of Common Pleas declared themselves clearly of opinion that a sale under these circumstances could not be supported. "Agreements," says Mr. Justice Story, § 293, "whereby parties engage not to bid against each other at a public

auction, especially in cases where such auctions are directed or required by law, as in cases of sales of property under execution, are held void; for they are unconscientious, and against public policy, and have a tendency injuriously to affect the character and value of sales at public auction, and mislead private confidence."

In ordinary auctions, the owner of the property is free to act. He may sell or withdraw his estate from the auctioneer's hammer. According to the authorities, he is even permitted to employ a bidder, who may prevent the sale below a limited price. But in judicial sales, no such option is allowed. The sale is positive, is generally against the will of the debtor, and not unfrequently, against the desires and interests of many of the creditors. No safeguards, which the law can interpose, do or will prevent the sacrifice of some interests, but all should have the chances of protection that are afforded by free competition. In Jones v. Caswell, 3 Johns. Cas. 30, Chancellor Kent, (then a Judge of the Common Pleas,) agrees with the court in the "importance that sales at auction, and particularly on legal process, should be conducted with good faith, and without prejudice to any party;" that "the attempt to silence bidders is against public policy, and the interests of the original debtor, whose property was liable to be sacrificed by such combinations." And, reiterating the rule in Troup v. Wood, 4 J. C. R. 254, he says, "the law has regulated sales on execution with a jealous care, and a combination to prevent

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competition is contrary to sound *policy. It operates injuriously both to the debtor and his remaining creditors, by depriving the former of the opportunity of obtaining a full equivalent for the property which is devoted to the payment of his debts, and opens a door for oppressive speculation." The interests of the creditors are in equal jeopardy with those of the debtor, and they may be equally incompetent with him to guard against the ruinous consequences of stifled competition. Barbara Barguet and the representative of Timothy might have attended the sale of Rice Hope, and been the witnesses of the sacrifice, but they had no power to avert it. They could neither pay twenty-two thousand dollars to the Bank of Charleston, nor become the proprietors of a Savannah river plantation. They sought the payment of their debt, and the law secured to them, in the language of Chancellor Kent, the opportunity of obtaining a fair equivalent for the property devoted to the payment of that debt, which is afforded only by free competition. Judge Spencer says in Thompson v. Davies, 13 J. R. 113, "a public auction is open to every one, but there must be no combination among persons competent to bid, silencing such bidders, for the tendency to sacrifice the debtor's property is inevitable." "The principle is of too salutary a nature to permit any refinements which tend to sap or subvert it." It may be added that these principles depend for their vindication on no local statute, on no peculiar usage. They have a much higher origin, and have been promptly recognized in every State where it has been found necessary to consider them. In North Carolina the subject has been very ably discussed by Mr. Ch. J. Henderson. In Smith v. Greenlee, 2 Dev. 128, the principles are thus condensed: "A sale at auction is a sale to the best bidder, its object, a fair price, its means competition. Any agreement, therefore, to stifle competition, is a violation of the principles on which the sale is founded. It not only vitiates the contract between the parties, so that they can claim nothing from each other, but also any purchase made under it, their claims against the vendor being weaker than those against each other—policy alone forbidding that the last mentioned should be enforced, but both policy and justice uniting to condemn the former. If this be the rule with regard to auctions instituted by private individuals, a fortiori should it be as to those public auctions instituted by law for great public purposes, such as execution sales, where the object is to secure the creditor, if possible, the satisfaction of his debt, and, at the same time, to obtain for the debtor a

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fair *price for his property. Men may, from the very worst of motives, both towards the creditor and the debtor, abstain from bidding without incurring any legal censure. They have a right to abstain from action—they may act or not, at their pleasure; but, if they do act, they must do it fairly. They cannot claim to themselves any benefit from a sale, the first principles of which they have violated, fair competition being the very essence of an auction sale. An agreement not to bid, for the purpose of paralyzing competition, vitiates the sale so that no party to such agreement can claim any benefit from it. The sale is void at law. There is no part of the transaction," concludes the Judge, "which should be preserved."

It is shown, however, in that, as in other cases, that persons may, properly, unite for the purpose of making a bid among themselves, where no one of the associates was able to purchase, or desired to own, the entire property exposed for sale. The effect of such an agreement is to advance the object which the policy of the law favors, a fair price to the parties interested in the article sold. In Phippen v. Stickney, 3 Met. 385, where the general rule is examined and approved by the Supreme Court of Massachusetts, this distinction is noticed and illustrated. The court say that, "after an examination of the adjudged cases, they cannot judicially declare that every contract between two or more individuals, in which it

may be stipulated that one is to be the purchaser for the joint benefit of himself and another, and that the other is not to interfere with his bidding, shall be held void as a violation of the rights of the vendor and as against public policy, merely because he, who seeks to enforce the contract, may have been thereby induced to abstain from bidding. Cases may readily be imagined, and are of frequent occurrence in sales of large magnitude, where two or more do unite, and are enabled to become purchasers, when neither of them could otherwise have participated in the bidding. By such an association the interest of the vendor as well as that of the vendee will be directly advanced." But they declare that the doctrine of invalidating such contracts applies "to all combinations having for their object to stifle fair competition at the biddings, with a design of becoming the purchasers at a price less than the fair value of the property." The current of decisions is so uniform, and the general principle so clearly announced, that it is not deemed necessary further to consider its validity, or the importance of preserving it. It is prop-

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er to notice the consideration, which was *so strongly and so confidently urged, as rendering the rule inapplicable to this case. The argument was that this was not a combination to paralyze, but to promote, competition —that the trustee agreed to pay a much larger price than the highest bidder, Dr. North, would have offered. But this does not meet the policy of the law, nor satisfy the exigency of the rule. He did not agree to pay to the right persons. The object of the law is to secure a fair price to those interested in the property. If a purchaser at sheriff's sale silences competition by buying off the bidders, and thereby has the property knocked off to him at one-fourth its value, it may be that the speculation will prove unprofitable—he may have agreed to pay, by this complicated arrangement, more than the property was worth, and more than the most enterprizing bidder would have offered—but this affords no relief, and is no reply to the defendant in the proceedings, or to his execution creditors. The inquiry of the law is, not whether the purchaser made a good or a bad bargain, but whether the persons interested in the property had the benefit of a full and free competition. If not, the sale is void. The whole transaction is void; and can be enforced by none of the parties to it, even against each other. The purchaser of Rice Hope agreed to pay a full price by assuming to discharge the debt of a third person to the Bank of Charleston. The land was not bound for that debt in any way—and the mortgagees of Rice Hope—those interested in the sale, derived no benefit from that payment, or from that part of the arrangement. In judicial sales this court has established the principle that no inadequacy of consideration, however gross, should impair the validity of the contract. In Stockdale v. Yongue, Rice Eq. 3, the land was bid off at sheriff's sales at one-fiftieth part of its real value. There was no suppression of biddings, no unfairness, and the purchaser was held entitled to the benefit of his contract. This was due to the public—to the security of purchasers under judicial process. But, while thus sternly protecting its own sales, it is the duty of the court to take care that none of the principles of public sales are violated. Men, intending no injustice, desiring only to protect their own interests, may misapprehend, or forget, or disregard those principles. It is the province of courts to expound and enforce them. "They are too salutary"—in the language of Judge Spencer—"to permit any refinements which have a tendency to sap or subvert them."

It is ordered and decreed, that the sale of

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Rice Hope made by *Mr. Gray on the 3d January, 1844, be set aside and annulled, and that the cause be remanded to the Circuit Court of Equity for Charleston District, to make such order, at the next sittings thereof, for the sale of Rice Hope, and the execution of the decree of March, 1843, as to the said court may seem just and proper.

JOHNSON, Ch., and O'NEALL, BUTLER, WARDLAW and FROST, JJ., concurred.

RICHARDSON, J., absent at the argument from indisposition.

In the case of Martin & Walker v. Evans the opinion of the court was also delivered by

DUNKIN, Ch. For the reasons stated in the decree, as well as those in Hamilton v. Hamilton, the court is of opinion that, on the principal ground of appeal, the motion should be dismissed.

But in regard to the conveyance of 1827 to Thomas Evans, Junior, the court thinks the decree should be reformed. The deed was recorded soon after its date. The title never vested in Thomas Evans, Senior. But it was a gift of so much money to his son. None of his then existing creditors now seek to impeach the transaction. It is not certain that any such exist. He was indebted, however, at the time of the gift, and he did not prove to the satisfaction of the Chancellor that he had, at any time, ceased to be in debt.

The question then is presented whether, after a lapse of thirteen or fifteen years, a son shall be called on to refund a sum of money given to him by his father under the circumstances detailed in the decree. In Partridge v. Gopp, 1 Eden, 163, Lord Northington, with great reluctance, and against his first impressions, held the child accountable, but it appears from the note of Mr. Henley that the decision was not very satisfactory to

the profession. It must be remarked too that the Lord Keeper thought there were circumstances in that transaction, which, as he expressed it, "seemed to smell strong of fraud and experiment." There was no doubt of the good faith of Thomas Evans, Sr., in this matter. Considering his means and the extent of business in which he was engaged, the gift to his son was inconsiderable, and might well be made with the purest motives. It is not necessary to determine more than the case before us, and the court is of opinion that, under the circumstances, the son was not responsible to the complainants; and that the decretal order subjecting the Cattish lands to the payment of their demands

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must *be reversed. In other respects the decree of the circuit court is affirmed, and the appeal dismissed.

JOHNSON, Ch., and O'NEALL, BUTLER, WARDLAW and FROST, JJ., concurred.

HARPER, Ch. If it were of any importance to the case, I should think it singular to contend, that the case of Hamilton v. Hamilton is to be considered as if it were a bill by the purchasers of the property for a specific performance of the contract. Certainly the intermediate mortgagees, as stated in the circuit decree, were the actors in the application which was heard and determined. The purchasers were contented. Some confusion of ideas seems to have arisen from the irregular manner in which the case was brought before the court. This was by the consent of all the parties, who were anxious to have their rights determined on: but I think the precedent a bad one, and hope it will not be followed in any other instance. But suppose the purchasers had not consented. Then, after giving the mortgagees a reasonable time to file their bill, the master would as of course have executed a conveyance in pursuance of his official duty. Or if he had refused to do so, and the purchasers had taken out a rule against him, the court would as of course have made the rule absolute, unless upon sufficient cause shewn to the contrary. Suppose him to have shewn for cause the facts and circumstances which are in evidence, as stated to him on the part of the mortgagees, (though it would be singular that he should shew for cause the statements of third persons,) could the court have proceeded to hear evidence and determine the merits of the cause in such a proceeding? The object of a rule is to compel the officers of the court to do their duty, when there is no dispute about facts: certainly not to try and determine litigated issues. This forms a distinction between the case of contract made with an individual and one made with an officer of the court, who is subject to its control by a summary proceeding. Such a return of the officer would be no sufficient cause, as the parties might file their bill and try their rights in a regular manner.

The only question which seems to have been regarded as material is the inducing of a person not to bid at a sale by auction. It seems to be understood that there is some rule (if rule it may be called, for I really have not perceived any definite rule on the subject suggested or contended for) avoiding purchases made under such circumstances, as contrary to public policy. I will venture to say that the utmost that can be made of

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the cases is, that *such an act is prima facie evidence of fraud in the purchaser, unless explained. To such a rule there can be no objection. Indeed the natural inference is that the party so deterring bidders, does it with a view to cause a sacrifice of the property and to procure unjust gain to himself. This would be actual covenous practice, as to the owner of the property, and, according to circumstances, might perhaps be so as against creditors,—for the rule, even as I have stated it, cannot be of universal application as to creditors.

The case of Jones v. Caswell, 3 Johns. Cas. 29, is evidently the foundation of the American cases, which were cited, on the subject. Yet if we examine the case itself, apart from the dicta, I cannot perceive that it bears at all on the matter we are considering. In that case (to state it shortly) the defendants had purchased a tract of land, bound by a judgment of which they had no notice. The land was advertised for sale, and the defendants applied to the owner of the judgment and offered to pay it off if he would not bid against them. He refused, unless they would also give him their notes to the amount of one hundred and fifty dollars, which they did. On these notes the suit was brought. Now, whether they were deterred by ignorance or whatever cause, it is plain that the defendants had nothing to do but to pay off the execution in the sheriff's office and their title would have been perfect. If there was any fraud it was not on the sale, but on the defendants, by taking advantage of their ignorance or alarming their fears. If the plaintiff had bid more than the amount of his execution, he would have lost his money. If, by affecting to bid, he had induced the defendants to bid more, he would have been guilty of, at least, a moral fraud on them. No bidder was deterred who had any right to bid.

The case of Thompson v. Davies, 13 Johns. R. 112, very fully sustains the decree in Martin & Walter v. Evans. That case purports to be decided on the authority of Jones v. Caswell, by Chief Justice Spencer. With the utmost deference for that very eminent Judge, I must be permitted to say that I do not perceive the grounds of law, justice or reason on which it can be supported. It is

supported by the case of Jones v. Caswell, as we have seen. The plaintiff had a senior, and, in effect, the defendant a junior execution against one Doughty. They had also been under liabilities for Doughty as endorsers, which the plaintiff had discharged.

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The defendant had also *other claims against Doughty to a considerable amount. Real and personal estate of Doughty was levied on under execution, and it was agreed between them that the plaintiff should bid for the personal estate to the amount of his execution; that he should give his note to the defendant for $225, part of the liability as endorsers above mentioned, (as it is stated) which he did, and afterwards paid; that defendant should bid off the real estate and afterwards sell it to the best advantage, and if it should sell for more than enough to satisfy his own demands, to reimburse plaintiff the $225. Plaintiff did bid off the personal estate to the amount of his execution, which was more than its value. Defendant bid off the real estate and afterwards sold it at a large advance. The action was for the $225. Here was a combination, not to sacrifice the property, but to make it, both real and personal, sell higher than it otherwise would have done, and to apply the proceeds to the payment of debts. Yet it was held that, however fair the intentions of the parties may have been, the agreement was void on ground of public policy. The agreement was for the benefit of the owner of the property; no other creditors appear to have been in question, and I suppose the defendant was allowed to retain the whole of the advanced price for which he sold the land. It only seems to me that, by the aid of the court, he consummated a fraud on the plaintiff.

I do not think it necessary to examine the other New York cases which were cited. Some of them were cases of the grossest actual fraud, as Troup v. Wood, 4 Johns. Ch. 228, in which there was a combination to sacrifice a large property and to purchase it at a merely nominal price. The same dicta are repeated, that an agreement not to bid at a public sale, is void, as against public policy and tending to fraud.

The decisions of New York were then of great weight in the other States, and deservedly so from the ability of their Judges. The decisions in question have been followed to a certain extent in other States, but in no instance without qualifications and exceptions. And what was the nature of these exceptions? It will upon examination be found uniformly this,—that where the circumstances are such as shew that there was no actual fraudulent intention to occasion a sacrifice of the property, such an agreement may be good: leading to the conclusion I have before expressed, that it can only be regarded as prima facie evidence of fraud. Such was the case cited from North Carolina of Smith v. Greenlee, 2 Dev. 126. The Chief Justice, Henderson, put various cases in which such an agreement may be good, as

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where *the property was too large for either of several bidders, but each desired a part, they might agree that one should bid for the whole, &c. The matter seems to have been put upon its proper footing in Massachusetts, by the case of Phippen v. Stickney, 3 Metc. 384. That was a case in which one party desired to have one portion of the property, which was to be sold entire, and the other another portion. The agreement that one should bid for both, was supported. The New York cases were cited. It was held by Mr. Justice Dewy to "embrace within the rule all fraudulent acts and all combinations, having for their object to stifle fair competition at the biddings, with the design that they should become the purchasers at a price less than the fair value of the property."

The only English case cited was that of Fuller v. Abrahams, 3 Brod. & Bing. 116; 7 Eng. C. L. R. 371. At an auction, a person requested the bystanders not to bid, as he had a claim on the owners, who had used him ill. They did, in effect, abstain from bidding, and he purchased the property for one fourth of its value. Here was a combination by which the property was sacrificed for less than its fair price.

Then the question in this case is (supposing that any bidders were deterred) whether the matter has been sufficiently explained. All the circumstances are before us, and we must determine whether there was or was not actual fraud. What act was there of fraudulent character, as respects the intermediate mortgagees? Is the arrangement between Dr. North, who did not wish to bid, and Mr. Adger, evidence of a fraudulent intention to injure the mortgagees? Why, the whole scope and purport of it was, if carried into full effect, to make them secure beyond the power of casualty. Instead of deterring a bidder, it was to bring a new bidder into the field of competition. Then as to the arrangement between the Bank and Mr. Adger and Dr. North. From the estimated value of the plantation, the strong probability at that time was that it would sell for more than $22,000. In that case, the agreement between Dr. North and Mr. Adger would have held good, and the mortgagees might have been still secured. This is no evidence of any injurious intention towards the mortgagees, nor, so far as we can see, has it produced any injurious effect. Dr. North would of course bid off the land as low as possible. The agreement to bid $50,000, was of course understood, if it should be rendered necessary by competition at the sale. Dr. North (or the gentleman repre-

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*senting the parties who were interested in the bond in his name) knew the extent of

the Bank's liens. Without any agreement, it would have bid high enough to cover these, and had no inducement to bid more. If, without any agreement, it had bid to this extent, and Dr. North had made a nominal advance on that bid, the land would have been knocked down to him, and these mortgagees would have been equally defeated. This might as well be called a fraud on the mortgagees, for if he had bid up to the whole amount of his debt (which the parties seem to think he was bound to do) he would probably have lost his debt, and been compelled to satisfy these mortgagees. Can it make any difference that the Bank was bound by its agreement to bid to this extent? Then as to the arrangement by which the Bank agreed to extend its bid to $30,000. Can this be regarded as a fraud on the mortgagees? It was to secure the payment in toto of the demands of one, and a considerable amount on those of the other. It was to create competition to a certain extent—certainly not to prevent it; still leaving Dr. North's arrangement to be carried into effect, if competition should carry the land beyond the proposed bid. If it did not, no injury was done. I can lay my hand on no fact or arrangement, which, at the time it occurred or was entered into, was not apparently calculated to add to the security of the mortgagees.

The case seems to be argued on no distinct and palpable ground or grounds of fraud, public policy or mistake; but it seemed to be thought that mingled together, they might make out a case for relief. Undoubtedly fraud is contrary to public policy, and relief will be granted in cases of mistake. But the truth is, that the only ground for the mortgagees is this, that debts to which they had a priority have been secured in preference to theirs, and they cannot but imagine there must be some way or other to correct this supposed anomaly. As I have said in the circuit decree, in Hamilton v. Hamilton, "suppose that the Bank and the owners of North's bond, speculating on the chances of intermediate mortgagees failing to attend the sale, or their being unwilling to bid, or from their circumstances unable to purchase, had entered into the agreement, in such event, to bid off the property, as they have done, so as to gain the priority, which they have gained, without doing anything to mislead or deceive the parties, would there have been any thing fraudulent in this?" I will venture to say that no case can be found in the books—certainly none

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has been produced to this court, in *which a bona fide creditor has contrived to obtain satisfaction or security for his debt, that he has been deprived of his advantage, without some actual covenous practice on the party alleging himself to be injured. One creditor prosecutes his suit, perhaps with much trouble and expense, but when he is on the eve of obtaining his judgment, another bona fide creditor obtains from the debtor, security or satisfaction for his debt; this cannot be impeached; though this seems to be taking a hard and injurious advantage of the suing creditor. Or if after judgment and execution, he can obtain money or choses in action, these cannot be taken away from him. Yet the only fraud attempted to be imputed, is the design on the part of Dr. North to secure his debt, and of the Bank to secure its uncovered debt.

The truth is, however, that in legal contemplation, Mr. Cruzer, the trustee of Mrs. Hamilton, or young Mr. Hamilton, was the purchaser. They had nothing to do with the arrangements which are supposed to have deterred bidders, and their only fraud was in consenting that the land should stand encumbered with the debts of Gen. Hamilton to a greater extent than it was before.

Then as to mistake: it is clear that the only mistake was that the parties took up the spontaneous impression, without any cause for it, except that Dr. North was the last incumbrancer, that he would bid at the sale. Indeed, they had rather cause for thinking the other way; for the land was so deeply incumbered before reaching the incumbrance of Dr. North, (according to the evidence about its full value) as to render it almost nugatory for him to attempt to secure his debt, or any material part of it. And it seems no such attempt would have been made, but for the arrangement with Mr. Adger. Neither this nor any other of the subsequent arrangements were communicated to the mortgagees, and could not have influenced their conduct. I see no footing on which this case can stand, unless it be laid down as a general rule, that in every case of several incumbrances, the last incumbrancer is bound to bid high enough to secure all those who have a priority over him.

I should hardly think it necessary to notice the ground taken, that the transaction in question operated as a fraud on the decree of the court, which directs the incumbrances to be paid off in a certain order, had it not been urged with apparent seriousness by able counsel. When the court directs property to be sold for the satisfaction of in-

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cumbrances, in their order, it means, *of course, if the property shall sell for enough to satisfy them all. But it is said the price adjudged to have been paid is $60,000, instead of $111,000 bid at the sale; and you cannot assume one price for one purpose, and another price for another purpose. This can scarcely be called a fallacy—certainly it is not a plausible one. Yet the Bank would have paid exactly the same price it has now paid. The order means the price which shall be bid at the sale. This would be to open the whole case. If, on equitable principles, such as have been considered, the parties can get at that price, no doubt their

debts will be satisfied. But if not, and the transaction be fair, it does not concern them what price the purchasers may have paid to third persons. If the Bank had bid off the land for $11,000, and without any concert or arrangement had then consented, from whatever motive, that it should stand pledged as it now is, could this be called a fraud on the decree of the court, or give the mortgagees a right to hold the land still subject to their incumbrances?

It is said, however, that it was bid off in pursuance of concert and arrangement. Very well; if there was any thing unlawful or fraudulent in that arrangement, it may be invalidated and the sale set aside. But if not, the case is the same with that I have first supposed. If in any case of such decree, the first incumbrancer, having purchased the property at a low price, should, from motives of conscience or humanity, pay a further price to the owner, or should choose to pay off the junior of several incumbrances, how could the intermediate incumbrancers entitle themselves to the additional price so paid?

It is in reference to this part of the case, that the commentary of Judge Story was referred to, in order to show his disapprobation of the doctrine of tacking, as being inequitable in its operation, and his impression that qui prior est tempore potior est jure would be the proper rule. With deference to that learned commentator, I think the rule was properly adopted, and of necessity, and that there is nothing inequitable in it. The doctrine is considered by Lord Hardwicke in the case of Wortley v. Birkhead, 2 Ves. 573, referred to by Professor Story. He thought it rightly settled, but adds, that it was so "by the particular constitution of the law of this country." It must be recollected that at law, in England, a mortgage is a conditional sale, and after condition broken, the estate of the vendee was absolute. It was a high exercise of authority on the part of courts of equity to divest him

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of his legal title, and regard it *only as a security. If the mortgagor himself were coming to redeem, and the mortgagee had afterwards advanced him money, or otherwise created a debt not secured by the mortgage, there would be an obvious equity for him to say to the mortgagor, the property is mine, absolutely, by law; you may redeem—but only on condition that you pay me every thing you owe me. The case I think is not at all different with respect to subsequent incumbrancers, where the owner of property (the first mortgagee) had no notice at the time he gave the new credit.

B gives credit to A, and takes a security, say a bond. A month or a year afterwards, C also credits A, knowing nothing of B's claim, and takes his note; what is there in justice or equity, to give one of these claims a preference over the other, or to prevent the junior creditor from obtaining satisfaction or security, though to the disappointment of the other? The court has adopted the maxim, qui prior est tempore potior est jure, as a rule of convenience, and because it is necessary to have some rule on the subject—not that there is any inherent right or equity in favor of one claimant rather than another. Indeed there are cases, and these I think not of unfrequent occurrence, where, in justice and conscience, the junior creditor ought to be preferred; though there are not sufficient grounds for the court to interfere in his favor. Equity, when at liberty to do so, inclines to put all debts on an equality, without reference to rank or date. But if the junior creditor can obtain a confession of judgment or a mortgage, what is there in equity to deprive him of his advantage? So in the case of a junior mortgagee, who buys in the first mortgage, he is clothed with all the equities of the first mortgagee; having no notice of the intermediate mortgages at the time he advanced his money or gave credit. It makes no difference that the junior mortgagee had notice of the intermediate incumbrances at the time he purchased the elder; which is the common case; he had a right to protect himself. He purchased and paid his money, with a view to the security of his debt, and in justice and conscience, he had a right to take that security; as much so as a simple contract creditor has to take a judgment or mortgage, to the prejudice of an older specialty creditor.

There is no case in which the court has ever acted on the maxim, qui prior est tempore, potior est jure, where one of the claimants has the legal estate. The distinction is pointed out by Lord Eldon, in Maundrell v. Maundrell, 10 Ves. 260. Where the legal estate is in a trustee, as where there is an

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out*standing term, the purposes of which have been satisfied, the termor or his legal representative is made a trustee for creditors, and there the rule applies qui prior &c. But he adds "it was very early decided, that if A and B advanced money innocently, and C bought also innocently, not having notice of each others advances, he who first had the luck to get the legal estate, had as good a right as any one; and should hold, by his legal title, the possession against the prior equities."

With respect to the case of Martin & Walter v. Evans, I think the conclusion still more palpable. In both the cases, the combination, as I have said, was to make the property sell higher than it would otherwise have done, for the satisfaction of creditors; and it makes no difference that by the arrangement, some creditors were defeated, provided there was no fraudulent design or practice towards them; but by the judgment of the circuit court any imputation of a fraudulent design is disclaimed. The case differs from that of Hamilton, in that it

does not appear that the complainants had any reason to believe that there were other incumbrancers who would bid up the property to secure their demands. They might not have known that the property would be sold on the day on which it was sold, but it was their business to attend to this.

I am of opinion, that the decree in the case of Hamilton v. Hamilton should be affirmed, and in the case of Martin & Walter v. Evans, reversed.

JOHNSTON, Ch., and EVANS, J., concurred.

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*THE EXECUTORS OF JOHN HASLETT v. ROBERT WOTHERSPOON and Others.

(Charleston. March, 1845.)

[*Corporations* ⟸220.]

The defendants subscribed articles of association whereby they agreed to unite in a company for building a Theatre, and to pay for the shares placed opposite their names at the rate of five hundred dollars per share. Trustees were appointed to transact the business of the association, who, having purchased a site, proceeded to erect a Theatre, and contracted debts over and above the sum subscribed, to a considerable amount. After the Theatre was erected the association was incorporated. *Held*, that the members of the association were jointly and severally liable, as co-partners, for all the debts contracted before the Act of incorporation.

[Ed. Note.—Cited in Meyer v. Brunson, 88 S. E. 360.

For other cases, see Corporations, Cent. Dig. § 866; Dec. Dig. ⟸220.]

[*Corporations* ⟸220.]

Drafts, for debts due by the association, drawn on the corporation and accepted but not paid, *held* to be no bar to the claims of the creditors on the association.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 866; Dec. Dig. ⟸220.]

[*Corporations* ⟸66.]

An Act of incorporation constituted certain persons a body politic by the name, &c., "with a present capital of sixty thousand dollars." The capital, in fact, was only thirty-seven thousand dollars. *Held*, that creditors of the corporation might compel the corporators to increase the capital to sixty thousand dollars in order to satisfy their demands.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 173–180, 449; Dec. Dig. ⟸66.]

Before Johnson, Ch., at Charleston, June, 1844.

Johnson, Ch. The following articles of association, entered into by and between the defendants, will, themselves, sufficiently show their nature and object,—viz:

"We, the subscribers, agree to unite in a company for building a Theatre, to be called the New Theatre, in Charleston, and to pay for the shares placed opposite our names, at the rate of five hundred dollars per share, and to pay the same to the Treasurer of the Company, in such proportions and instalments as may be called for by the Trustees, Robert Wotherspoon, James Rose, William A. Carson, R. W. Cogdell and Henry Gourdin, or a majority of them, or of the Trustees who may be appointed to fill any vacancy in their number: Provided, that this engagement shall have no effect till forty shares are taken, and that when forty shares are taken, the said subscription shall be good for three hundred dollars per share, if so much be necessary for the purchase of the site of

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the Theatre, and that the residue be *payable as may be called for by the Trustees, when seventy shares are taken. Adopted, 10th March, 1835."

It is signed by the defendants, who took amongst them something over seventy shares, amounting in all to about $37,000, the whole of which has been paid in, and disbursed in the payment of debts.

The trustees named in these articles having purchased a site whereon to erect a suitable building, on the 17th February, 1837, entered into an agreement with Fogartie & Sutton, brick-masons, to do the brick work, and with Ephraim Curtis & Co. to do the carpenters' work of the said building; for which Fogartie & Sutton were to be paid $14,000, and Curtis & Co. $13,500. The work was satisfactorily finished, and accepted by the trustees. Curtis & Co., on 27th February, 1838, gave a draft for $1,500 to Francis Lance, on George W. Logan, who had been appointed treasurer of the company. The draft was duly accepted, but was not paid at maturity for want of funds. On the 10th of March, 1838, Robert Wotherspoon, the chairman of the board of trustees, gave to Fogartie & Sutton, on account of the money due them on the building contract, a draft on Logan, the treasurer, for $2,000, payable eight days after date; this was also accepted by Logan, but was not paid for want of funds, and both the drafts were purchased by the complainants' testator.

The bill is filed as well on behalf of all the other creditors of the company, who may come in and contribute to the expense, and establish their demands, as of the complainants.

And the complainants further state, that on the 27th December, 1837, after the building had been finished, and was ready for use, the Legislature passed an Act constituting the trustees named in the articles of association, and their "associates," a body politic, by the style and name of the Charleston New Theatre Company, for the purpose of conducting a Theatre in Charleston, and that the said trustees were afterwards appointed directors of the said company, and continued in that office until the corporation became insolvent, and its object was abandoned.

The bill further states, that the testator, confiding in the solvency of the corporation, brought an action at law against it, to recover the amount of these drafts, and that

on the 1st February, 1840, judgment was entered for him for $4,016.95, of which $1,500 was afterwards paid by Logan, the treasurer; that an execution sued out on that judgment has been returned nulla bona, the sheriff being unable to find any property, real or

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per*sonal, whereon it could be levied; and the complainants in fact say, that the building and lot of land was all the visible property which the company or corporation possessed; that that had been transferred by the trustees named in the articles of association to the corporation, and that it had all been sold under fi. fa. against the corporation.

By the first clause of the Act of incorporation, it is enacted: "That Robert Wotherspoon, W. A. Carson, James Rose, Richard W. Cogdell and Henry Gourdin, and their associates and successors, be, and they are hereby declared a body politic, for the purpose of erecting and conducting a Theatre in the City of Charleston, by the name and style of the Charleston New Theatre Company, with a present capital of $60,000, and with the privilege of increasing the same to $100,000." And the bill prays that the defendants may answer, whether the capital of $60,000 was in truth paid in,—and if not, that the corporators may be compelled to contribute to pay what may be sufficient to pay the debts, or to make up the deficiency, or that the subscribers to the articles of the association, if they are other persons than the corporators, may be decreed to pay the demands of the complainants by an assessment upon themselves.

All the subscribers to the articles of association are made defendants. Robert Wotherspoon, one of them, is a certificated bankrupt, and pleads that in bar to the relief sought by the bill against him, and that must be allowed. James Rose, and twenty-four others, have answered jointly, and admit the justness of the complainants' demand, and the liability of the members of the association for all the debts, whether contracted before or after the Act of incorporation, and they state that the theatre and lot have been mortgaged for a part of the debts, and suggest the propriety of selling them to pay the debts, as far as the proceeds will extend. The corporation was also made a party, and their answer is substantially the same as that of James Rose and others.

Ker Boyce, another of the defendants, admits in his answer that he subscribed the articles of association for $500. He states that he paid it, and insists that he is no further answerable. 1st. Because the articles never were intended to have, nor could they have any further obligation than to bind them to pay the sum subscribed, to the person entitled to receive the same. 2d. Because the Act of incorporation did not extend or increase the liability of the subscribers to the articles, beyond the amount subscribed; and if it could have that effect, he is not bound,

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because *he never assented to it in any manner, before or after it was passed. 3d. Conceding the possible liability of the associates to Fogartie & Sutton, and Curtis & Co., he insists that their acceptance of drafts from the corporation for the amount due, was a discharge of the liability of the associates.

The firm of Street & Boinest were also subscribers to the articles, and they put in their defence on the grounds taken in behalf of Mr. Boyce; and so of Thomas Roger, L. A. Pitray and I. E. Glover. Judgments, pro confesso, have been taken against the other defendants.

It appears from the journal of the corporation, that Mr. Glover was present at a meeting of the stockholders, on the 28th of February, 1838, when a resolution was adopted accepting the Act of incorporation, and it is very clear he was mistaken when he said in his answer that he had never accepted or assented to it. His solicitor, Mr. Northrop, has subsequently filed with the proceedings, a correspondence between them, which very satisfactorily shows that it originated in his forgetfulness. It does not appear that Boyce, or any of the other defendants who rest on the same defence, ever attended any of the meetings of the directors, or stockholders, after the Act of incorporation, and from what I can collect from the evidence, it is, I think, very clear, that the management of their affairs was confided, almost exclusively, to the directors. But it is in proof, that in the winter of 1839-'40, Mr. Boyce entered into a contract with Mr. Abbot, the manager of the theatre, to sell him his stock, on condition that "the others" (I suppose the other stockholders) would concur—for Abbot desired to purchase all the stock. Mr. Logan, the secretary, also testified, that Street, of the firm of Street & Boinest, "would several times ask him questions in reference to the business of the company," and "spoke to him as a stockholder." There is no evidence of any act on the part of Roger or Pitray, in relation to the affairs of the company, after the act of incorporation. But judgments, pro confesso, had been taken against them, and it was not until after the argument had been gone into, that a motion to open them, and let the defendants in to answer, was made for that purpose, and granted by consent; and if it should become necessary, I think the complainants ought to be let into proof of their acceptance of the charter, if they have any to offer.

The first ground relied on by the resisting defendants, raises the question, whether they are bound by any contract made by the company, beyond the amount which they sub-

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scribed to the *original articles of association. The assumption that this was intend-

ed as a mere charity, is the only possible ground of this defence; and it is true that men may voluntarily contribute to the construction of a Theatre for the public use and benefit, as well as a Church or an Hospital. But that such was not the case here, is manifested, as well by the nature of the undertaking, as by the articles themselves. No instance has fallen under my observation, in which a Theatre has been erected merely as a public convenience; and although, as was obviously the case here, public convenience might enter largely into the consideration of the undertaking, some personal benefit is contemplated. Here the capital stock is divided into shares of equal value, obviously with a view to regulate the distribution of the profits, if any were made, and to apportion the losses. In a contribution to a mere charity, it would have been wholly nugatory. It could not, therefore, have been intended as a charity, but an association of the parties to contribute a limited amount of money to a common object, for their common benefit; and whether it be called a partnership, or its character be designated by any other name, it would astonish a merchant to be told, that the individuals were not liable to creditors beyond the amount of the capital sum put by them, severally, into the common fund. In other words, that having paid in their portion of the capital, they are not liable at all. The language of the Court in 1 Mylne & Keene, 76, is very strong to the point.

Besides the complainants, numerous other creditors have come in to establish demands against the defendants, some of which were contracted before, and some after the Act of incorporation, and it is insisted that Boyce, and the other defendants associated with him in the defence, are not liable to contribute to the payment of the after-contracted debts; they put this upon the ground that they never accepted the charter, and that the Act itself was a dissolution of the original association.

I should find no difficulty, if it were necessary, to deduce from the facts, that Boyce, Glover, and Street, of the firm of Street & Boinest, particularly the first two, did, in effect, accept and approve the charter. It is not enough that they were merely passive; as between creditors and the association, they were bound not only expressly to disavow the charter, but to give publicity to it.

The persons named in the Act of incorporation, viz: Robert Wotherspoon, W. A. Car-

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son, James Rose, Richard W. Cogdell, *and Henry Gourdin, are the same persons who are constituted trustees by the articles of association. And the objects expressed in the Act "erecting and conducting a Theatre in Charleston," are the same, and it is these persons, "and their associates," who by the Act are constituted a body politic. The names subscribed to the articles, amongst which will be found the names of these defendants, show who their associates were; and there was nothing to prevent their participating in the benefits of the corporation, if they had thought proper. They were in fact and in law, members of the corporation The Act of incorporation might have been obtained without their knowledge or consent, and they may have refused to accept under it; but how were the persons dealing with the corporation to know who the corporators were, but through the Act, and the articles of association? It need hardly be added here, that one who holds himself out to the world as a member of a partnership, or corporation, is equally liable with him who conducts the business, although he remain perfectly passive. None of the defendants deny knowledge of the Act of incorporation, and residing here, the reasonable presumption is, that they did know of its existence; the proof is that it was known to Boyce, Glover and Street, and as between the defendants, their neglect to give notice of their dissent, subjects them equally to all the liabilities incurred. They had been associated for the purpose of building and conducting a Theatre, without any limitation as to time. The charter had the same object in view, and was for the common benefit of all, as without it each would have been severally liable for all the contracts of the company, and it cannot be supposed that one would forego such an advantage, when it could not in the least diminish his profits. If it had been a profitable concern, and these defendants had come in to receive their dividends, and the treasurer had said, "you are not entitled, because you have not expressed your consent, or attended the corporation meetings," might they not have answered triumphantly, "the Act and the articles show that we are members of the corporation, and it was never yet heard that corporators forfeited their right by neglecting to attend the meetings, unless there was some express enactment either in the Act of incorporation or its by-laws." As between the parties to this suit this question is unimportant, but it becomes so, when I come to consider the liability of the corporators to contribute to make up the capital contemplated by the Act.

Another ground of defence is, that these

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debts are merged in *the drafts drawn and accepted by Wotherspoon and Logan, and the judgments against the corporation upon them, and that this made them the debts of the corporation. This would be, indeed, "a new way of paying old debts." If this was a debt of the association, the assumption of it by the corporation certainly would not discharge it; and if even the payment of it had actually been made by the corporation, without the consent of the associates, it would have been no bar to an action against them for the same debt. If it were otherwise, worthless

paper is not the sort of currency which constitutes a lawful tender in the payment of an honest debt.

The corporation having accepted an assignment or transfer of all the visible property of the partnership, they are, as between themselves, primarily liable for all the debts. But it is conceded that the property of the corporation will not be sufficient to pay all the debts, and the question is, how is the deficiency to be supplied?

At the time the Act of Incorporation was passed, the Theatre had been built, and was ready for use, and the Act recites, and necessarily on the authority of the persons applying for it, that its capital was then "a present capital of $60,000." And persons dealing with the corporation, and desiring to know what their means were, might well suppose that the whole of this sum had been paid in, and was in the hands of their treasurer. The fact that only $37,000 is all that was or ever had been subscribed, and all that ever has been paid in, was calculated to surprise, and operated as a fraud on the creditors, for which the corporation is responsible. The case of Hume v. Winyah and Wando Canal Company, Carolina Law Journal, page 217, decided by Chancellor Desaussure, whose judgment was affirmed by the Court of Appeals, strikes me as decisive of this question. There, a corporation not professing to have any fixed capital, made by-laws, by which each of the corporators was bound to contribute equally, or rateably, to all expenses incurred, and it was held that the corporators were liable to be assessed for all the debts incurred. Now this corporation professed to have $60,000 capital, and if, in the case cited, they were personally bound to the extent of all their engagements, here they are necessarily bound to contribute, to the extent of the capital, on the faith of which they obtained credit.

It follows from what has been said, that under the articles of association, the associates or persons who subscribed the articles,

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*are liable, jointly and severally, for all the debts incurred before the Act of incorporation. That the corporation having accepted an assignment of all the property of the association, for the purpose of carrying out their object, they are primarily liable for their debts. That the funds of the corporation falling short of paying all the demands, the corporators are bound to contribute rateably to make up the capital of $60,000, to be applied to their payment. That the debts of the corporation proper, are to be first paid out of the property and funds belonging to it, including the amount of capital to be contributed and made up by an assessment on the members, to the amount of $60,000. If this prove insufficient, the debts of the association are to be postponed and be paid rateably by the subscribers to the articles.

The case of Goddard v. Pratt, 16 Pick. 412, pushes the liability still further. There the members of an iron manufacturing company, which had been in operation for some time, obtained an Act of incorporation by the name of the Wareham Iron Company, but continued to carry on their business in the name of the old firm. The Court refused, in a suit against the company, to admit evidence to shew a general reputation, that, in using the name of the firm, the name of the corporation was meant; and held, that although the Act of incorporation might operate as a dissolution of the company, yet the members were liable as partners, when dealing with persons having no notice of the dissolution. It proceeds on the principle, that if a retiring partner neglects to give notice, or suffers his name to be used, he will be liable for the debts of the new concern. If, therefore, the corporation assets should turn out insufficient to pay the debts of the corporation, and they have dealt with persons ignorant of the dissolution of the association, the members will be liable as partners.

It is therefore ordered and decreed, that an account be taken of the debts of the Theatre, whether contracted by the association or the corporate body: and of the property and funds applicable to the payment of the same,—and that the master do also inquire and ascertain in what sum the several members should contribute to satisfy the liabilities of the association, and body corporate, and what must be contributed by the solvent members to make good the deficiencies of such as are out of the jurisdiction, or are unable to pay. The plaintiffs' costs, to this time, to be paid by the defendants, Boyce,

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Street, Boinest, Roger, Pitray *and Glover; and the other parties to pay their own costs. Subsequent costs to be paid as hereafter directed.

The defendants, Ker Boyce and Street and Boinest, appealed, on the following grounds:

1st. Because the articles of agreement never were intended to have, nor could they have, any further obligation, than to bind the parties who were subscribers, to pay the sum subscribed to the person entitled to receive the same.

2d. Because the Act of incorporation cannot affect any except such as accepted of the same. And there is no proof of acceptance on the part of either of these defendants.

3d. Because, admitting any obligation on the subscribers for more than the amount they agreed to pay, it could only arise from some privity of contract. And this was not, nor could be, proved to exist in this case.

4th. Because the acceptance of the drafts was, even as to the contractors, an extinguishment of their claim on the subscribers: and the transfer of these drafts to a third person, could only give to such third person

a personal action against the parties who were bound by the draft.

5th. Because, in a case were it is sought to charge a party as a corporator, the fact of his assent must be proved, and it is not for the defendant to prove his dissent.

6th. Because the assent of the parties to contract with the corporation, and to receive payment from the agent, was a waiver of all claim on the original subscribers under the original articles of agreement, except those who had signified their acceptance of the charter of incorporation.

A. G. Magrath, for the appellants.
Ashby, contra.

Curia, per DUNKIN, Ch. This court concur entirely with the Chancellor, that the associates or persons who subscribed the articles of the 10th March 1835, are liable, jointly and severally, for all the debts incurred for the purpose of the association before the Act of incorporation. In the language of Walburn v. Ingilby, (referred to in the decree) "whosoever became a subscriber upon the faith of the restricting clause, or of the limited responsibility which that holds out, must have himself to blame, and be the victim of his ignorance of the law of the land."

The court concur, too, on the other points ruled by the decree, except as to the liability

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of the appellants as corporators under *the charter of December, 1837, on which the opinion of the court is reserved.

It is ordered and decreed, that the decretal order of the circuit court be enlarged, and that, in taking an account of the debts of the Theatre, the master distinguish, as far as practicable, between those contracted by the association and those contracted by the corporate body,—and that he also take an account of the sums paid in by the several subscribers to the association, as well as by the several corporators; and also an account of the administration of the funds by the trustees appointed under the articles of association. The question of costs being also reserved until the final hearing.

JOHNSON, HARPER and JOHNSTON, CC., concurred.

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2 Rich. Eq. 404

ELMORE MANES v. FRANCIS B. DURANT and Others.

(Charleston. March, 1845.)

[*Husband and Wife* ⇐8.]

A husband is regarded as a purchaser for valuable consideration of all the personal property in possession of the wife. A secret conveyance, therefore, to a trustee by the wife on the eve of the marriage, of her personal property in possession, even where the object is to make a reasonable provision for the children of a former marriage, is fraudulent and void as against the husband.

[Ed. Note.—Cited in Brooks v. McMeekin, 37 S. C. 302, 15 S. E. 1019.

For other cases, see Husband and Wife, Cent. Dig. § 29; Dec. Dig. ⇐8.]

[*Husband and Wife* ⇐8.]

No act of the husband, such as giving a note to the trustee for the hire of the property, will amount to a confirmation of the conveyance, unless the husband knows, at the time he does the act, that the original transaction is questionable.

[Ed. Note.—Cited in Brooks v. McMeekin, 37 S. C. 307, 15 S. E. 1019.

For other cases, see Husband and Wife, Cent. Dig. § 29; Dec. Dig. ⇐8.]

Before Harper, Ch., at Marion, January, 1842.

The decree of his Honor is as follows:

Harper, Ch. In September, 1838, the complainant was married to Isabella C. Shan-

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non. She was seized and possessed of *some real estate in the village of Marion and two slaves. A few days previous to the marriage, she conveyed to the defendant, Francis B. Durant, her half brother, the two slaves and a quantity of household furniture, in trust for the use of her mother, Mrs. Ruth Durant, during her life, remainder to her own children, if she should leave any living at her death, and if none, to the two daughters of the said Francis B. Durant. It does not appear that any one was made acquainted with the execution of this deed, except the trustee and the counsel who prepared it.

After the marriage, the slaves remained in the possession of the complainant, his mother-in-law also continuing to live with him. In the beginning of January, 1840, the complainant having been informed of the existence of the deed, and the trustee being about to leave the district, they went together to the office of W. W. Harllee, Esq., where the deed was read to complainant, and he executed to the said W. W. Harllee, as attorney for the trustee, his note of hand for $100, specified to be for the hire of the slaves, "conveyed to him, the said F. B. Durant, as trustee, by my wife, J. C. Manes, before our marriage, for that and other purposes." On the 8th of January, 1841, the complainant executed a similar note, written in his own hand. The object of the bill is to set aside the deed in question as a fraud on the marital rights.

The defendant, Mrs. Ruth Durant, by her answer, claims that although the legal title of the real estate was in the said Isabella C. Shannon, yet she herself and another deceased daughter, Anne Shannon, had, in equity, an equal interest with her, and, consequently, that she is entitled to three-fourths of the said real estate. But, besides that there was an entire failure of proof on this matter, I do not think it properly put in issue by the answer. The subject of the suit

is the deed of trust, and she may make the claim by a bill for partition, which the complainant can answer and defend. She claims also the furniture included in the deed as her own private property. The proof of this I should regard as too slight, and having accepted the deed and claiming under it, she would, I suppose, be estopped to deny the title of her grantor. If not, and the deed should be set aside, she will have plain and adequate remedy at law for the recovery of the property. I do not regard this matter as in issue.

In general, it is not questioned that a voluntary conveyance made by a woman in con-

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templation of marriage, without the *knowledge of the intended husband, will be set aside as a fraud on the marital rights. It has been supposed, however, that exceptions have been made in some particular cases, as where the object was to make a reasonable provision for the children of a former marriage. In the case of Ramsay v. Joyce, (M'M. Eq. 236, [37 Am. Dec. 550,]) I expressed my own opinion, that there was no such exception. By assuming the burdens of the marriage relation, the husband is regarded as a purchaser for valuable consideration of all the personal property in possession of his wife, and is there any doubt but that a voluntary conveyance, even to provide for children, is void against a subsequent purchaser for valuable consideration and without notice?

The principal question, however, related to the confirmation of the deed, by complainant's acquiescence after he was apprized of it, and his giving the notes for the hire of the negroes. I am inclined to believe that such a transaction must be regarded as a case of actual fraud—suppressio veri—the suppression of truth which the party was bound to disclose—which cannot be confirmed by any thing short of that which would operate as an original conveyance, rather than one of those in which fraud is implied from the circumstances and relation of the parties, which admit of confirmation. If one should sell to another, for a valuable money consideration, property, of part of which he had a few days before made a voluntary conveyance to a third person, it could hardly be doubted but that this amounted to actual fraud.

But, supposing it to be of the latter class, I think the alleged acts of confirmation are not sufficient to have that effect. To operate as a confirmation, I think the act must be intended to confirm. It seemed to be thought that the rule in this respect was laid down somewhat too strongly in Butler v. Haskell, 4 Des. 709, that the party must be no longer under the circumstances of necessity, influence, or confidence which led to the first transaction, and that he must be "aware that he is not bound by the original contract, but may be released from it; but that, nevertheless, he chooses, deliberately and without imposition, to confirm what he had first done." The rule, I think, may very well be taken as laid down by Lord Redesdale in Murray v. Palmer, 2 Sch. & Lef. 486, that the party must at least be aware that the act he is doing is to have the effect of con-

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firming an *impeachable transaction. He must at all events know that the original transaction was questionable. The maxim that every one must be presumed to know the law, seems not to apply where the party has been practised upon by fraud. In the present case there is nothing to shew that the complainant knew the original transaction to be questionable, or any thing more than that he acquiesced in what seemed to him inevitable.

It is therefore ordered and decreed, that the deed in question be set aside, and delivered up to be cancelled.

Munro, for the complainant.
Harllee and Dargan, contra.

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2 Rich. Eq. 407

J. J. DICKISON v. PINCKNEY L. PALMER and A. CARMICHAEL.

(Charleston. March, 1845.)

[*Execution* ⊂⊃327.]

The sheriff sold property of P. under executions, and, after satisfying the executions, there remained a balance in his hands of the proceeds of the sale. P. being absent from the State, one of his creditors filed a petition praying that the sheriff be ordered to satisfy his demand out of the balance in his hands due P. *Held*, that the plaintiff had plain and adequate remedy at law by process of foreign attachment, and the petition was dismissed.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 980; Dec. Dig. ⊂⊃327.]

[*Execution* ⊂⊃327; *Garnishment* ⊂⊃60.]

Where a sheriff sells property under fi. fa. and, after satisfying the fi. fa. there remains in his hands a balance due the defendant arising from the sale, such balance is not considered as in the custody of the law.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 974; Dec. Dig. ⊂⊃327; Garnishment, Cent. Dig. § 115; Dec. Dig. ⊂⊃60.]

Before Johnson, Ch., at Marion, February, 1845.

The decree of the Circuit Court is as follows:

JOHNSON, Ch. This is a petition in which the complainant states that the defendant, Palmer, is indebted to him on a promissory note in the sum of $85, besides interest, and that he has removed from and now resides without the limits of the State, so that the ordinary process of law cannot be served on

him. That the defendant, Carmichael, being the sheriff of the district, had, in virtue of sundry writs of fieri facias against the defendant, Palmer, levied on and sold certain

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chattels which belonged *to him; and that after satisfaction of all the executions in his office against the defendant, Palmer, there remained in his hands a balance of about $200, to which the said Palmer is entitled. The prayer of the petition is, that the defendant, Carmichael, may be restrained from paying that balance to the said Palmer, and that he be decreed to pay to the complainant out of that sum his said debt, and interest, and the costs of these proceedings. The defendant, Carmichael, admits the truth of the facts stated in the petition, and submits himself to the judgment of the court. The defendant, Palmer, demurs, on the ground that the complainant has plain and adequate remedy at law by the process of foreign attachment.

The rule very clearly is, that money in the custody of the law is not the subject of attachment at law, Bowden v. Schatzell, Bail. Eq. 364, [23 Am. Dec. 170,] and on that principle it was held in Blair v. Cantey, 2 Sp. 34, [42 Am. Dec. 360,] that money in the hands of the sheriff, made by a fieri facias, was not the subject of a foreign attachment against the plaintiff in the cause in which it was levied; and that, I think, is well sustained by authority. The command of the writ of fi. fa. is, that the sheriff shall have the money in court on the return of the writ, and the law is not so unreasonable as to interpose, at the will of a party, a stranger to the proceeding, to prevent the execution of its own process. The rule is based on this course of reasoning, and although it is not the most satisfactory to my mind, when the money belongs without question to the absent debtor, it is undoubtedly sustained by the decisions of the English Courts on the custom of London, from which our attachment system is derived.

This case does not fall, however, within either the principle or the rule. The fund here is the excess of the sales of the absent debtor's property, after paying all the executions against him, not money raised by the authority or order of the court, but from the necessity of selling an article of property of greater value than was required. Of the excess, the court had no control whatever, and the sheriff became the debtor of the defendant in the amount, as for so much money had and received to his use, and no one else had any interest or control over it. The petitioner had, therefore, an adequate remedy at law by the process of attachment, and it is ordered and decreed that the petition be dismissed.

Phillips, for complainant.
Harllee, contra.

2 Rich. Eq. *409

*ELIZA T. PEAY v. NICHOLAS A. PEAY et al.

(Charleston. March, 1845.)

[*Dower* ⟸13.]

T. in consideration of twenty thousand dollars, paid by A. P., conveyed to R. C., in fee, a tract of land, "in trust for the use of said A. P., his heirs and assigns forever, and to permit the said A. P. to have and possess the same, and to enjoy the profits thereof, and in trust to convey the same to such person or persons as the said A. P. shall, by deed or will, or other writing under his hand, direct and appoint." *Held*, that A. P. took, under the statute of uses, at least a qualified or determinable fee in the land, and, never having exercised the power of appointment, that his widow was entitled to dower in the premises.

[Ed. Note.—Cited in Blount v. Walker, 31 S. C. 25, 9 S. E. 804; Brooks v. McMeekin, 37 S. C. 268, 305, 15 S. E. 1019.

For other cases, see Dower, Cent. Dig. § 44; Dec. Dig. ⟸13.]

Before Dunkin, Ch., at Richland, June, 1844.

The complainant and Austin F. Peay, deceased, were married in Dec. 1818, and this bill was filed to recover dower.

So much of the decree of the circuit court as relates to the question decided by the Court of Appeals, is as follows:

The Chancellor. In July, 1840, Thomas Taylor, in consideration of twenty thousand dollars, paid by Austin F. Peay, conveyed to Roland Cornelius, in fee, a plantation containing eighteen hundred and twenty-four acres, situate on the Congaree in Richland district, "in trust for the use of said Austin F. Peay, his heirs and assigns forever, and to permit the said Austin F. Peay to have and possess the same, and to enjoy the profits thereof, and in trust to convey the same to such person or persons as the said Austin F. Peay shall, by deed or will, or other writing under his hand, direct and appoint." It was objected to this as well as some other deeds hereafter to be noticed, that they were manifestly made for the purpose of preventing the right of dower, and were in fraud of those rights. No authority or precedent was adduced for impeaching a deed of this character on such ground. It has been said, that a deed executed by the husband on the eve of his marriage, for this purpose, would be deemed fraudulent. But the propriety of this dictum may be well questioned. It is not like a deed privately executed by the wife under such circumstances. The hus-

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band becomes respon*sible for all the existing, as well as future debts of his wife, and may be supposed to contract with some reference to the estate which he is to receive. But Lord Hardwicke is said to treat it as "clear, that if a man before marriage conveys his estate privately, without the knowledge of his wife, to trustees, in trust for himself and his heirs, in fee, that will prevent

dower." (2 Rop. on Husb. and Wife, 354, note; Co. Litt. 216, n.) But these deeds were not made in contemplation of marriage. The husband had never been seized. No right of dower had attached. The money belonged to the husband, without any claim, actual or contingent, on the part of the complainant. She had no authority to control the mode in which it should be invested; and no right whatever could be created, until a legal seisin of the husband in the real estate purchased. It becomes, then, necessary to inquire what is the legal effect of the deed of July, 1840. One of the grievances enumerated in the preamble to the statute of uses was, that uses fraudulently deprived widows of their dower, because the widow could be endowed of that estate only whereof her husband was legally seized. The statute was intended to remedy the evil, by transferring the possession to the use. The only question was, whether the use was executed in the testator. And on the part of the defendants, it was insisted, that as, by the terms of the deed, the trustee was to convey the premises to such person or persons as the said Austin F. Peay should appoint, the fee must remain in the trustee for that purpose. But in Maundrell v. Maundrell, (10 Ves. 264,) Lord Eldon says, "The law is, that where there is a power to A to appoint, and till he makes an appointment, or, for want of an appointment, to him and his heirs; the fee, in the meantime, is vested in him, as that qualified fee which is to yield the estate which may arise out of the execution of the power; and this law," he says, "is established upon Leonard Lovie's case, 10 Rep. 78, and all the authorities downwards." In Mr. Butler's note (119, to Co. Litt. 216) it is said, "if a person limits the estate to such uses as he shall appoint, and in the meantime, and until he makes the appointment, to the use of himself and his heirs, or if he limits it to the use of himself for life, and after his decease, to such uses as he shall appoint, and for want of appointment, to the use of his right heirs; in both these cases, the settlor and his heirs have a qualified and determinable fee, until by an exercise of the power of appointment an use vests in the person to whom it is appointed—

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or till by the death of *the settlor without exercising his power, the execution of it becomes impossible. To this fee dower is clearly incident. If the settlor makes an appointment, a new use springs up, and vests in the appointee; and the fee originally limited to the settlor ceases, and with it the right of the wife to her dower out of it." But if no appointment is made, the fee, from being qualified and determinable, becomes simple and absolute. (See also, Sug. on Powers.) It is remarked in the books, that this mode of conveyancing was frequently resorted to, in order to place it in the power of the husband to defeat the claim of dower. It appears to the court that the deed of July, 1840, falls within the principle. By operation of the statute of uses, the qualified fee was in Austin F. Peay and his heirs, until the power of appointment was executed. He died without having executed the power (his will having been executed in 1834) and the fee became absolute and simple. The complainant is, therefore, entitled to dower in the premises.

The defendants appealed.

Preston and W. F. DeSaussure for the defendants.

Bailey and Tradewell contra.

Curia, per DUNKIN, Ch. This court is satisfied with the view taken by the Chancellor, and the appeal is dismissed.

JOHNSON, HARPER and JOHNSTON, CC., concurred.

NOTE.—This case was decided in May, 1845, and was ordered to be reported, but was overlooked by the Reporter when preparing the cases of that term.

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2 Rich. Eq. *412

*MARTIN v. PRICE.(a)

(Charleston. Jan., 1846.)

[*Assignments for Benefit of Creditors* ⊂=295.]

Lapse of time *held* to bar a cestui que trust's claim to real property in the possession of the trustee.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 854; Dec. ⊂=295.]

[*Trusts* ⊂=168.]

The statute of distributions has no application to the legal estate in trust property. Where, therefore, an estate in fee simple is vested in a trustee, his estate descends, on his death, to his heir at common law. Per Johnston, Ch.

[Ed. Note.—Cited in Cone v. Cone, 61 S. C. 522, 39 S. E. 748; Delleney v. Winnsboro Granite Co., 72 S. C. 41, 51 S. E. 531.

For other cases, see Trusts, Cent. Dig. § 221; Dec. Dig. ⊂=168.]

Before Dunkin, Ch., at Chambers, Charleston, October, 1845.

On the 26th of August, 1825, Robert Martin sued out a writ of foreign attachment against Samuel H. Lothrop, a wharfinger and warehouse man, then absent from the State, and afterwards, on the 20th of July, 1827, recovered and duly entered judgment on the same, for $6,522.49. On the 12th September, 1825, Lothrop, being in New York, executed an assignment of his property to his brother-in-law, William Price, Jr.,

(a) This case should have been given with the others of the term at which it was decided, but circumstances prevented its being inserted in its proper place.

in trust for payment, in the first place, of certain preferred creditors, and then of his creditors generally. William Price, Jr., the assignee, was also the principal preferred creditor, and accepted and acted under the trusts of the assignment. Robert Martin was not a preferred creditor, and the lien of his attachment was dissolved by Wm. Price, Jr., the preferred creditor, becoming bail for Lothrop. Included in the assigned property, was a certain town lot and store houses, adjoining "Lothrop's Wharf," and known upon the old plat of Gillon's lands, as Nos. 8 and 9, and on the more recent plat of Edward B. White, Surveyor, by the letters A. B. C. D. One undivided moiety, however, of this lot, had been, in 1809, mortgaged by Lothrop to the Bank of South Carolina, and passed to his assignee, subject to that incumbrance.

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On the 30th *June, 1826, the master in equity, by virtue of a decree of foreclosure, in behalf of the Bank of South Carolina, sold and subsequently conveyed to Wm. Price, Jr. the undivided moiety which had been mortgaged, who thenceforward held the same as his own property. The other undivided moiety remained in his possession as assignee of Lothrop, until his death in 1831, intestate, when the legal title descended to his heirs or heir at law. William Price, Jr. left surviving him, his widow Eliza Price, and five minor children, the eldest being a daughter, (now Mrs. Toomer) at that time about thirteen years old.

They are all parties defendants to this bill. James Adger was duly appointed administrator of the estate of Price, and as such, undertook to administer the personalty belonging to the assigned estate of Lothrop. The real estate descended as above stated.

During his lifetime, William Price, Jr. had mortgaged to the Bank of South Carolina the undivided moiety of the town lot which he had purchased at the sale of the master aforesaid, and on the 2d July, 1832, by virtue of a decree of foreclosure against his administrator and heirs at law, James W. Gray, Esq., Commissioner in Equity, sold and conveyed that undivided moiety to Mrs. Eliza Price, who retained possession of the whole lot until the conveyance to James Lamb, Esq.

The bill in this case was filed on the 6th day of March, 1845, by Robert Martin, the judgment creditor of Lothrop, against James Adger, administrator, Eliza Price, the widow, and the heirs at law of William Price, Jr., the assignee of Lothrop, for an account and administration of the assigned assets and estate of Lothrop. He claims the said undivided moiety of the town lot and the rents and profits thereof, as a part of the assigned estate and subject to his debt, and prays that the same may be sold for the payment thereof, or that the sale of the same to Mr. Lamb be confirmed, and his bond given for the purchase money to Mrs. Price, may be applied for that purpose. The bill alleges that all knowledge of this moiety lot, and of its being a part of Lothrop's assigned estate, had been concealed from the complainant by the assignee Price, in his lifetime, and by his widow and heirs since his death, who "without regard to their duties as trustees, used the said undivided moiety as their own." That he was ignorant of his rights, and did not discover the same, and the unfair advantage taken of him by the defendants, until after the 29th September, 1842, at which time the

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title to said lot became the *subject of litigation in this court, between James Lamb, the purchaser, (who is also a party defendant in this cause) and the said Eliza Price. The bill is sworn to in the usual form.

James Adger, the administrator, answered, admitting a balance of cash in his hands, belonging to the assigned estate, of $1,371, (the greater portion of which has been in his hands since 1835,) and disclaiming all knowledge of the lot in question being the assigned estate of Lothrop.

The complainant, at the hearing, claimed and urged that Mr. Adger is chargeable with interest on the amount in his hands, unless he could discharge himself by shewing that he had notified the creditors of Lothrop to come in and receive the same, or at least, that he had kept the fund separate and distinct, and had not suffered it to be mixed and used with his own in his business.

Mrs. Price answered, setting out the title of her brother, Samuel H. Lothrop, to said lot; admitting the assignment of Lothrop to her husband, and that he took possession of the property, and acted under the assignment till his death, in 1831, without making any conveyance of the undivided moiety which still remained in his possession. She also admitted that it was not conveyed to him by the master's deed of 1827. Denying that she ever acted or claimed to act under the assignment of S. H. Lothrop, but, on the contrary, refused to have any thing to do with it. She further claimed, that she had long since bought and paid for the lot, and held the same as a bona fide purchaser, under a sale and conveyance in fee, from James W. Gray, Esq. Commissioner in Equity, bearing date July, 1832, and pleads possession and the statute of limitation, in bar to complainant's claim; and she set up the decree of the Court of Appeals, in the cause between herself and James Lamb, as confirmatory of her title. Her answer neither admits or denies the allegation of complainant, that he was ignorant that any part of the assigned estate was undisposed of, but denies all concealment, either by William Price, Jr. in his lifetime, or by herself, and alleges the charge to be without any foundation; and in conclusion, says complainant's claim is old and stale, and not entitled to the relief of this court.

James Lamb and the heirs at law of Wil-

liam Price, answered formally, submitting their rights to the judgment of the court. On reference to James W. Gray, Esq. one of the masters, he reported, "all the proceed-

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ings in the case of Eliza Price, com*plainant, and James Lamb, defendant, in her bill filed in this court, Sep. 29, 1842, as the evidence agreed upon by the Solicitors of all the parties to be admitted in this case."

Upon this evidence, which was very voluminous, the cause was heard.

This evidence shows that James Lamb, Esq. having agreed to purchase said lot from Mrs. Price, afterwards refused to accept the title tendered; under advice of counsel, that Mrs. Price had a right to convey no more than one undivided moiety. She never pretended to produce or have any paper title, but relied upon her adverse possession as a good and sufficient title, and thereupon filed her bill to compel a specific performance against James Lamb. That cause was heard on circuit, before Chancellor Johnson, at Charleston, February, 1843, who dismissed the bill with costs, upon the express ground, that Mrs. Price could not claim the benefit of adverse possession and the statute of limitations, although the statutory time of possession had expired, because her possession was, under her husband, a trust for the creditors of Lothrop, who were the parties beneficially interested.

From this decree, an appeal was taken, and on the 3d of February, 1844, the Appeal Court pronounced the following decree.

Dunkin, Ch. The defendant agreed to purchase from the heirs of William Price, the premises designated as Price's Wharf, for $47,000. Some difficulty arose as to the title to a small portion of the premises, estimated to be worth $3,000. It was agreed that the bond of the purchaser, for this sum, should be withheld until the complainant should make and tender a good title to this portion of the premises. The contract was made in November, 1841. The defendant took possession of this portion, under a lease from the complainant, and of the residue under his purchase.

The complainant insisted in her bill, that she had since tendered a good title for this portion of the premises, and she relied on her adverse possession for more than ten years prior to the period of tendering the conveyance. The Chancellor who heard the cause, was of opinion, that under the circumstances, the possession of the complainant could not be regarded as adverse, and this court inclines to the same opinion. But on looking into the proceedings to which the master refers in his report on the title, the court is, by no means, satisfied that the com-

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plain*ant had not a good marketable paper title. They have been unable, however, to procure a statement of the proceedings under which the complainant purchased the property at the master's sales, or a copy of the master's conveyance to her under those sales.

In an ordinary case, it might be sufficient to affirm the decree of the Chancellor, dismissing the complainant's bill. But both parties are anxious to complete the contract, if it can be carried into effect safely. The court has, therefore, determined to retain the case, and in the meantime, direct the master to amend his report, by setting forth specially the proceedings under which he made sale of the premises, together with a copy of his conveyance to the complainant, Mrs. Price, with leave to report any additional special matter; and it is so ordered and decreed.

JOHNSON and HARPER, CC., concurred.

JOHNSTON, Ch., absent at the hearing.

Afterwards the master having made his amended and supplemental report, in conformity with the decree, on the 1st of February, 1845, the Appeal Court made the following decree:

DUNKIN, Ch. It appears from the master's supplemental report, that by his deed of 7th July, 1832, he conveyed certain premises to the complainant, concluding his description as follows: "Together with all Warehouses, Storehouses, and other outbuildings, erected or built on the said several lots or parcels of land known by the name of Nichols' Wharf, afterwards Keith's Wharf, and lately by the name of Lothrop's Wharf."

There can be no doubt from the testimony, especially that of Mr. Kerr and Mr. Adger, that the half lot (about the title to which alone any doubt exists) constituted a part of Lothrop's wharf, and afterwards of Price's wharf. It has already been decided, that the fee vested in Price, the intestate, either as purchaser, under the master's sales in 1827, or as assignee of Lothrop.

In the proceedings under which the complainant purchased, the administrator of William Price, and all his heirs at law, were parties. From the date of the conveyance, she and the defendant, as her vendee, have held the exclusive possession of the entire premises, for more than twelve years. We think the description of the deed is sufficient to indicate the character of the possession, as well as its extent.

In the same proceedings of which these

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constituted a part, an *order was made for the creditors of Lothrop to prove their demands, and the residue of the assigned estate, specified in the order, was directed to be sold, and the proceeds paid to the administrator of Wm. Price, for the purpose of being applied to the uses of the assignment.

Under the testimony now submitted to the Court, we are of opinion that the title tendered by the complainant was sufficient un-

der the terms of the agreement, recited in the pleadings.

It is ordered and decreed, that, on receiving the title to the moiety of the lot, which has been heretofore tendered, the defendant execute and deliver to the complainant his bond, as stipulated in the agreement dated 1st January, 1842. Costs to be paid by the parties.

JOHNSTON and HARPER, CC., concurring.

The deed of 1822, to Mrs. Price from James W. Gray, Esq. to which this appeal decree refers, is set forth at large in the evidence, but upon the face of said deed it appeared the words extracted and quoted do not apply to or form any part of the conveyance of the lot in question, but that one undivided moiety only of said lot was specially conveyed and described in a subsequent and separate clause and part of the deed in the words following, viz; "All that undivided moiety or half part of all that town lot situated in Charleston, measuring and containing in front southwardly on a street leading from East Bay-street, to the head of the said Lothrop's, late Price's wharf, about fifty feet, and the same number of feet on the back line, and in depth about seventy-five feet, more or less, butting and bounding to the south on the street or passage aforesaid; to the north on lands now or late of Theodore Gaillard; to the east on part of wharf, and to the west on buildings of Lefevre."

The other undivided moiety, which is now in question, was not conveyed. Various proceedings in Chancery in reference to the estates of Lothrop and Price were set forth in the evidence, either in part or whole. But none of them contain any reference to this part of the assigned estate of Lothrop.

The preferred creditors of Lothrop were not before the Court, and they were in no wise referred to, because they had all been long since paid in full.

It was not claimed on the part of Mrs. Price, that she had discharged the trusts of her brother's assignment, but the contrary: she denied she ever was trustee: no evidence was offered, or before the Court, to show that

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the trusts of the assignment had been *executed though it appeared that an order had been entered to call in the creditors of Lothrop, and to authorize the administrator of Price and the master in Equity, to sell and convey such of his assigned estate as had been brought to the view of the Court.

No report or decree consequent upon these orders was included in the evidence reported by the master.

It appeared by the testimony of James Adger, Esq., who was the agent of Mrs. Price till 1836, "that soon after Mrs. Price purchased the wharf in July, 1832, and which he bid in for her at the sale, he went on the wharf to do business, and that Patrick McOwen told him, that one half of the large brick store next to Mr. McNellage [on lot A. B. C. D.] belonged to the estate of S. H. Lothrop; and he thinks that in consequence of this information from McOwen, that he returned the said property as belonging to Lothrop's estate for one or two years; that McOwen was calculating that his wife had a right to part of that store. McOwen married Lothrop's sister." This moiety had been the property of Seth Lothrop, who was the father of S. H. Lothrop, Mrs. Price and Mrs. McOwen; after his death, upon settlement of his estate it became, in 1816, the property of S. H. Lothrop.

On the part of the defendant it was urged at the hearing, that the decree between Price and Lamb was conclusive of Mrs. Price's title; that complainant's claim was old and stale, and that her possession had been adverse for more than ten years, and she was entitled to the benefit of the statute of limitations in bar.

The complainant insisted that she had no paper title, had never purchased or pretended to purchase or pay one cent for the undivided moiety; that he was not a party to the decree in Price v. Lamb; that said decree, upon a mere comparison with the title deed upon which it was founded, clearly appeared to be a misconception and erroneous, but offered to rest his cause upon it, and if his Honor, upon an inspection, should not be satisfied of his error in that decree, to admit that he had no case deserving the favorable consideration of the Court.

He insisted that the statute of limitations could not run in favor of the defendant, and that her possession could not be deemed adverse, because: upon the death of Wm. Price, Jr., the original trustee, the legal estate descended either at common law to the heir at law, his eldest son, or under our statute of distributions to his widow and children, who, in either case, became seized in trust for the creditors of Lothrop.

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*If the legal estate did descend to the heir at law, then, he was not only a minor, and could not be barred by the statute, but, from the date of Mrs. Price's purchase of one moiety, the heir at law (the trustee) and herself were tenants in common of the whole, and her possession was in support of the common title, and not adverse to it. There was no proof or pretence of an ouster, and without it her possession could not be adverse to her co-tenant.

If, on the other hand, the legal estate descended under the statute of distributions, then Mrs. Price and her minor children took as trustees, and she being one of several trustees, the statute of limitations could not run in her favor against them, for a double reason—first, because they were her co-trustees and co-tenants; and secondly, they were all

minors. But if such a thing were possible, still the statute of limitations could not avail her against her cestui que trust. This was a direct technical trust, which she had never executed or repudiated, but had concealed, and from which she had never been discharged; and the concealment of the property, and the trust that attended it, was a fraud, which the statute would not aid. In fact, if she was not the trustee, the minor heir at law was, and she could not bar him, because of his minority, and being also her co-tenant in common. If she was a trustee, then her minor children were her co-trustees, and for that reason, and because they were minors, the statute would not aid her to bar them. If she was not a trustee, she could not bar the cestui que trust, without barring the trustee; if she was a trustee, the statute will not run in her favor, and especially as there was a fraudulent concealment only recently discovered.

The Chancellor. On the 12th September, 1825, the late Samuel H. Lothrop made an assignment of certain property, specified in a schedule, for the benefit of his creditors. There were preferred creditors, considerable both in number and amount; but after payment of these, the surplus was to be distributed among his other creditors, rateably, in proportion to the amount of their demands. Within this latter class the complainant falls. William Price, Jr., since deceased, was the assignee of Samuel H. Lothrop. The assignee died in May, 1831, intestate. The defendant, James Adger, administered on his estate, and the other defendants are his heirs at law, and James Lamb, Esq.

The allegation is, that the complainant obtained a judgment against Lothrop in 1827, which is yet unsatisfied; that the trusts

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*of the assignment have never been fulfilled; that the defendant, James Adger, has received a portion of the assigned estate, for which he has not accounted, and that a part of the real estate assigned, has been sold by the other defendant, Eliza Price, who is about to receive the proceeds of sale from the purchaser, James Lamb, who is, therefore, also made a party defendant. The prayer of the bill is, for an account, and that the debt of the complainant may be paid.

It may be as well, first to consider the case of the defendant, James Adger. His intestate, Price, had acted as assignee of Lothrop, for about six years prior to his decease. He was also a preferred creditor, provision being made by the assignment for the payment of all sums which Price then was, or might hereafter be responsible for, as endorser of his notes, or as security to any other obligation of the assignor, Lothrop. In the answer of Mr. Adger, he states, that finding the personal estate of Price insufficient to pay his debts, and "that the affairs of the assigned estate of Lothrop were not altogether settled," he, on the 24th of January, 1832, filed a bill against the widow and children of his intestate, praying a sale of his real estate for the payment of his debts, and also praying the sale of a house and lot in Cheraw, being part of the real estate specified in Lothrop's assignment, "in order finally to close the affairs of the assigned estate of Lothrop."

On reference to the proceeding, thus made part of the defendant's answer, it appears that an order was made in the cause for the creditors of Lothrop to prove their demands, and that the complainant might contract to sell the premises in Cheraw, belonging to the assigned estate of Lothrop, deceased, and that the commissioner should execute a title to the purchaser, "paying the proceeds of sale to this complainant, on account of the assigned estate of Samuel H. Lothrop."

The answer of the defendant, James Adger, further states, that the house and lot in Cheraw were never sold; that the house was since burnt down, and that some rents, received by him, together with the sale of a negro, and a dividend on Mr. Lazarus' estate, constitute all the funds of Lothrop's assigned estate, which have ever come to his hands, and submits his readiness to account.

The claim against Mrs. Eliza Price, is founded on the proposition, that the premises conveyed by her to her co-defendant, James Lamb, were included in the assign-

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ment of Lothrop to *Price, and that a portion of these premises, to wit, a moiety of lots Numbers 8 and 9, still constitutes a part of the assigned estate, for the proceeds of which Mrs. Price was responsible to the creditors of Lothrop.

The deed of 1825 conveys to Price all the assignor's estate, "named in the schedule A," annexed to and forming part of the deed. The schedule describes the premises as "one wharf, bounded to the north by a wharf belonging to George Chisolm, and on the south by a wharf belonging to George Gibbs & Son, running east and west, with twelve brick stores thereon." This is the whole of the description; and, without more, it is quite clear that no title is made out to a moiety of lots Numbers 8 and 9. But it appears from the master's report, in Price v. Lamb, that the premises, sold to Mr. Lamb, consisted of lots Numbers 10, 11, and 16, and lots Numbers 8 and 9; that on the 15th of August, 1809, Samuel H. Lothrop was the owner in fee of lots Numbers 10, 11, and 16, and of a moiety of lots Numbers 8 and 9; and that on the 16th of August, 1809, he mortgaged the premises, which he owned, to the Bank of South-Carolina. In August, 1816, Samuel H. Lothrop became the owner of the other moiety of lots Numbers 8 and 9. In the summer of 1824, he erected a new brick store on lots Numbers 8 and 9. Previous to that time, the ground on which the new store

stands, had been the yard of the old store. The new store was No. 1 in the twelve stores on the wharf, which consisted of four stores on the north side, and eight on the south side. "It was always used," says the master, "by Mr. Samuel H. Lothrop, as a part of the wharf property, and the rates for storage in it brought into the books of the wharf;" and that "it was necessary to make up the number of twelve brick stores mentioned in the schedule to the assignment." Under this testimony the complainant may well insist, that lots Numbers 8 and 9, as well as lots Nos. 10, 11, and 16, passed by the description. Whether lots Numbers 8 and 9 had originally constituted part of the wharf was not very material. All belonged to Samuel H. Lothrop, and he, by his improvements on them, and connecting these improvements with the other store-houses on his wharf, had made it part of the same. When he speaks, then, in the schedule of the wharf, "with the stores thereon erected," it is plain that he regarded the stores as erected on the wharf, and, of course, that the lots, on which they stood, were part of his wharf. The wharf, called Lothrop's Wharf, with the buildings on the

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wharf, were then, in 1825, in *possession of William Price, under the assignment of Samuel H. Lothrop. In August, 1826, the Bank of South-Carolina filed a bill against Samuel H. Lothrop, and his assignee, William Price, junior, to foreclose the mortgage executed by Lothrop, in August, 1809. Here the difficulty commences, and it is the only difficulty in the case. When Lothrop executed the mortgage in 1809, he owned only a moiety of lots Numbers 8 and 9, and he included in his conveyance Numbers 10, 11, and 16, and, of course, only a moiety of 8 and 9. Subsequently, he purchased at sheriff's sales the other moiety, which belonged to Seth Lothrop, deceased. In 1824, as has been said, he erected a brick store on lots Numbers 8 and 9, constituting No. 1 in his range of stores, which form part of Lothrop's wharf. In preparing the bill for foreclosure, the description is taken by the solicitor from the mortgage of 1809. No notice is taken in the pleadings, either on the part of plaintiff or defendant, of any tenancy in common of this portion of the premises. In February, 1827, a sale was made by the master, under the decree of foreclosure, and William Price, junior, became the purchaser. He, at the same time, re-mortgaged the property to the Bank of South-Carolina.

The store on lots Numbers 8 and 9, continued, says the master, to be regarded and used as part of the wharf property when William Price, junior, purchased, and he so used it until his death, in May, 1831. Price died insolvent. In March, 1832, the Bank of South-Carolina filed a bill against James Adger, his administrator, and against Eliza Price and the other heirs at law of William Price, junior, praying a foreclosure of the mortgage, and payment from his general assets, of any deficiency. In January, 1832, the administrator (as has been heretofore stated,) had already preferred his bill, praying, among other things, the sale of the real estate of his intestate, Price, and also for a final settlement of the assigned estate of Lothrop. In the answer, filed by the administrator to the bill of the Bank of South-Carolina, reference is specially made to the embarrassment arising from the affairs of Lothrop's assigned estate, and the aid and direction of the court are craved by the administrator. The suits were conducted together. In order to a final adjustment, the creditors of Lothrop were called in. It was insisted, in the argument on the part of the complainant, that the order for calling in the creditors of Lothrop had never been heard of until the appeal decree in Price v. Lamb, pronounced

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in February, 1845. *It is a misapprehension. No one was better acquainted with the order than the complainant himself. He appeared before the master under the notice, established his debt, and became party to the decree, pronounced by Chancellor Johnston, in May, 1831, and so it appears from the records of the court.

The report of Mr. Gray, filed on the 24th of May, 1831, and entitled in the case of the Bank of South-Carolina, for themselves and Creditors v. Administrator of William Price, junior, and others, was confirmed by the decree of Chancellor Johnston. The administrator and heirs of Price, the creditors of Price, and the creditors of Samuel H. Lothrop, were parties in the proceedings. The object was to marshal the assets, real and personal, and to pay the debts of both estates, so far as the assets would extend. The report sets forth, at full length, of what the estate of Price consisted, and what were the remaining assets of Lothrop's assigned estate. The latter are specified as being "a house and lot in Cheraw, negro Prince, one-third of Wham, (negro,) and $391.90, in the hands of the administrator of Price." Notice was given to the creditors, both of Price and of Lothrop, through the Charleston Courier, on the 23d of May, 1832. The master further reports, that in obedience to former orders, and after due notice, he, on the 2d of July, 1832, sold "all that property, known as Price's Wharf, situated in Charleston, to Mrs. Eliza Price, for the sum of twenty-two thousand five hundred dollars, and that" (she having complied with the terms of sale,) "he had made her a title."

Among the creditors of Samuel H. Lothrop reported by the master as having "rendered statements of their demands, and exhibited proofs of their correctness," is the complainant, as a judgment creditor of Lothrop, to the amount of six thousand five hundred and twenty-three dollars and forty nine cents.

Mr. Adger was the person who bid off the property at the master's sales, for Mrs. Price. It cannot be doubted, from his testimony, and that of Mr. Ker, (who had been wharfinger for about twelve years,) that the premises, now in question, were used and treated as part, first, of Lothrop's, and afterwards Price's Wharf. She (Mrs. Price,) took and held possession, and has received the rents of store No. 1, in the same manner as of the other stores, (by herself, or those claiming under her,) from her purchase in July, 1832, until the filing of this bill, on the 6th day of March, 1845.

It is said, however, and it is truly said,

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that, although the *master's conveyance to Mrs. Price, of July, 1832, describes Numbers 10, 11, and 16, together with the ware-houses, store-houses, and other out-buildings, erected thereon, as formerly known by the name of Nichols', afterwards Keith's Wharf, and lately by the name of Lothrop's Wharf, he conveys, also, a moiety of the lots Numbers 8 and 9, and that this excludes the assumption that the other moiety passed. The inference is, that, at that time, and now, the other moiety was part of Lothrop's assigned estate.

When it is proved that, from 1824, certainly, these premises had been used and considered as part of Lothrop's, and afterwards of Price's Wharf, that in the proceedings under which the sale was made to Mrs. Price, and to which the creditors of Lothrop were parties, it was assumed, if not adjudged, that no part of these premises constituted any portion of Lothrop's assigned estate, and they (the creditors,) interposed no claim; that the master, according to his report, sold to Mrs. Price "all that property known as Price's Wharf, situate in Charleston," and that she was put in possession of these premises, as part of her purchase, the court is of opinion that it would be a fraud, on the part of the creditors of Lothrop, to avail themselves of this defective conveyance. The deed of the master is their deed, and so, on its face, it purports to be. There can be no doubt whatever that these premises were considered as part of Price's Wharf. They sold, and she purchased, "all that property known as Price's Wharf," and she was entitled to all proper deeds and assurances from the parties to the proceedings.

But it is not necessary to rest the defendant's right to protection on this footing. In the case of Price v. Lamb, the previous proceedings in the several causes were not fully developed. Whatever may have been the fiduciary relations between the defendant, Eliza Price, and the creditors of Lothrop, anterior to the proceedings of 1832, the court is of opinion that, with these proceedings and the decree of 1834, the trust ceased. It ceased, at least, for the purposes of this case. It is well settled, that when a trustee does an act purporting to put an end to his trust, the statute of limitations commences its operation. Starke v. Starke, Car. L. Journ. 503. The character of the proceedings of 1832, necessarily involved the inquiry as to what constituted the assigned estate of Lothrop. The legal title of the real estate was in the heirs of Price, of the personalty in Adger, his administrator. In order to enable the

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court to marshal the assets, *it was the duty of the parties to surrender up the estate, to be sold by the officer of the court. Accordingly, the real estate in Cheraw, and the personalty in Charleston, were reported to the court, as assets of Lothrop's estate, were ordered to be sold by the master, and the fund to be distributed, according to the decree. It is difficult to maintain, that these were not acts purporting to be a determination of the trust, as between the heirs of Price and the creditors of Lothrop. The general doctrine is very fully discussed in Kane v. Bloodgood, 7 Johns. Ch. 90, and in Willison v. Watkins, 3 Peters, 43, [7 L. Ed. 596.] In the former case, Chancellor Kent recognises the principle, that if a trust subsisted, so that the trustee could recover as having the legal estate, it would follow, that the right of the cestui que trust, as against the trustee, could not be barred. "But," continues he, "supposing the trustee was to deny the right of the cestui que trust, and assume absolute ownership, is there any case in equity that would allow the latter his remedy beyond the period limited for the recovery of legal estates at law? So long as the trust is a subsisting one, and admitted by the act or declaration of the parties, no doubt the statute does not affect it: but when such transactions take place between trustee and cestui que trust, as would, in the case of tenants in common, amount to an ouster of one of them by the other, I can hardly suppose that a Court of Equity would consider length of time afterwards as of no consequence. There is no good reason why the statute of limitations should not apply to such a case, as well as to cases of constructive trust, and to cases of detected fraud, and to all other cases in which the statute is assumed as a rule of decision." Mrs. Price has been in exclusive possession and enjoyment of these premises for thirteen years since the fiduciary character thus terminated, and the complainant cannot be permitted now to disturb that possession, or question its effect.

If there had been any fraud, on the part of the trustee, the cestui que trust might be entitled to relief, but on a different principle. But the defendant has neither done nor omitted any act, to which fraud could be imputed. The complainant enjoyed all the means of information in 1832, which he has now. The deeds were all on record: and if any defect existed, it was as well known to the complainant as to the defendant. There is no testi-

mony whatever in the case, which would warrant the suspicion that she knew any thing which she did not disclose, or which was not as well known to him as to her.

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*If it were necessary for the decision of the case, there is much ground for declaring that, as between these parties, the whole matter is res adjudicata, by the proceedings of 1832 and 1834. What a party has had once the opportunity to litigate, he shall not be permitted, afterwards, to call in question. M'Dowall v. M'Dowall, Bail. Eq. 324.

The decree of 1834 establishes the order and manner in which the funds of the assigned estate of Lothrop shall be distributed. It is manifest that they were entirely inadequate to discharge the preferred debts, as established before the master, and that nothing would remain for the general creditors. It is only necessary to direct, and it is hereby Ordered and Decreed, that the funds in the hands of the defendant, James Adger, be paid to the preferred creditors of Lothrop, as specified in the schedule to the master's report of May, 1834.

As to the defendants, Eliza Price, and the other heirs of William Price, junior, and the defendant, James Lamb, it is ordered and decreed, that the bill be dismissed with costs.

From this decree an appeal was taken, on the following grounds:

1. Because the circuit decree is founded upon evidence not before the court at the hearing, and of which the complainant had no notice or the opportunity of reply: and if the introduction of the same after the hearing, was deemed essential to the justice of the case, it should have been introduced only upon a rehearing ordered.

2. Because as to the fund in Mr. Adger's hands, the circuit decree erroneously ordered the same to be paid to the preferred creditors of Lothrop, who were not before the court, and in fact there are no such creditors or claimants, all having long since been paid, and more than paid, in full, which the complainant would have shown, had the evidence relied upon in the decree been before the court at the hearing.

3. Because Mr. Adger is liable for interest on the funds in his hands, and withheld from the creditors of Lothrop, and his account should have been referred to the master to state the same, with interest, in conformity with the established practice of this court.

4. Because as to Mrs. Price, and the undivided moiety of the town lot in question, the same was held by William Price, Jr., at the time of his death, under a direct, technical, continuing trust, exempt from bar by the statute of limitations; and if, upon his

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*death, the legal estate and trust descended to his widow, as one of his heirs, and not to his eldest son as heir at law, then his minor children were her co-trustees, and she is not entitled to the benefit of the statute of limitations against them, or the cestui que trust, who is entitled to all their rights. And there was no evidence before the court to show that she or they had, within the statutory period, either repudiated, denied, executed or been discharged from the trust.

5. Because if, upon the death of her husband, the legal estate and trust did not descend to her, but to the heir at law, then her possession of the whole lot under her title to one undivided moiety, was as tenant in common with the trustee, a minor and exempt from bar by the statute of limitations; and there was no proof of an ouster.

6. Because her concealment of the trust property was a fraud, and the statute of limitations could only run against the complainant from the date of the discovery of the fraud, which is within the statutory period.

7. Because Mrs. Price never had any "paper title," to more than one undivided moiety, and never purchased, bargained for, or paid for the other moiety,—and the parol evidence of Mr. Ker and Mr. Adger, referred to in the decree, is in contradiction of the deed, and is only the evidence of what her agents, acting under her commands, did without being brought to the notice of the complainant.

J. B. Campbell, for appellant. If this decree shall be sustained, Mrs. Price will be essentially benefited, and the complainant injured, by the injustice occasioned, at her instance, by the oversights, delays and mistakes of this court. The plainest principles of justice, as well as the highest judicial authorities, unite to forbid this. "If," says Lord Eldon, "there be a principle on which courts of justice ought to act without scruple, it is this—to relieve against the injustice occasioned by their own acts or oversights, committed at the instance of the party against whom the relief is sought." Lord Redesdale, in a great and leading case, lays down the same rule, and adopts the very language of Lord Eldon as his own. (6 Ves. 73; 1 Sch. and Lef. 434.)

Mrs. Price falls strictly within the rule. She has been driven to rely upon decrees hitherto procured, at her instance, under misapprehensions apparent upon the face of

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them. This decree *gives her the full benefit of the lapse of time gained to her by the delays of the Court, ending only in error and mistake. It would be strange if a Court of Equity, whose peculiar jurisdiction it is to correct and relieve against the errors, mistakes and accidents of others, should hesitate to correct its own oversights. The title to the property in question has been under the consideration of this Court since September, 1842. Mrs. Price then filed her bill, to compel her vendee, James Lamb, to accept her title, and complete his purchase contract with her. She, at that time, pretended to

no title except one acquired by the statute of limitations under an adverse possession. She set up no "paper title."

The Circuit Court, Chancellor Johnson presiding, February term, 1843, decreed that her possession had never been adverse; that she had no title in her own right, and could acquire none under the statute of limitations; because she was a trustee, and her possession a trust for the benefit of the creditors of her brother, Samuel H. Lothrop. The cause came up on appeal. This court, after the lapse of one year, in February, 1844, expressed its concurrence in the circuit opinion, but instead of confirming that decree, retained the cause, and contented itself with ordering the master to report, as farther evidence, the equity proceedings and deeds under which she acquired the wharf property, in the hope of finding she had, what she did not profess to have, "a good marketable paper title." There could have been no error; it would have been at least safe, having formed an opinion upon the case made before them, if the court had done what, in the language of the decree, "in an ordinary case, might be sufficient—affirmed the decree of the Chancellor, dismissing the complainant's bill." It is always safe for courts to decide causes upon the evidence brought to their view. It is the duty of the Solicitor to prepare and fully develope his case; if he fails to do so, it may be the misfortune of the client, but not the error of the court. It would be burdensome to the bench, if it were a part of its duty to prepare, as well as adjudicate causes. It would be difficult, as well as unsafe, to unite the duty of the advocate to the character of the perfect judge.

In conformity with the direction of the decree, the master made his supplemental report, and at the end of another year, this court made its final decree, and adjudged that Mrs. Price had in fact the "good marketable paper title." Reasons were assigned for this decree. The deed was referred to—the part

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*of it which was deemed her "good paper title" was specially cited; but on examination, did not confirm the conclusions of the decree. Exactly the reverse. The deed excluded the moiety lot in dispute. It did not, even by implication, convey it to Mrs. Price. It is a canon in the construction of written instruments, that a particular specification will exclude what is not specified. (Chancellor Kent, 1 Johns. Chan. Reps. 183.) It was too clear to be doubted. It would be disrespectful to suppose this court, having a full year for consideration and advisement, would adjudicate upon the legal effect of a deed, without reading the whole of it. But if the question were open for the expression of an opinion, certainly no lawyer would say, having read the deed relied upon in the appeal decree, that it included any "paper title" or conveyance to Mrs. Price or any one else, of more than one moiety of the lot, and that moiety there is no dispute about. The decree ordered the purchaser to accept the title tendered, and comply with his part of the purchase contract. This decree was promptly enforced; and under the stringent process of a contempt of court, Mr. Lamb, a gentleman of the highest consideration for intelligence, standing and probity, was attached (his person arrested) and compelled to pay for property, the title to which, it was manifest, was a mere nullity—the judicial offspring of near three years of judicial parturition.

A man of Mr. Lamb's intelligence did not require the aid of counsel to see this. The unsatisfied creditors of Lothrop, too, could see that nothing had been settled by a judgment plainly founded in error. They were not parties to the suit; therefore, technically, not bound by the result. The complainant is one of these creditors, and immediately filed his bill. Mrs. Price having obtained the decree against Mr. Lamb, now rested her rights upon that. The court had found for her "a good marketable paper title," and she claimed, as she was well entitled, all the benefits of it. She stood upon the deliberate opinion of the highest court. Upon this ground the case was argued, and it rested upon it. True, it was objected that the complainant's debt was old and stale. But his debt was a judgment debt, and within the presumptive period of twenty years, and there was an end of the objection. It had been settled by the decree of Chancellor Johnson, and the concurrent opinion of this court, that Mrs. Price's possession had not been adverse, and the statute of limitations could not run in her favor. It had been assumed that she was a trustee, and her pos-

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session a trust for the *creditors of Lothrop. She denied she had ever held as trustee. If this were true, it could not aid her, because if, from the death of her husband, she was not a trustee, then the heir at law, at common law, was; a minor, and from the date of her purchase, her co-tenant in common. As her co-tenant she could not bar him without an ouster. As a minor, he was exempt from the operation of the statute. She never pretended that she had executed the trust, or been discharged. She denied she ever was trustee.

The decree, which is the subject of this appeal, then followed. It substantially admits that the decree in Price v. Lamb could not be sustained. It certainly does not rely upon it, and passes it over in silence. The "good marketable paper title" could nowhere be found. It had been diligently sought for; it could not be discovered, neither could it be created by the "Delphic lines" of the appeal decree. A new field was now to be explored, or the complainant must have his decree. Mrs. Price could not acquire a statutory title in 1843, 1844, and in 1845. The "paper title" idea was exploded, and must be given

up. It was then discovered, by diligent search, among the records of the Register's office, that in May, 1834, such proceedings had taken place in the case of "The Bank of South Carolina v. James Adger et al.," as would, upon ex-parte extracts, raise a presumption that Mrs. Price's fiduciary relations, as to this property, had terminated at that time. Upon these extracts, collected extra-judicially, the reasoning and conclusions of the decree rely. It was held that from the date of Mr. Gray's report, filed May 24th, 1834, and the circuit decree of the same day, made "by consent," not of the proving creditors of Lothrop, who were not heard in the premises, but by consent of the Bank of South Carolina, of Mr. Adger and Mrs. Price,—the statute began to run in favor of Mrs. Price. Assuming, then, for our present purpose, (and it is a mere assumption,) that the present decree rests upon evidence properly before the court, or that the evidence is sufficient to support the conclusions drawn from it, then, from May 24, 1834, to the corresponding day of 1844, the statutory title would be perfected by adverse possession. Now we say, that if such a title has been perfected, and is binding against the complainant and other creditors of Lothrop, in favor of Mrs. Price, it has been done by the unnecessary delays and judicial errors of this court. Delays resting, too, upon no other or better excuse than that "both parties" (Price

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v. Lamb,) "were *anxious to complete their contract." This court, although expressing a concurrent opinion with the circuit decree of Chancellor Johnson, where "the creditors of Lothrop" were declared to be the "parties in reality beneficially interested," withheld a final decision for one whole year, in the hope of obtaining evidence more favorable to the anxieties of the parties before them. The creditors of Lothrop were not parties, but their interests were under the view of the court. The appeal decree of 1844, retaining the cause for further evidence, was filed near four months before the expiration of the statutory time, supposing it to have commenced May 24, 1834. If this court had then pursued that course which, in the language of the decree, "might be sufficient in an ordinary case," and made their decree final, the creditors of Lothrop would now have no cause of complaint. And why was this not done? What was there in this case to take it out of the rules of ordinary cases? The decree speaks for itself. "In an ordinary case, it might be sufficient to affirm the decree of the Chancellor dismissing the complainant's bill; but both parties are anxious to complete the contract, if it can be carried into effect safely. The court has therefore determined to retain the case," &c. (Price v. Lamb, appeal decree of 1844.) Had this then been an ordinary case, the circuit decree might have been affirmed. The reason assigned for not doing this, is, "both parties were anxious to complete their purchase;" but there were other parties within the view of the court who were "in reality the parties beneficially interested." They were the creditors of Lothrop. With this knowledge there would have been no injustice done if the court had, while retaining the case for the coming in of the "good marketable paper title," ordered these creditors to be made parties to the bill, and thus given them a right to be heard before the statute of limitation had run its full course. The familiar practice of the court would warrant this. "There can be no doubt the court, at any stage of a cause, upon seeing that sufficient parties are not before it, have a right to arrest the case, and direct the bill to be amended, so as to bring in all the parties in interest." (1 Hill's Chan. Reports, 53.) It is the duty of the court to do this upon its own motion; "equity in all cases delights to do complete justice, and not by halves." (3 Peere Wms. 333.) "It is a leading principle in courts of equity, that where a decision is made, it shall provide for the rights of all persons whose interests are immediately connected with it." "The rights of all persons

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*interested, must be settled and decided upon, so that the orders of the court may be safely executed by those who are compelled to obey them, and future litigation may be prevented." Calvert on Parties in Eq. 1; Mitford's Eq. Pl. 164; Story's Eq. Pl. ch. 4; Poore v. Clarke, 2 Atk. 515; Falk v. Clinton, 12 Ves. 58; Cockburn v. Thompson, 16 Vesey, 25; 2 Story's Equity, 742. The court will not wait for the motion of parties already before it. It may be their interest to exclude the proper party; such was the case in Price v. Lamb, and the court seems to have seen this when the case was retained upon the ground that "both parties were anxious to carry their contract into effect." But the court also saw that there were other parties (not parties to the bill) who were "beneficially interested." Suppose a case. A and B come before the court, asking to complete a contract, touching lands in question. They are anxious to effect their purpose. The calling in C, a third party, would prevent this, and they avoid making him a party. But the court sees it, and declares that C is "in fact the party beneficially interested," and that A and B do not in any wise appear entitled to what they claim. What then is the duty of the court? If the uniform action of the greatest judges and the highest courts which have adorned the administration of equity jurisprudence in England and America were to be relied upon, there would be no doubt. Show me the case, if it can be found, where an English Chancellor, having retained a case for additional testimony in favor of the parties already before him, has not, at the same time, called in parties whom he saw were "in reality beneficially interested."

Would it be doing complete justice? Would it not be doing justice by much less than halves, to do otherwise? Yet this court did rule otherwise. The cause was reserved in aid of the parties before the court. The party, "in reality beneficially interested," was not called in; at the end of another year, the statutory period was completed, and, upon that lapse of time, thus gained, the present decree relies to bar the rights of the complainant. This court is now asked, its former decree being clearly an oversight and erroneous, to bar the rights of creditors, because, pending its own delays and oversights, "occasioned at the instance of the party against whom relief is prayed," sufficient time has elapsed. Is not this an injustice, occasioned by the acts or oversights of the court, contemplated by the rule of equity? Surely, if ever there was a case where the rule of Lord Eldon and Lord Redesdale, the

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highest judicial authority; but *a rule founded, in fact, in common sense justice, (an authority higher than judicial,) should be applied in full force and vigor, this is such a case.

The position of Mrs. Price is precisely such as to place her within this rule. At her instance, the court has committed an oversight. The effects of it work great injustice; she is benefitted, the complainant is injured, and has brought her into court for relief. This court, under "a principle on which courts of justice ought to act without scruple," is bound to give that relief; if it is refused, she is left in the enjoyment of the property of her late brother, for which she has never paid one dollar, and has, in her own right, no color of title, except under favor of this court; while his creditor, who had intrusted him with the safe-keeping of his property, as a mere bailee, and not as a purchaser, is deprived of his last hope of payment. If Mrs. Price can successfully resist the complainant's claim, she will gain what never belonged to her; if she fails, she loses nothing, she only fails to gain what rightfully belongs to another. How stands the complainant? If he succeeds, he will obtain part payment from his creditor's property, of a debt contracted by the breach of a sacred fiduciary relation. If he fails, he will be turned out of court with the loss of what honestly belongs to him, having first been invited by a reliance upon the declaration of the court, that he was a party "in reality beneficially interested." The experiment will not be lost upon him. He will have gained what ought not to be forgotten, the opinion of the court in 1845, that it would be a "fraud" for the creditors of Lothrop, then to avail themselves of a matter in which, in 1843 and 1844, it was deemed, by the opinion of the very same court, they were "in reality beneficially interested."

We come now to the consideration of the several grounds of appeal.

The first ground states that the decree is founded upon evidence not before the court at the hearing, without notice to the complainant, and to which he had no opportunity of reply; and he claims to have the same struck out, and the decree reformed, so as to conform to the case made by the evidence and pleadings before the Court; or at least, that a rehearing shall be ordered, and that he shall have an opportunity of being heard and producing evidence in reply. He claims the right to know, before judgment, upon what evidence his rights are to be adjudicated. The simple proposition is, that he demands a trial, in the judicial meaning of the term. He thinks this not unreasonable.

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If we *state the facts correctly, they require no comment, and there is an end of argument; one conclusion only can follow. It is to be hoped the time will never come, when it will be affirmed, and the proposition gravely discussed, that this Court can decide causes upon evidence not before it at the hearing, but the result of researches made afterwards without notice to the parties to be affected. The documents and matter objected to, and denied to be judicially before the Court, are appended to the printed evidence reported by the master and marked "Appendix A," pages 22, 23 and 24. They consist of extracts from the report in the case entitled "The Bank of So. Ca., et al. v. James Adger, administrator, et al;" of one of the Schedules (E) to said report; and of the decree (by consent) of Chancellor Johnson thereon, all filed the same day, May 24th, 1834. These papers were not in evidence at the hearing, and the first knowledge the complainant had of their being used as evidence, was derived from the decree of the Court. They are copied by the Register from records in his office, and these office copies, marked by the Register, "for the Hon. B. F. Dunkin," were found enclosed in the decree after it was put on file by the Chancellor. They are not included in, or referred to by, the master's report of evidence, which was, by agreement of the parties, the only evidence upon which they went to trial, and the master so reported. They formed no part of the evidence and proceedings in Price v. Lamb, and they were in no way referred to in the argument or otherwise, at the hearing of this cause. They were not in evidence. The accuracy of these statements cannot be doubted, and they can be easily tested by a reference to the records. This is all we know of the mysterious history of this foundling testimony. It is manifest that so much of the decree as declares the possession of Mrs. Price to have been adverse, and so much as orders the funds in Mr. Adger's hands, to be paid to the "preferred creditors of Lothrop,"

are conclusions resting entirely upon these "extracts." There is, without them, no other ground in the decree, for assuming that Mrs. Price had ever been discharged from her trust, if in fact she ever was a trustee, and in no other way were the preferred creditors ever before the Court.

The second ground demonstrates the propriety of the first. It presents the most conclusive illustration of our position. Relying upon these documents, the chancellor thought it "manifest that Lothrop's estate had been entirely inadequate to the payment of his preferred debts as established before the

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master, and that nothing would *remain for the general creditors," and upon this presumption, has actually ordered the funds remaining in the hands of Mr. Adger, to be paid to the preferred creditors. There could be no more conclusive proof of the danger of assuming to know more of a cause than appears by the evidence before the Court, than this experiment affords. The Chancellor remarks in his decree that "in the case of Price v. Lamb, the previous proceedings in the several causes were not fully developed." This is doubtless correct. But it is just as little to be doubted that they were in evidence, only so far as they were developed. But, the complainant could have had no objections to a full and complete development, and had the learned Chancellor examined the whole proceedings, or if the general creditors had known upon what evidence they were to be excluded, he would at once have been shown, that the preferred creditors had, long since, been paid in full. They are entitled to the merit of asking nothing from the Court, because they were entitled to nothing, and they knew it. They had been paid to the last farthing; had given their receipts in full nine years before, and were satisfied. The payments had been properly vouched in this Court before the master, and the accounts certified by him to be correct. The receipts and the master's certificates, are here before the Court for inspection. We do not offer them in evidence, because it is not the practice of this Court, sitting in appeals, to allow the introduction of new testimony. But we do urge them as a satisfactory argument against ordering money to be paid to parties who are not before the Court, and who do not claim it. If it appeared to the Court that their interests were involved in the issue, it would have been proper to call them in as parties. In Price v. Lamb, the creditors of Lothrop generally were brought to notice, and it was there apparent that they would have been entitled to a decree, had they been before the Court. But no decree was made in their favor. They were not even required to be made parties. How does it happen that they were so unfortunate? How, that the preferred creditors are so fortunate? Under what principle of right or reason will this Court go in search of one class of creditors, and force upon them double payment, while another class is denounced as guilty of "a fraud" in asking the aid of this Court? (Circuit Decree, p. 16.)

If we were at liberty to meet these ex parte extracts by evidence in reply, that part of the decree which assumes that from May 24th, 1834, Mrs. Price's adverse posses-

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sion commenced, *would be found to have, in fact, just as little to stand upon as that part which ordered a two-fold payment to the preferred creditors, or as the decree in Price v. Lamb, which gave her "a good marketable paper title." Lord Hardwicke was a pre-eminent judge. It is no small merit to have the support of his illustrious authority, and he declares he had found himself, "twice in the same case in that difficulty, in which a Judge will always bring himself, when his curiosity or some better motive disposes him to know more of a case than judicially he ought." Rich v. Jackson, 6 Vesey, p. 334.—note.

And here we might safely rest our case, and say the facts entitle us to all we ask. But we go much further, and insist that the testimony (admitting it to be before the Court as it stands) and the law, properly applied, cannot sustain the conclusions of the decree. If the Court shall come to the same opinion, then the objection to the evidence will be immaterial; without, therefore, waiving that objection, we will examine the case as it appears by the Chancellor's decree.

The next question in the order of the grounds of appeal is as to the interest on the fund in Mr. Adger's hands. This fund was received by Mr. Adger, as administrator of Price, who was assignee of Lothrop, and under the sanction and order of this Court. It appears, by the account, filed with his answer, to have been in his hands now about ten years. He does not allege that he has ever notified the complainant or other creditors, or declared any dividend, or taken any steps whatever to discharge himself of the trust. He was a party to the suit in which the complainant and others proved their debts. He must then be presumed to have known they were entitled to payment after the preferred creditors, the last of whom he paid himself. He does not allege that he has kept this fund separate and distinct from his own. It was incumbent upon him to show this, and failing to do so, it must be assumed that he used the fund, or at least mingled it with his own. Under such circumstances, and the uniform current of authorities, his liability for interest was not doubted, and it was not deemed necessary at the circuit hearing to do more than bring the point to the notice of the Court. It was not considered as an open question. In a similar case, Chancellor Kent expressed his surprise "that the point should be drawn

in question, after what had been said and ruled by him, and considering how fully and explicitly the doctrine had been established in the English Chancery." (4 Johns Chan.

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Reports, 302.) *This admonition applies with equal force in the Courts of this State, and was not lost upon the counsel in this case. Mr. Adger's liability for interest is as well settled under the uniform decisions of our Courts, as it is in England or New York. But the circuit decree has not taken this view of the subject, and it is thus made necessary for me to urge this point, which I shall do briefly. What we claim is well and clearly put by Chancellor Kent:

"The defendant rendered no sufficient excuse for not distributing this fund. He appears to have been guilty of negligence, and he does not show what he did with the fund in the mean time. The presumption is that he appropriated it to his own use. He is justly chargeable with interest on the fund, from the time it was converted into cash, and with the costs of suit. This is the rule of this Court in the case of a negligent trustee." (1 Johns. Chan. Reports, 84; Gray v. Thompson.)

In England the doctrine is as well settled as any other. Ratcliff v. Graves, 1 Vernon, 196, by Lord Keeper Guilford, in 1683, among the early cases (also Lee v. Lee, 2 Vernon. 548,) ruled it to be reasonable that executors and trustees in all cases should answer interest if they had used the money in trade, and that they should not turn trust money to private advantage. To discharge themselves they must show that they had kept the money by them. The cases of Newton v. Bennett, 1 Bro. C. C. 359; Perkins v. Boynton, 1 Bro. C. C. 375, are by Lord Thurlow, and to the same point. In Treves v. Townsend, Lord Loughborough said "the defendant has kept trust money under a trust that he should not keep it. Therefore he must pay interest. It is a fraudulent neglect of duty he had undertaken as assignee. The money of a merchant at his banker's does not lie idle, it is a part of his stock in trade. I was surprised to hear it urged, that the assignees were to make no division or to take an active part in settling the bankrupt's estate, unless called upon by the creditors. Their only excuse is, that they could not make a dividend, because they were so negligent." (1 Coxe Chan. 50, and 1 Bro. C. C. 384.) Costs follow of course in all such cases.

And Lord Thurlow, in Franklin v. Frith, 3 Bro. C. C. 455, said, "keeping money at one's bankers is no proof that he did not make interest of it; it is in aid of his credit." See also Hilliard's case, 1 Ves. Junr. 84; Dawson v. Masey, 1 Ball and Bea. 231; and Bird v. Lockey, 2 Vernon 744; and in Littlehales v. Gascoigne, 3 Bro. C. C. 73. "If a trustee retain money (unnecessarily,) for any length of time, which, by application to the Court, or by investing, he might have made pro-

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ductive, he shall be *charged with interest." Sir Wm. Grant, in a case where trustees had kept money idle at their bankers, but to a separate account, made them not only pay interest, which was scarcely resisted, but costs, because the fund being under their control increased their credit. (Ashburnham v. Thompson, 13 Vesey, 492.) Lord Eldon went still further, and in a very emphatic manner declaring the rule of the English law in the House of Lords, said "the cestui que trust may say he will not take a fixed rate of interest, and require an account and payment of the actual profits made by the trustee." (Montgomerie v. Wauchope, 4 Dow. P. R. 151.)

The only doubt in the English authorities thrown upon this general doctrine, is a remark of Lord Hardwicke, in Child v. Gibson, 2 Atkins, 603. Chancellor Kent expresses a belief that he is there incorrectly reported; and it is well known that the reports of Atkins abound in mistakes. The American cases are uniform in their authority to the same point. In Dunscomb v. Dunscomb, Chancellor Kent said, "the defendants say the money has always been kept in readiness to pay to the persons entitled, when demanded; but this is no sufficient excuse. If they had any real doubt or difficulty, as to the person authorized to receive, they could have applied to the Court for advice, or brought the money into Court. If the money (as we are at liberty to suppose,) has been mingled with their own money, it has answered the purpose of credit, and the rule is settled, that executors and all other trustees are chargeable with interest, if they have made use of the money themselves, or have been negligent, either in not paying the money over, or in not vesting it, or loaning it, so as to render it productive." (1 John. C. R. 510.) See also Manning v. Manning, ib. 535; Shieifflin v. Stewart, ib. 623, 629; Brown v. Rickets, 4 John. C. R. 302. In this last case, Chancellor Kent lays down the general rule, "a trustee is not to make any gain to himself from the use of the trust funds, but it must all be accounted for to the cestui que trust. So, if a trustee mingles the trust monies with his own, so as to answer the purpose of credit, he must answer for what it may reasonably be supposed to have made. He must not in any event be a gainer by his employment of the trust fund. It is a principle of universal law that a tutor, curator or trustee shall not make and retain a profit of the trust fund." The decisions in our own Courts are not less conclusive. The chief doubt that has been expressed, and the question in most instances has been, not as to liability for interest, but for interest with

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annual rests, and *for compound interest.

Mr. Adger is chargeable with interest on the annual balances in his hands, under the cases in our Courts. See Darrel v. Eden, 1 Dess. 241; Benson v. Bruce, 4 Id. 463; Walker v. Bynum, Id. 555; Jenkins v. Fickling, Idem, 369; Pace v. Burton, 1 McCord's Chan. 202; Black v. Blakely, Idem. 10; Oswald v. Givens, Riley's Chan. Cases, 38; Chesnut v. Strong, 2 Hill's Chan. 140; McCaw v. Blewet, 1 Bailey's Eq. Reports, 48; Brown v. Vinyard, 1 Bailey's Eq. Reports, 460; Lafont v. Ricard, Idem, 487; Henderson v. Laurens, Car. Law Journal, 131.

The authority of the cases in South Carolina, of every decision of Chancellor Kent, and the decisions of the English Chancery, and even the rule of the civil law, combine to fix upon Mr. Adger payment of compound interest, or at least, interest with annual rests. Lord Eldon (11 Vesey, 92) said that "in such cases the charge of compound interest was consistent with every view of moral justice, and the Court would shamefully desert its duty by adopting a different rule." Sir William Grant adopted the same rule. (12 Vesey, 129.) And I cannot, in this connection, refrain from asking the indulgence of the Court, while I repeat what has fallen from one of the ablest Chancellors who has illustrated equity jurisprudence from the American Bench. "It cannot be amiss to observe," says Chancellor Kent, "that the civil law was not forgetful of the justice and necessity of such a strict provision against trustees who converted trust money to their own use; while it gave ordinary interest against the tutor who suffered the pupil's money to lie idle, yet if he converted it to his own purposes, he was held responsible for interest, non ex more regionis (as 5, or 4, or 3 p. ct.) sed gravissimas vel maximas usuras, which different commentators fix at 12, or 8, or 6 pr. cent, while 4 pr. cent was the ordinary interest. Dig. 3, 5, 38, Id. 26, 7, 7—6, and 10; Code 5, 56, with the notes of Gothofredus and Voet's Comm. ad. Pand. lib. 26, tit. 7, s. 9.) Such coincidence on this particular point between two such systems of jurisprudence, serves of itself, to show that the principle adopted has clear foundation in natural justice, or, at least, is recommended by obvious dictates of public policy. Indeed it appears to be an interesting fact, that the refusal of compound interest in ordinary cases between debtor and creditor; the denial of compensation to executors and other trustees; the charge of simple interest against them when they negligently suffered trust monies to lie idle; and the charge of

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extraordinary interest against them *when they invest it to their own use, are distinct principles not only well settled in the English Law, as I have abundantly shown, in this and the other cases referred to, but they all existed as known principles in the civil law of Rome; and these principles, from the prevalence of that code, are now probably acknowledged and settled as part of their common law in most of the continental nations of Europe. This historical fact is calculated to inspire us with much respect for these principles, independent of their practical utility in securing the diligence and fidelity of trustees." There is nothing in this case to excuse Mr. Adger from this uniform rule, and no excuse is set up by him. It is said he has always been able to pay. This doubtless is true; but if he were to show that he had always kept the amount on deposite to his credit in bank, it would not change his case or discharge him, because that would be in aid of his credit, and thereby he had the use of the money. He knew who were the parties entitled to receive the money. It was in his hands for the purpose of paying to them, and he neglected to do so. The creditors were ignorant that he had received the money to their use, and only came to the knowledge by filing their bill in this Court. He is, in the words of Chancellor Kent, "justly chargeable with interest from the time he received the money, and with the costs of suit." I have dwelt upon this point, because the decree of the Circuit Court made it necessary, not because I supposed it a question deserving of serious argument. If there is any authority in decided cases resting upon the soundest reason and morality, Mr. Adger is as clearly liable for interest on the fund in his hands, as for interest in the nature of damages, on a promissory note or bill of exchange, after maturity and non-payment; and I dare say he has, in his life, found it necessary to demand interest in such cases and to know the law. My apology for occupying the Court with a citation of authorities is to be found in the necessity (caused by the Circuit decree) for making such a point a ground of appeal. For myself, I do confess, I feel very much in the position of that Solicitor, who stood up before Lord Thurlow, proclaiming "a fee simple the highest estate known to the law," until his Lordship, to speed the cause, took a note of the annunciation.

Before entering upon the discussion of the subsequent grounds of appeal, I now propose briefly to examine a point raised in the answer and in argument, but not noticed in the circuit decree. It is said the complainant's claim is a stale demand, and this is

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*urged in bar to the relief prayed. The doctrine, or as it has been called "the law of courts of equity," is that it will not entertain stale demands. This rule is adopted independently of any positive legislative limitations. "A court of equity," (says Lord Camden, in Smith v. Clay, Ambler, 645, and 3d Brown's C. C. 640, note,) "which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept

upon his rights or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting the court is passive and does nothing; laches and neglect are always discountenanced; and therefore from the beginning of this jurisdiction there was always a limitation of suit in this court." The true doctrine is here stated to its fullest extent, and we are willing the defendants shall have the full benefit of it. Expedit, reipublicae ut sit finis litium, is a good maxim and we are willing to stand to it. If there has been a want of "conscience, good faith and reasonable diligence;" if he has unnecessarily and for an unreasonable length of time slept upon his rights, or is chargeable with neglect and laches, Mr. Martin must fail, and if this can be shown by the defendants, he is willing to fail. He will then be barred of his relief, not only against Mrs. Price, but against Mr. Adger and the fund in his hands. Beckford v. Wade, 17 Vesey, 86; Bonney v. Rigdon, 1 Cox. Cas. 145; Blannerhasset v. Day, 2 Ball and Beatty Reports, 104; Hardy v. Reeves, 4 Vesey, 479; Huntington v. Smith, 1 Bro. Par. Cas. 95.

What, then, is to be considered reasonable diligence, good faith and conscience; and what laches, unreasonable lapse of time, acquiescence and neglect? The rule by which this is to be settled is as well established as the doctrine itself. This court is bound under general principles to regulate its proceedings by analogy or in obedience to the limitation of actions or rights at law. In this State this is binding upon the court, by special statute enactment. Statutes at Large, 7 vol., page 340.

In the case just cited, Lord Camden has put it that an equitable right will be barred in the same manner as a legal title would be in an action at law. Vide Medlicott v. O'Donnel, 1 B. & B. 166. But as the court has no legislative authority, it could not properly define the time of bar by positive rule; it was governed by circumstances. But as often as the legislative power had limited the time to bar proceedings at law, the

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Court of *Chancery adopted that rule, and applied it to similar proceedings in equity. And in cases of fraud, where the facts constituting the fraud have been known, and where there is no subsisting trust or continuing influence, the same principle will apply.

In Hovedon v. Lord Annesly, 2 Sch. & Lef. 639, and Bond v. Hopkins, 1 Sch. and Lef. 428, (both by Lord Redesdale,) and the cases there cited, the same principle is laid down. If the equitable right is not acted upon in the same time the legal should be, and the parties are sui juris, and informed of their rights, it will be barred. Andrew v. Wrigley, 4 Bro. C. C. 125. Townsend v. Townsend, 1 Idem. 550. Cholmon v. Clinton, 2 Merivale, 361. This court is bound to regulate its proceedings by analogy, or in obedience to the statute of limitations (1 Ball & Beat., 106; 4 Vesey, 479; 1 Bro. Par. Ca., 95; 2 Sch. & Lef., 650.)

Now let us test the complainant's claim by these well settled principles. If he is barred at law, his claim must be deemed stale, and in that way also barred in this court. If he is barred, it will be idle to go further. It will then be of no consequence to enquire whether Mrs. Price has held adversely, and thereby acquired title against a subsisting claim or not. If he has no longer any claim, then he has no right to call Mrs. Price or Mr. Adger into court. But even if his claim is still subsisting, and still retains its vitality, it does not necessarily prove that Mrs. Price may not be protected in her possession. Title by adverse possession may be acquired, while at the same time the debt of the complainant is still subsisting. In the one case he would have no debt and there would be an end of the matter. In the other he would have a good claim still subsisting against the estate of Lothrop, but not against this particular property. By the settled law of South-Carolina, judgment and specialty debts, which are not barred by the statute of limitations, are, after the lapse of twenty years, presumed to be paid. Payment, not the statute of limitations, may be pleaded in bar to them. But this plea may be avoided, not as in the case of the statute of limitations by proof of a new contract and promise, but merely by proof of non-payment. Lapse of time raises that presumption of payment in favour of a defendant which throws the burden of proof on the plaintiff. Less time than twenty years will not raise this presumption against a judgment or bond creditor, except under strong additional circumstances in proof of payment. This is as much the law

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of South-Carolina as the statute con*stituting this court. Kennedy v. ex'ors of Denoon, 2 Trea. Con. Reports, 617; admin'r. Cohen v. ex'ors Thompson, 2 Mill's Con. Rep., 146; Wilson v. Stanyarne, Mss. Dec'r. 1818; Palmer v. Dubois, 1 Mill's Con. Rep's., 178; (Levy v. Hampton, 1 M'C. Rep's., 145;) 3 M'C. Rep's. 340.

The complainant is a judgment creditor at law, his debt a judgment debt duly signed and entered of record, July 26, 1827. His bill was exhibited in this court on the 6th day of March, 1845; less than eighteen years had then elapsed. He is then, clearly within the period established by law. We have seen that by the established principles of this court, it regulates itself by the rules of law in such cases, and we have seen by express legislative enactment, it is bound to do so in this State. The complainant's claim, then, considered merely as a debt, is still subsisting at law, and therefore this court will rec-

ognize it. No circumstance or pretence additional to lapse of time is set up to show payment; in fact the proof of non-payment is positive.

But it may be said, that though his debt at law still survives, yet the complainant's equity is barred. If this is what is meant, the position rests upon no better foundation. Not less than twenty years will bar an equity; the rule is a familiar one, and is similar to the rule at law where great length of time will raise the presumption of an ouster between co-tenants. "It is not that mere possession is sufficient to bar the true owner. There must be something tantamount to a disseisin, and great lapse of time will be taken as proof of ouster or disseisin." But in this court, great length of time may be deemed sufficient evidence, that some act has been done, which if done, is subversive of the claimant's right, and twenty years has been assumed as the period sufficient to raise such evidence or presumption. But the parties must not labour under disability, as coverture and infancy. Fraud also is an exception until discovery. So, too, ignorance of one's rights and mistake; and even the distress of a party, so far as it accounts for neglect and laches, will pro tanto in this court, weaken the presumption. Now in the first place, there is nothing to bring Mr. Martin within these rules, and if there were, we shall show that he is also within the exceptions. In 1825, the breach of trust under which Lathrop became his debtor, occurred. In 1827, he recovered judgment at law. In 1845, this bill was filed, and within twenty years from accrual of the first cause of action. But this is not all on this point. If Mr. Martin had never recovered judgment at

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law; if he were at law *to this day, a simple contract creditor, still, he is safe in this court, and his debt is here a subsisting debt, and we will prove it; not by showing, (what the bill sets forth and what we have a right to stand upon,) the gross fraud which was practiced, by withholding this property from the view of the court and creditors, and concealing from them that it belonged to the estate of Lothrop, but by the solemn decree of this court itself, (thanks to the researches of the learned Chancellor.) By the circuit decree and the evidence there developed, it appears that this claim was, under an order of this court, proved in the master's office, reported by the master, and his report confirmed by decree, 1834. This claim is then a debt by decree in this court since 1834, and in a cause too, not yet concluded; from that time it has been waiting the action of this court and the defendants, who were bound to have discovered funds and property in their hands, and applied them towards this very debt. And now this court, under such circumstances, is asked to say that such a claim is a stale demand: that it has become stale, too, while the fund for its payment has been lying idle, under the order and direction of this court. It will, indeed, be a new doctrine, that the scales of justice have stood poised so long in this court, that the subject matter of their weighing is now extinct of old age.

Where, in this case, is the long acquiescence, the sleeping upon rights,—the want of activity,—conscience, good faith and diligence? Where the neglect and laches, which under Lord Camden's rule render this court inactive? The truth is, that the efforts of the complainant to keep alive and prosecute this claim are indicative of any thing except laches or neglect. He has, year after year, time after time, and at all times, upon every occasion, given his diligence and his money to its pursuit.

Under all the circumstances of this case, and the established and well settled rules of law, and of this jurisdiction, it cannot be pretended, that the complainant's claim is not still subsisting at law and in equity. Whether his relief is barred as against Mrs. Price and this particular property, is another matter. This remains to be seen. Claims in equity may be barred,

1st. By the statute of limitation; whenever there is a statutable bar at law, the same period is by analogy or rather obedience to the statute, adopted as a bar in equity.

2. The presumption of something done, which, if done, is a bar to the equity: great length of time, laches and acquiescence will raise this presumption, not because the court

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really believes *what is presumed, but, in the absence of all evidence, for the purpose of quieting possession, (as in Eldridge v. Knott, Cowper 215, pr. Lord Mansfield.)

And, 3, Upon the ground of public policy, or the inconvenience of relief; as in the case of an account against a trustee, where the presumption of a final settlement might be rebutted by positive proof; yet the court will not open such account after great lapse of time, where the parties are dead, and the vouchers and receipts lost. Lewin on Trusts, 613.

Fraud until discovered, and direct trust between trustee and cestui que trust, are uniform and universal exceptions to the rules by which equities are barred. No length of time will cover a fraud, so long as it remains concealed. The title to avoid the transaction, does not properly arise till after discovery, and the statute will then begin to run. In Poussin ads. White, 1 Bailey Eq. 459, Chancellor Harper said, "the rule is notorious, that time will not run to protect a fraud, until the fraud has been discovered." And this is only a repetition or confirmation of a familiar rule. In Lever v. Lever, to which we shall have occasion again to refer, the same learned Chancellor says, "at law the statute does not begin to run, till there is some usurpation of the claimant's right, or a cause of action has arisen. The posses-

sion of an agent or bailee (and a bailment is a trust) is the possession of the bailee or principal, and is not adverse till demand is made." After discovery, the defendant may avail himself of the statute; and when the bill charges fraud, the defendant may demur, unless the plaintiff allege that the fraud charged was only discovered within the statutory period. But if the complainant do so allege, the defendant must either deny the facts charged as fraud, or prove the complainant had knowledge of it. So. Sea Co. v. Wymondsell, 3 P. W. 143; Mitford's Pleadings, 269, 4th ed. "It is sufficient that the allegation of fraud be substantially, though not clearly or formally made." 1 Bail. Eq. R. 458, pr. Harper, Chan. So, too, the statutory bar will not apply to a direct technical and continuing trust, which is the mere creature of a Court of Equity, and not cognizable in a court of law; but where the trustee does an act purporting and intending to be an execution of his trust, and is so understood by his cestui que trust, who deals at arm's length with his trustee, without concealment or fraud, or undue influence, and the cetui que trust is fully informed of his rights, and under no disability, then, time will run to protect the trustee, by analogy to the

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*statute of limitation. But the cestui que trust must be sui juris, and must be honestly made acquainted with all his rights. If this is wanting, neither the lapse of time, nor the most solemn deed of settlement and release will avail, and the trust will be opened and enforced. The same transactions between trustee and cestui que trust, which, between landlord and tenant or cotenants, would amount to an ouster at law, will enable the trustee in equity to avail himself of the statute of limitation, or lapse of time, as the case may be. And, as great length of time will be deemed evidence of an ouster at law, it will be deemed in equity, evidence of a discharge of the trust, or a relinquishment of right by the cestui que trust. This doctrine does not conflict with or contradict the well settled principle, that "no time bars a direct trust." But it proceeds upon the assumption that the trust has been discharged; Lewin on Trusts, 389, 611 to 617; Chalmer v. Bradley, 1 Jac. and Walk. 67; Bennett v. Colley, 2 Mylne and Keen, 232; Llewellyn v. Mackworth, Barn. 449; Beckford v. Wade, 17 Vesey, 97; Hovedon v. Lord Annesly, 2 Scho. and Lef. 533; Townsend v. Townsend, 1 B. C. C. 554; Pomfret v. Windsor, 2 Vesey, 484; Smith v. Clay, Ambler, and 3 B. C. C. 639; Wedderburn v. Wedderburn, 2 Keen, 722, by Lord Langdale, M. R., and the same case, 4 Mylne and Craig, 52, by Cottenham, Lord Chan.; Kane v. Bloodgood, 7 Johns. C. R. 90 to 122; Starke v. Starke, Car. Law Jour. 511; Moore v. Porcher, 1 Bailey's Eq. 198; Piatt v. Vattier, 9 Peters, 413, by Story, Justice; Gray v. Givens, Riley's Chan. Cases, 41, and 2 Hill C. R. 511; Watkins v. Williston, 3d Peters Reps. 41; Coterell v. Purchase, Cas. Tem. Talbot, 65; Medlicott v. O'Donnell, and Annan v. Tyrawly, 1 B. B. 166; Roche v. O'Brien, Ib. 330, by Lord Nanners; So. Sea Co. v. Wymondsell, 3 Peere Wms. 143; Blannerhassett v. Day, 2 B. and B. 118; Whalley v. Whalley, 1 Meri. 446; Prescott v. Hubbell, 1 Hill C. R. 213; Riddlehover v. Kinard, Ib. 378; Farr v. Farr, Ib. 391; Eigleberger v. Kibler, Ib. 121; Lever v. Lever, Ib. 65, 67; Wardlaw v. Gray, Dudley's Eq. Rep. 88, 89. Laches for a great length of time, too, on the part of the cestui que trust, may deprive him of his rights—but for laches to operate as a bar, it must be shown that the cestui que trust knew his rights and neglected them, or at least, that the trustee did not aid in concealing them, or otherwise, he will not be barred; for while he is ignorant of his rights, he cannot be blamed for not quarreling with those who have usurped them—and

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the *court will not presume a man to have abandoned his rights, so long as he remains in ignorance, or labors under a mistake. Randall v. Errington, 10 Ves. 423, 427; Chalmer v. Bradley, 1 Jac. and Walk. 51; Pickering v. Stamford, 2 Vesey, 284; see also Thayer v. Davidson, 1 Bail. Eq. 412, where the doctrine is fully discussed by Chancellor Harper, and the qualifications fully sustained. The rule is universal, says he, "that if it be not in the power of the party to vindicate his rights, the law will not allow him to lose them;" and in Gray v. Givens, just cited, the same learned Chancellor says, "the defendant relies on the length of his possession, to maintain his title to the land. More than sixteen years have elapsed, during which he has been in exclusive possession. There is no doubt but that the possession of one tenant in common, is the possession of the other, and that his possession will not be adverse so as to admit the operation of the statute of limitation without an ouster of the co-tenant. Whatever is sufficient to give the co-tenant notice, that the party in possession claims exclusively for himself and in his own right, will, I think, be a sufficient ouster. But there are no circumstances beyond the naked possession. No doubt an ouster may be presumed from a long exclusive possession, (cites Doe v. Prosser, Cowp. 217, where it was presumed after forty years,) but in no case, unless aided by circumstances, has such presumption been made on a possession of less than twenty years." But it is impossible that the co-tenant or cestui que trust can have due notice, if it is carefully concealed from him, that his cotenant, or his trustee, has such possession. There can be no acquiescence in acts which the party is ignorant at the time that he has any right to dispute. Sir Wm. Grant, 2 Merivale, 361. We shall presently see how this applies to our case. Where the cestui que trusts are a class of persons, too, as creditors, the sanction of a part, even of the majority,

will not be binding on the rest, but the settlement and transactions with the trustee, which he sets up as a discharge of his trust, must be the joint act of the whole. They cannot be expected to exert the same vigor and activity in the prosecution of their common rights, as individuals would do in pursuit of exclusive interests, and they have, therefore, been allowed more indulgence. 3 Vesey, 740, 752; 1 Anst. 109; 12 Ves. 158; Bro. P. C. 42; Lewin on Trusts, 389. The rule is of universal authority—is found in all the cases—is sanctioned by every Judge or elementary writer in England and Amer-

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ica, and by the re*peated and continuous dicta and decisions of the courts of our own State, not only that one co-tenant cannot bar another, or a trustee his cestui que trust, aided by fraud undiscovered, or while the cestui que trust or co-tenant is under disability, (as infancy or coverture) but also while the parties to be barred are ignorant of their rights, and that they have been usurped. I do not mean ignorance of the law applicable to rights, but of the facts upon which rights are founded. To avoid misapprehension, let us illustrate by a case from our own books. Thus in Gray ads. Wardlaw et al. Dudley's Eq. Rep. 88. The defendant's intestate had acted as the agent of Nicholson and Duncan, for collecting rents. "They exhibited a book," says Chancellor Johnson, "which purports to contain the intestate's semi-annual returns of the money received by him, and the money paid over to them; the evidence produced, shows that he received other sums to a large amount not charged against himself in these accounts and the question is whether the statute could operate to bar these demands. I think not. The statute will not run against a demand arising out of a technical continuing trust until after the termination of the trust and I cannot conceive of any case that would afford a better example of such a trust than the present. Nicholson and Duncan confided to the intestate the receiving of money due to them for their use—and this imposed on him the obligation to account with and pay to them the amount received and until he had performed this obligation the trust necessarily continued." "There is another view," says the Chancellor, "of this matter, which is equally if not more conclusive. The statute will not run against a demand arising out of a fraud, until the fraud is discovered; now the question propounded, supposes that the intestate received monies for which he did not account, and whether he neglected to do so from design, from negligence, or inadvertence, it is equally a fraud on Nicholson and Duncan. They depended on him alone for an account of the monies which he had received. They had no other means of obtaining information on the subject, and it would be as reasonable that the statute should begin to run before a cause of action arose, as that it should operate to bar a party who had no means of knowing he had a right of action." This is the language of Chancellor Johnson, then and now one of the members of this court. Chancellor Johnston, another member of this court, delivered the appeal decree, specially confirming the circuit de-

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cree upon this point—and *Chancellor Harper, the third of the four Chancellors constituting this court, concurred in this appeal decree, and upon no other grounds than those taken in the circuit decree. This is the true doctrine, and it applies in every particular to our case, and nowhere is it more distinctly stated, than in the cases cited by the Chancellor in the circuit decree. Ignorance of the cestui que trust, where it is the duty of the trustee, (which is always his duty,) to afford full and perfect information, and he does not afford it, is a complete and perfect protection against the bar of the statute of limitation, lapse of time, laches, acquiescence or neglect to prosecute his rights, operating in favor of the trustee, no matter whether the trustee intends fraud or not. He may be ignorant himself of the facts concealed, and perfectly innocent of any fraudulent purpose. But when he does make the discovery, it is then for the benefit of the cestui que trust; and it is a direct fraud for him to claim a benefit to himself, from the concealment. If he knew what was concealed from his cestui que trust, the concealment was a fraud. If he did not know it, he did not claim adversely, except from the time of the mutual discovery and notice of the denial of the trust; and from that time only, will the statute or time run to bar the rights of the cestui que trust. This is the true doctrine, and I challenge the whole bar of the country to controvert it by a single reputable authority. It would be a new thing for this court to give to any one, and especially a trustee, a direct personal benefit from his own negligent or fraudulent acts.

There is another well settled rule, too, which, if it shall appear that Mrs. Price never was a trustee, we shall claim to apply in full force to this case.

The cestui que trust cannot be barred, except by barring the trustee. The possession of the trustee is the possession of the cestui que trust, and he is entitled to the benefit of it, and of all the rights of the trustee. The legal estate is in the trustee, the equitable in the cestui que trust; and both these parties being out of possession and disseized, the party in possession, the disseisor, must bar the legal estate of the trustee, otherwise his possession avails him nothing against the equity of the cestui que trust; no matter how long the time, as between the trespasser and the equitable estate, provided the legal estate is preserved. If the legal estate is in an infant, a feme covert, or other person under disability, and cannot be barred, the equitable estate is thereby protected, as

against a stranger, who has got into pos-

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*session. He has nothing to do with the equitable estate. He holds against the legal estate. This is the rule, as expressly laid down by Lord Redesdale in the leading cases of Hovedon v. Lord Annesly, and in Bond v. Hopkins, already cited. The cestui que trust can doubtless compel his trustee through a Court of Equity to assert his rights, and then those rights enure to his benefit. What then becomes of the claim by possession against the equitable estate, a possession that does not bar the legal estate? Lord Alvanley, and afterwards Lord Eldon, laid down the same rule in Harmood v. Oglander, 6 Ves. 199; 8 Ves. 106–132. See also Greenville v. Blythe, 16 Ves. 224; Hansard v. Hardy, 18 Ves. 455; Pomfret v. Windsor, by Lord Hardwicke, 2 Ves. 472; Willis v. Shorral, 1 Atk. 484; Pickering v. Stamford, 2 Ves. jr. 272–281.

But is is useless to cite authorities to support a doctrine which cannot be questioned, which is every where and uniformly conceded.

"So long," says Sir John Leach, "as he who has the legal estate is not disseised, so long as the legal estate is not turned into an adverse right, it is nonsense to talk of equitable dissesisin. So long as the legal estate subsists in the possession of my trustee, it is idle to talk of a possession, which is to deprive me of my equitable rights." It is true, if the trustee, for a great length of time, concedes that the party in possession is the cestui que trust, and the real equitable owner, by his neglect or indifference seems to acquiesce in this, he may be barred. If the mortgagor is out of possession, and thereby, (according to Shultz v. Stoney, 1 Hill Chan. Rep.) the legal estate has passed to the mortgagee, where it is from the first, by the English law, and he receives from the trespasser interest (rents and profits,) on the mortgage money for more than twenty years, the mortgagor may be barred of his equity of his redemption, and the trespasser or disseisor will be deemed to have acquired it, though the legal estate still subsists. This is precisely what was finally decided in the great case of Cholmondeley v. Clinton, reported in 2 Ves. and Beames, 113 to 116; 2 Merivale, 71 to 75, 81 to 86, and 170 to 362, and in 2 Jac. and Walker, 1 to 206. That case deserves particular notice. It confirms every doctrine we have advanced, and is entitled to the highest consideration and weight as authority. No case in Westminster Hall was ever discussed or adjudicated with more marked ability and learning: no less than nineteen of the ablest and most learned of the English bar, brought to the

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dis*cussion all their pre-eminent abilities and learning, and among them were Messrs. Butler and Preston and Sir Samuel Romilly, Sir Edward Sugden and Hart, Chancellors of Ireland, Vice Chancellors Shadwell and Leach, Lord Chief Justice Gifford, and Lord Chancellors Lyndhurst and Cottenham. It was heard and at various stages adjudicated by Sir William Grant and Sir Thomas Plumer in the Rolls Court; twice by the twelve judges of England on law points, and finally by the House of Lords, where Lords Eldon and Redesdale delivered elaborate judgments. And in that case thus discussed and adjudicated, every doctrine which I have propounded upon the application of the bar of the statute, or of length of time, to trusts, is either conceded in the argument or confirmed by the decisions of the bench. This, surely, is strong confirmatory authority, and is entitled to some weight even in this court.

Now let us apply these well settled principles to the circumstances of this particular case. If it shall appear that Mrs. Price has had such transactions with the complainant as purported and were understood by both to be an execution of her trust, or such as would between tenants in common amount to an ouster of one of them by the other, and there has been no concealment or fraud on her part; if her cestui que trust, the complainant, has been kept, or has had reasonable opportunity of being, fully informed of his rights, and sufficient time has elapsed; or if (as may appear,) she has never been a trustee at all in this matter, and has, (or it has been possible for her to have,) acquired title by the statute of limitation, or by lapse of time, against the trustee, then her title is perfected and the complainant effectually barred.

The fourth and fifth grounds of appeal raise the question, whether, upon the death of Wm. Price, jr., the original trustee, intestate, the legal estate and trust descended under our statute of distributions, commonly known as the Intestates' Act, (5 Statutes at Large, 162,) or at common law. If it descended under the provisions of the statute, his widow became entitled to one-third of the lot in question, and his five minor children to the remaining two-thirds, in equal aliquot parts. If it descended at common law, then, the heir at law, the eldest son of the intestate, took the legal estate and became the trustee. It has been apparently assumed by the Chancellors, who have heretofore had occasion to consider this case, that the legal estate and trust did descend according to the statute. My own consideration of the subject has brought my mind to a different

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conclusion, and I shall *endeavour, before I close, to show that the trust never was cast upon Mrs. Price, but descended at common law to the heir at law. In deference, however, to the opinions of the Chancellors, I shall in the examination of the remaining questions, proceed in the first place upon the assumption that the trust descended under the statute. In this view, then, upon the

death of Wm. Price, jr., the trust devolved upon his widow and his five minor children, the eldest of whom, a daughter, is now (1846) about 26 years old. They took the estate under precisely the same tenure by which their intestate held it in his life-time. It will not be denied that the assignment of Lothrop to Price created a direct technical trust in favor of Lothrop's creditors: such a trust as is the mere creature of equity jurisdiction, and over which this court has exclusive administration and control. (2 Story's Eq. p. 304, sec. 1058.) At law, the creditors could have no action against him, while their interests were not ascertained by a division or dividend. Upon this trust the undivided moiety of the lot in question was held by Mr. Price, at the time of his death, and descended to his distributees. The other moiety he held in his own right, but subject to the mortgage to the Bank of South Carolina. Upon foreclosure of this, Mrs. Price became the purchaser of that moiety. She then became legally possessed of one moiety in her own right, and jointly with her five children (all minors) of the other moiety in trust for the creditors of her brother, S. H. Lothrop. Her title at law, then, was a tenancy in common in her own right of one moiety of the whole lot, and as to the remaining moiety a tenancy of one-third of the same in trust, with her minor children, who were her co-tenants, and her co-trustees.

The circuit opinion and decree declares that she has since acquired a good title in her own right to that moiety which her husband held in trust for the creditors of Lothrop, and which, upon his death, the decree also assumes, descended to herself and her children, subject to the same trust. It is our purpose to inquire how it is that she has acquired this title, and how the creditors of her brother have been deprived of their rights. It will not probably be denied that the provisions of the same law which cast the trust upon Mrs. Price, made her minor children her co-trustees. It will perhaps be conceded that the undivided moieties, one held by Mrs. Price in her own right, and the other the trust estate of Lothrop, was a tenancy in common, under one of the sections of the same statute, which cast the

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descent upon her, *and which abolishes the jus accrescendi. (Stat. at Large.) It may, too, I think, be assumed without the danger of raising any new question, that as to the moiety in trust, the legal estate in that was a tenancy in common, in unequal parts, between the six trustees, five of whom were minors; one-third of the legal estate in this moiety was in Mrs. Price; the other two-thirds in her minor children in equal parts. The only unity required between tenants in common is, that of possession. For one tenant in common may hold his part in fee simple, the other in tail, or for life; so there is no unity of interest. One may hold by descent, the other by purchase; so that there is no unity of title. One's estate may have been vested for 50 years, the other's but yesterday; so there is no unity of time. (2d Cruise Dig. 524; 2 Black Com. 191-2; 1 Thomas Coke, 759.) This is, I believe, a correct view of the rights and position of the parties under the statute of distributions upon the death of Wm. Price, intestate. It is conceded that they continued the same till the 24th day of May, 1834. From that period the circuit decree declares that she began to hold adversely and to acquire, and at the end of ten years (the statutory time) did acquire under the statute, a good title by adverse possession. Let us now first inquire why it is that May the 24th, 1834, is fixed upon as the starting point for the adverse possession. In January, 1832, Mr. Adger, the admr. of Price, filed his bill in this court, for the purpose of obtaining a sale of a part of the property of his intestate, Wm. Price, jr. The plantation on Caper's Island was brought to notice by this proceeding, and was ordered to be sold. The bill also brought to view the lot in Cheraw, belonging to Lothrop. This was ordered to be sold. Mrs. Price and her minor children were the only parties defendant to that bill; she answered for herself, and also as guardian ad litem of her minor children. The same solicitors (Messrs. King and McCrady,) represented all parties, complainant and defendants, and the whole proceeding is manifestly one by consent and pro forma. The wharf property is in no way referred to or noticed in this proceeding. The creditors of Lothrop were never called in under this bill, nor was this case subsequently united with the "Bank v. Adger," and the two conducted together. The Chancellor assumes this to be so. It is a mere assumption and is not correct. It was not so, and it is a mistake to say so; nothing was heard of this suit after the attainment of the object for which it was instituted, which was the sale of certain specified prop-

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erty. Subsequently, the Bank *of South Carolina filed their bill for a foreclosure, against Mr. Adger, admr., and the widow and heirs of Price.

Mrs. Price here again answered as the guardian ad litem of the minor children, and as such, represented them. Under this bill, the creditors of Lothrop were called in, and under it, the complainant proved his debt, in the master's office, had a favorable report, which report was confirmed by decree of the court, May 24th, 1834. It is this decree which, in one view, cannot preserve Mr. Martin's debt from becoming a stale demand, but in another view is deemed sufficiently efficacious to give to Mrs. Price the complainant's just rights. It is this decree which a Court of Chancery is called upon to

consider a faithful and full execution of a trust. The trust property was never mentioned or brought to the view of the court, and, besides the fact that Mrs. Price was a trustee, seeking by concealment of trust property to obtain a personal benefit, she volunteered to assume the position of guardian over the very minors whose legal rights it was necessary to bar. This whole suit of 1832 and '34, was got up and conducted under the patronage of Mrs. Price, for the express benefit of herself. This is manifest from the results as well as an inspection of the proceedings. In the first she was appointed guardian ad litem, on motion of the complainant's solicitor, and every order in the case on either side, is in his handwriting and on his motion. The second suit was conducted and resulted in the same manner. The wharf property was sold at midsummer by consent, bid in for the exact amount of the mortgage debt, at $15,000 less than Price's purchase, and which he had proved it to be worth before this court, (see Chancellor De Saussure's decree, January, 1827,) and $25,000 less than Mrs. Price has sold it for. The report and decree thereon, of May 24th, 1834, were all of the same day, and by consent of the Bank and of the defendants; but the creditors of Lothrop were not heard, and had no notice or notion of what was going on, or that a decree was to be made, by which property they had never heard of, was to be considered as brought to view. They had no opportunity to except to the report. Where was the rule of court—where Lord Bacon's ordinance, that "no order shall be made for confirming or ratifying any report without day first given, by the space of a sevennight at least, to speak to in the court."

The whole proceedings were irregular as to the creditors, and in their effects were an imposition upon the court, and a fraud upon the creditors. It has been seen that Mrs.

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Price's minor *children were her co-tenants and her co-trustees in the trust. They were all minors at the date of this decree, she was their guardian ad litem, and as such controlled the very proceedings, by which this court now holds she has barred them of their rights. She has thus by the aid of this decree overcome not only the disability of their infancy—of their being co-tenants and co-trustees, but also the relation of guardian and ward. Nor will any lawyer pretend to sustain such transactions? Can it be said that it is possible for Mrs. Price to have held adversely and acquired title against infancy, co-tenancy, and the relation of guardian and ward? Is such to be the decision of this court? I hope not, for the sake of common sense as well as common justice. It is impossible; this court does not so administer the rights of infants. If it were allowable to lay aside the seriousness which this question deserves, I should say there is one and only one way by which such a decision could be made: make a new reading of an old maxim. Lex de minimis non curat. It would be no greater perversion of this maxim to say it applies to little children and their rights, than it is of the doctrines of this court, to advance some propositions which have been advanced in this case. It is clear, not only that Mrs. Price has not barred her co-trustees, but that she was in a position where it was impossible to bar them. But suppose Mr. Martin, as one of the creditors of Lothrop, had, on 24th day May, 1834, gone much farther than is pretended by the decree and by his deed, with such information only as these proceedings afforded him, agreed to discharge Mrs. Price of her trust, and had admitted that she had duly and fully executed it, even then the whole might be opened. He would not be estopped, or Mrs. Price protected in her possession. The books are full of authorities to this point. Many of them have been already cited. They are founded upon the general and recognized doctrine, that a trustee, executor, agent, or other person acting in a fiduciary capacity, cannot become a purchaser for himself, or in any way use the peculiar relation in which he stands as trustee, to derive a personal advantage from the management and disposal of the trust property and funds. Gregory v. Gregory, (Sir G. Cooper 201;) Cook v. Collingridge, (1 Jac. 607;) Chalmer v. Bradley, (1 Jac. and Walk. 5;) Walker v. Symonds, (3 Swanston, 1 to 90;) are cases directly to this point, and especially so is Wedderburn v. Wedderburn, already cited, where Lord Langdale in the Rolls, and Lord Cottenham on appeal, opened deed after deed, and after

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a lapse of *29 years, as to one of them, upon the ground "that full information, such as trustees and guardians are bound to give, especially in a case where personal interests of their own are involved, never was properly communicated." There was no charge of fraud or pretence of fraudulent intention or concealment. The defendants set up deeds of release and discharge by the complainants, executed under advice of counsel, in bar to their claim. They also relied upon the lapse of time, the statute of limitations and the staleness of the claim. But Lord Cottenham in appeals said, "The case is one of trust. No presumption of payment, or satisfaction, or waiver can arise, because the title is in dispute at this moment; and the facts upon which the plaintiff's title depends were not made known to them; and although the commencement of the transaction is of an early date, and one of the plaintiffs attained the age of twenty-one in 1809, and the youngest in 1820," (this was in 1838) "yet the transactions have never terminated, or the accounts been finally closed. No case has, under such circumstances, considered time as precluding the account

from the commencement; namely, where the situation of trustee or cestui que trust has continued, the transactions between them not closed, and the delay of the claim attributable to the trustee not having given the information to his cestui que trust, to which he was entitled, and accounted with him in such manner as the court is of opinion he ought to have done. This is not the case of an attempt to raise a constructive trust upon transactions closed many years before, but of a direct trust, of which the transactions are not closed." Such is precisely the present case in every respect, except that in our case the trustee has kept back the information, and the accounts have remained unsettled by reason of this, for about ten years only; in that case the delay was twenty-nine years.

There is, too, another distinction in this case; it cannot be pretended that Mrs. Price ever gave any consideration in the pretensive settlement and discharge which is set up as to the trust property she attempts to hold. In that case there had been an accounting or settlement, and large sums paid over by the trustee, as the consideration upon which the deed of discharge was founded. There the trustee was only mistaken as to his duties. He never attempted to seize the trust property as his own, but he supposed he had a right to deal with the trust affairs and the cestui que trust as with other transactions and persons. Whoever is desirous of knowing what really is the English chan-

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*cery, and how far it goes to prevent trustees from deriving a personal benefit from their dealings with their cestuis que trust, will do well to read this case in 4th Mylne and Craig and in 2 Keen. But the same doctrine is recognized, conceded and sustained in all our cases (with the present unfortunate exception,) and especially in Starke v. Starke; Watkins v. Williston; Kane v. Bloodgood; and Moore v. Porcher, referred to by the Chancellor. Again, it was assumed, that with the decree of May 24th, 1834, there was an end of that case, and that the decree was final. This is a mere assumption and not correct. It is a mistake. The last decree in "the Bank of Adger," was the appeal decree of March 20th, 1835, and this bill was filed March 6th, 1845, fourteen days within the statute of limitation, even if it were possible for the statute to apply. It is well settled that while any part of a cause is in court, this court may review its decrees therein, by a re-hearing; Price v. Nesbit, 1 Hill's Chan. Reps. 454; and Johnson v. Britton, Dudley's Equity, 28. The decree of May 24, 1834, was not final, till March 20, 1835. The fact is, this case of the Bank v. Adger has never yet been concluded. There has always been a fund under control of the court, waiting for distribution, and this is of itself sufficient, under the Chancery practice, to keep the cause, especially a creditor's bill, alive.

I think it is clear, that if Mrs. Price was a trustee, she has not been and could not be discharged. The relative positions of herself and her co-trustees and co-tenants, all under disabilities, preclude her from barring them. She was not only their natural guardian, but their guardian at law, and controlled, as such, their action, and planned and directed the very acts which it is now pretended enabled her to hold adversely to them, and finally deprive them of their legal rights. It would be monstrous for this Court to say that a guardian could use his position as such, to strip his wards of their estate. If their estate is preserved the complainant's equity is equally safe; it cannot be pretended that the complainant has acquiesced in these tortious acts, because, "there can be no acquiescence in acts which the party is ignorant, at the time, that he had any right to dispute."—(Sir Wm. Grant, 2 Merivale, 361.) I have shewn that there is nothing in the shallow pretence that his claim is stale. It is, I believe too, now conceded, that Mrs. Price has not, and never did have any paper title, or the shadow, even, of a paper title; and if she had, it was from a grantor who had no right to convey.

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She never pur*chased, and if she ever did, in good faith, suppose she had purchased, it was her own mistake and misfortune to imagine she had purchased what she must have known she had paid nothing for, and from a party who did not pretend to sell, and if he did, had no right to sell.

But I have said that my examination of the subject has brought my mind to the conclusion, that Mrs. Price never was a trustee. That this property was not distributable under the Act of 1791, and that it descended at common law. This opinion is founded upon the express words of the statute, as well as the obvious meaning and purpose of the enactment. The Convention of 1790, by the 5th section of the 10th Article of the Constitution, then adopted, directed the legislature to pass laws for "the abolition of the rights of primogeniture, and for giving an equitable distribution of the real estates of intestates." The legislature, at its session in 1791, passed the Act known as the Intestates' Act, and by the first clause of that Act declared, "That the right of primogeniture be and the same is hereby abolished." This declaration is of itself clearly broad enough to destroy that right as applied to legal estates, held in trust; but the remaining part immediately following of the same sentence goes on to say, "and that when any person possessed of or interested in or entitled unto any real estate in his or her own right, in fee simple, shall die without disposing thereof by will, the same shall be distributed in the following manner." The Act then directs the man-

ner of distribution, and "that in all cases where provision is made by this Act for the widow of a person dying intestate, the same shall, if accepted, be considered as in lieu of and in bar of dower." The restriction to estates held by the intestate in his or her own right, and the provision that the share of the widow shall be in bar of dower, as clearly seem to exclude estates held in trust, as the first part of the sentence seems to include them. If then we are to follow the statute literally, there is no descent of estates held in trust. The descent at common law is clearly abolished by the words of the Act. It is equally clear that they are excluded from the descent substituted under the statute. Expressio unius est exclusio alterius. And therefore there is no descent of such estates, and the title becomes extinct with the life of the intestate. But this is a conclusion not to be adopted if it is possible to avoid it. The statute was remedial, and so intended, and it is proper so to construe it as to effect the remedy, and not defeat it. The probability is that this question was entirely over-

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looked, in the use of *the general words abolishing primogeniture, or that it was supposed the restricting words of the same sentence sufficiently controlled their general and sweeping effect. I think the rules of construction, in such cases, will warrant the latter view. The Barons of the Exchequer, in Heydon's case (3 Rep. 7) laid down rules for "the sure and true interpretation of statutes."

1. What was the common law before the making of the Act?

2. What was the mischief and defect, against which the common law did not provide?

3. What remedy the Parliament hath resolved and appointed to cure the disease, and

4. The true reason of the remedy.

It was held to be the duty of the Judges to make such construction as should suppress the mischief and advance the remedy, adding force and life to the cure, according to the true intent of the makers.

Statutes, too, are to be construed in reference to the principles of the common law. It is not, in a doubtful case, to be presumed that the legislature intended any innovation beyond the necessity of the case to which the remedy is applied. Now it will be at once conceded that the abolition of primogeniture, and the application of the distribution, provided by the Act, to trust estates, so far from being a remedy, would be an evil; and this was the view of the legislature in restricting the distribution, and excluding from it trust estates. If to the well understood purpose of the statute, and the evil which it was intended to remedy, we apply the rules of construction and interpretation, with even the narrow latitude they give, we shall, I think, be constrained to the conclusion, that its intention and fair interpretation is to abolish primogeniture, as applied only to the estates of intestates, held in their own right, and that this excludes its application to estates held in trust. It is always fair and allowable to consider the mischiefs to be remedied, and the provisions of the Act for remedying them, and this must be done by considering the provisions as a whole, and not in detached sentences, or parts of sentences. If in this case the Act had provided any manner of distributing trust estates; in fact if it had not expressly excluded them, the Courts would, under the general words abolishing primogeniture, feel bound to include them, without regard to the manifest and obvious inconvenience and evil of distributing them, like other estates. The real intention, too, when clearly ascertained, will always prevail over the literal sense of the terms; and the

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inten*tion of the legislators, when discovered, ought to be followed consonant to reason and discretion. This certainly cannot be done in this instance without coming at once to the conclusion that the Act of 1791 does not apply to trust estates. There is no possible reason why it should apply. There is no ground for supposing it was intended, notwithstanding the general words, to apply; and there is great reason, the reason of inconvenience, and the absurdity it presents, for believing it was intended not to apply to such estates. If as to them primogeniture is abolished, there is no rule of descent substituted in its place, and the estate, as I said, must expire with the trustee; for it is clear, they are excepted from the plan and manner of distribution established by the statute. Adopt the other construction and there is no absurdity and no inconvenience to be met and obviated, but the contrary. It is supported by every consideration of convenience and reason; and is, I have no doubt, "the true reason of the remedy intended." If then, this view be correct, what is the position of Mrs. Price, and what her rights from the date of her purchase at the master's sale, in 1832? Clearly, she purchased one undivided moiety of the lot, and the legal title to the other undivided moiety was in her eldest son, a minor, now at this present time about twenty-four years of age. He held the legal estate and supported the trust. The equitable estate was in the complainant and other creditors of Lothrop. Mrs. Price and her son were tenants in common; she took and held possession of the whole. But her possession was not and could not be adverse, but was in support of the common title. The possession and seisin of one tenant in common, is the possession and seisin of the other. Such possession is not adverse to the right of his companion. 1 Inst. Coke, 199 b. If there be an ouster, either actual or by implication, then ejectment will lie, and the statute from that time will run; the possession of the disseisor is then

adverse. But if one take the whole profits, this is no ejectment, and the other has no remedy at law. Coke's 1 Inst. ut supra. But the reception of the profits for a great length of time, will raise the presumption of a disseisin. No actual ouster need be proved, but the lapse of time, (as in one case 36 years) will be sufficient evidence to go to a jury, who may establish an ouster and quiet possession. Doe, d. Fisher v. Prosser, Cowp. 217, pr. Lord Mansfield, and Peaceable v. Read, 1 East, 568, pr. Lord Kenyon. Now Mrs. Price had received the rents, and had the possession for 13 years before the filing of this bill, but during 10 years of that time

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her co-tenant was a minor, *and she was his guardian. There was no ouster—in fact there could be none. The proceeding of 1834 was not adverse to the minor. Mrs. Price was his guardian ad litem, as we have seen, and controlled and directed his action. If he had not been a minor and under that disability, if he had been sui juris, and she had been his solicitor in the cause, she could not hold any advantage to herself, personally arising out of proceedings managed by her. How then can it be pretended that she can bar him by riding over the relation, 1st, of a co-tenant; 2d, of guardian and ward, and 3d, the disability of minority? We have seen, beyond doubt, that Mr. Martin and the creditors cannot be excluded except by excluding and barring their trustee, whoever that may be, and if the heir at law, at common law was the trustee, there is an end of the argument. The simplest problem in the Horn Book of the law is not clearer than what we claim.

The next and final proposition is, that the concealment of the true title to this property, and of the trust that attended it, was a fraud which has been but recently discovered, and that the statute can only run from the time of the discovery. This proposition rests, of course upon the assumption that Mrs. Price was a trustee. The bill charges, that taking "unfair advantage," and not discharging her duty, as trustee, Mrs. Price concealed from the complainant his equity in this property, and the trust which attended it, and in fact concealed that Lothrop had conveyed the same under the general terms of his assignment. That instead of affording that information which it was her duty to give, as to the title, and which she was herself informed of, she concealed it from the complainant, "and held and used the moiety lot as her own," in direct violation of her duty and obligations as trustee. This is clearly a substantive allegation of fraud. "Fraud may be either direct fraud or fraud of unfair advantage." (Verplanck on Contracts, 226.) "The concealment which amounts to fraud in the sense of a Court of Equity is, the non-disclosure of those facts and circumstances which one party is under some obligation to communicate, and the other party has a right, not merely, in foro conscientiæ, but juris et de jure, to know." 1 Story's Eq. 216, section 207. "It is the duty of trustees to afford to their cestui que trust, all the information of which they are, or ought to be, in possession. A trustee may involve himself in serious difficulty, by want of the information which it was his duty to obtain, and he who undertaking to give information, gives but half information, in the doctrine of

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this Court, conceals."—*(Pr. Lord Eldon, 3 Swanston, 58–73.) And this is that concealment which amounts to fraud in the sense of a Court of Equity. The bill also charges that this concealment and fraud has been but lately, and within the statutory period, discovered. This brings the pleadings within the strictest rules of practice. Wymondsel v. So. Sea Co., 3 Peere Wms. 145; Poussin ads. White, 1 Ball. Equity, 458.

The answer neither denies or admits the ignorance of the complainant, and the discovery of his rights, or the time that this knowledge came to him. It denies the fraudulent concealment, but does not deny the facts charged as such. She denies, too, all knowledge herself that she ever was trustee; that the property was a trust; that she never acted or pretended to act as trustee. This is clearly an admission of all the facts charged, because it cannot be said she afforded full information of facts of which she claims, herself, to have been ignorant; but now, being informed, she claims in her own right. This is both concealment and taking unfair advantage of concealment, and that is fraud in law and in morals. In her answer, Mrs. Price in fact relies upon the decree in Price v. Lamb, and the famous "paper title" of that case, and sets the same up in bar to our rights. We have seen what was the brief career of that title. But, some emphasis was placed upon the allegation in the bill, that Mrs. Price had held and used the moiety lot as her own, as if this were proof of the acknowledgment of her adverse possession. I was surprised to hear this. I might say I was mortified, but the expression does not become me as applied to maturer years and wisdom. It would not be fitting to my humble professional sphere to play the critic. But I was surprised. Why, the charge that "she used the lot as her own," is a part and parcel of the charge of fraud; neither more or less, and so it appears. No one, certainly no lawyer, could mistake it. It is just what Martin charged against Lothrop, when he brought his action of trover and conversion for his 106 bales of cotton. It is what every declaration at law or bill in Equity which impeaches a possession as fraudulent, must charge.

I have heard of the simple indignation of honest laymen, at hearing the combining and confederating clauses read against them, but

I never did before dream that a lawyer would pretend that, to allege that A, regardless of his duty, and of right and justice, having got into the possession of the property of B., concealed from B his rights, and held and used the property as his own,

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*thereby taking "unfair advantage" of B, was an admission of any thing favorable to the claims of A. Such an idea is a refinement beyond my humble legal acquirements. To me it seems to be a subtlety which scarcely deserves a better name than a quibble, and old Dr. Watts taught us, when we were children, that "quirks and quibbles have no place in the search after truth." Compare this narrow distortion of the bill, and of the plain and obvious meaning of language, with the judicial language of Chancellor Harper, in a similar case and a similar charge in Poussin ads. White et al. 1 Bailey Eq. 458.

It is not denied—it must be conceded, that Mr. Martin was in profound ignorance of his rights, until the decree in Price v. Lamb. It is clear that Mrs. Price did not give him such information as would have put him upon the assertion of his rights, "and whether she neglected to do so from design, from negligence, or inadvertence, it is," in the language of this Court, "equally a fraud;" (Dudley's Eq. 89) and neither the statute, eo nomine, or time could run against Mr. Martin, and in her favor, except from the discovery of the fraud.

For Mrs. Price to say that she was ignorant of the trust which devolved upon her and of the rights of her brother's creditors, may excuse her from the discharge of her duty till she discovered it; but surely this cannot avail her either in law or morals, in resisting them, after she is informed of her duty. What would be said of the executor or guardian who, upon settlement with his ward, should, from mutual ignorance or inadvertence, retain half his estate, and then, being informed of his error, should excuse himself upon the ground of ignorance, but because he had at first acted innocently, should insist upon retaining, for that reason, what he could only hold tortiously? The Chancellor relies upon the cases of Starke v. Starke, Watkins v. Williston, and Kane v. Bloodgood. They are conclusive authorities upon this very point. "If," says Chancellor DeSaussure, in Starke v. Starke, "there had been any circumstances which indicated unfairness, and any injustice resulting from it, the Court would without scruple have opened the transaction, set aside the relinquishment or discharge, and ordered an account;" and Judge O'Neall, delivering the judgment of the Appeal Court, says, "But it is in evidence, that at that time the trustee did an act, intended and understood to be, by the cestui que trust, a discharge of the trust;" and, "if it was pretended that a fraud had been committed by the trustee, or that his cestuis que trust

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were ignorant *of their rights, the statute would not commence to run until a discovery of the fraud; or until they were informed of their rights." In Watkins v. Williston, the same doctrine is fully avowed; and the argument of Chancellor Harper, and the judgment of the Court, proceed entirely upon the ground, that the landlord had full notice that the tenant disclaimed his tenancy and claimed in his own right for full four times the statutory period before bringing the suit. "Here" says Judge Baldwin, "was no secret disclaimer, no undiscovered fraud; it was known to Bordeaux" (the landlord) "and was notice to him that Williston (the tenant) meant to hold from that time by his own title and adverse possession; this terminated the tenancy." In Kane v. Bloodgood, the same doctrine is conceded, as indeed it is in every case upon this subject, ever decided by Chancellor Kent. That was a case of constructive, and not technical trust. There was a legal as well as equitable remedy; an action at law as well as bill in Chancery could have been maintained, and the Court decided, what every well read lawyer knows, that merely by a choice of the forum or jurisdiction it is not in the power of the party to avoid the effect of the statute. The statement in the bill was of itself decisive of that case. It showed that in 1804 the plaintiffs had a legal cause of action, and then made a demand and were refused payment. The bill was filed in 1821. "They were barred at law, and upon established principles of Equity by analogy, and in obedience to the statute of limitations, were equally barred in this Court." (Kent Chan.)

But, says the circuit decree, "The complainant enjoyed all the means of information in 1832, which he has now. The deeds were all on record; and if any defeat existed, it was as well known to the complainant as to the defendant." It is true the deeds were on record, but it may well be doubted whether that alone afforded as extended means of information, as was afforded by this Court 10 years afterwards, by the decree in Price v. Lamb, which declared the class of persons of which the complainant is one, "beneficially interested." Whether the defects in Mrs. Price's title were "as well known to him as to her," is a proposition which Mrs. Price best understood, and can answer for herself. Mr. Martin has already said for himself, on oath, that he was ignorant of his real rights till a very recent date. But this is argument which applies in more ways than one. Mr. Martin is an intelligent merchant, but he is not a lawyer; and is he to be blamed for not having found out that Mrs. Price had no title

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*in her own right, when this Court, advising for two whole years upon this same title, and with her title deeds before them, for one year, for adjudication, did not discover that

"any defect existed," but that the deeds gave her "a good paper title"? Is Mr. Martin to be told that he is to lose his rights, because he was not more astute in finding out the true state of this title, without seeing it, than the Court of Equity Appeals, having it spread open before them? Was it to be expected of him, to trace with more safety and skill the labyrinth and doubtful chain of this title, than any one else, or to suffer for his failure? "The deeds were all recorded!"—and what did this avail him; was he to go to the records, caeca regens filo vestigia, and ascertain whether Mrs. Price was faithfully discharging her duty? Did this Court say to Nicholson and Duncan, you ought to have gone among your tenants and enquired whether more rent had been paid to your steward than he had accounted for? No; no such thing. The Court said it was Gray's business to afford this information, and failing to do so, neither he nor his administrators, when it was discovered, should claim exemption from liability by force of the statute. As well might the defaulting cashier, or fraudulent book-keeper, after a long continued series of frauds for succeeding years, when at last detected, turn upon his wronged and injured employer, and taunt him with this judicial exemption, and say to him, you trusted and relied upon me in full faith that I would deal honestly with you; this was not only your folly, but is my justification. The books were open to you, why did you not examine them? "You enjoyed all the means of information then which you have now."

The Chancellor says there is no testimony to warrant the suspicion that Mrs. Price knew any thing she did not disclose. I certainly differ from this opinion in my view of the testimony. Mr. Adger was the friend and agent of Mrs. Price. He bid for her in the purchase of the wharf; he continued to have the management and control of it for several years, and held the most confidential relations with her. Mr. McOwen married a sister of Mrs. Price; he has been for many years in the employment of Mr. Adger; he knew and communicated to Mr. Adger, soon after Mrs. Price's purchase, the fact that a part of this lot belonged to the estate of Lothrop, (his wife's brother.) All this is in evidence and was notice to Mr. Adger, as the agent of Mrs. Price, and he acted upon it in making the tax returns. Notice to Mr. Adger, the agent, was notice to Mrs. Price, the

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principal. This is legal *notice, proved positively by the testimony of Mr. Adger. But there is no positive testimony of direct personal notice fixed upon Mrs. Price. This may be conceded. Most minds would, however, think this testimony sufficient "to warrant the suspicion" that she might know what her agents, friends and kinsfolk all knew concerning her affairs.

There is another circumstance, which goes very far to raise the presumption that Mrs. Price did actually know the true state of the title to this lot and stores. She certainly did know that she only purchased an undivided moiety. The advertisement and description by the Master, under which she purchased, her title deed, and the mortgage she gave for the purchase money, are all conclusive as to this. Was it likely then that she should never enquire who was her co-tenant? Who the owner of the other moiety? Was not such an enquiry most natural? If she did enquire, it is scarcely probable that she was not fully informed. Her solicitors, her friends and family all knew and could inform her. How stands the case with Mr. Martin and the other creditors? They had no inducement to investigate the matter except the suspicion of bad faith against their trustee, and this, at that time, they had no cause to suspect. I think it may be said with safety, under such circumstances, that it is going quite too far to assume that the means of correct information were equal. As to the registry being open to the creditors, that is very appropriately answered by Lord Manners, referring to a very similar pretence set up. "They might," said he, "have employed some person to examine the registry; but there was nothing to induce them to do it, or to suggest it to them: and if they had, unless they had some one as astute as the counsel in this cause, the objection would not have occurred." (2 B. & B. 129.)

The Chancellor has expressed the opinion that it would be "a fraud for the creditors to avail themselves of this defective conveyance." This is a mere opinion, but it is a judicial opinion, and falls harshly upon the ears of a man who has been deprived of his property by a succession of breaches of trust, by one after another of the same family, and now is to lose his rights, if he does lose them, only by the lapse of time, accomplished, too, by judicial delays and oversights. But it is some consolation to have shown that the conveyance was not "defective;" and the foundation upon which the charge of fraud rested being thus removed, it is to be hoped the charge will fall with it. But there certainly has been something defective in this

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matter, and that *something was the decree in Price v. Lamb, which found for Mrs. Price the "good paper title." But the complainant is guiltless of the sin of having "availed himself" of that. (Mr. Campbell was going on to contrast the respective claims of Mr. Martin and Mrs. Price to the charge of fraud, when he was interrupted by the court, and requested to confine himself to the argument.)

The circuit decree also expresses the opinion, that there is much ground for saying this whole matter is res adjudicata, as between these parties, by the proceedings of 1832 and 1834. I confess, that with all the respect and reverence with which I am accus-

tomed to receive every thing which falls from the learned Chancellor, still I am not able to find the grounds for this view of the case. With all that anxious diffidence and distrustful reliance upon myself, which I always feel when called upon to express dissent from any proposition or opinion advanced by him, I am compelled, nevertheless, to say I can find no more ground for this, than I did for the "good marketable paper title," or for the decree ordering the payment of creditors who did not ask it, and had already been paid in full.

There is one remaining point which calls for scarcely more than a single remark. The decree gives costs against the complainant. This, under the circumstances of the case, is unusual. It is not the practice of the English Chancery to give costs against a party whose rights are lost by the operation of the statute of limitations, or lapse of time. This practice has been uniformly adhered to by Chancellor Kent, through all his decisions. "It is not usual," says he, "to give costs where an unfortunate claimant has color of claim, and is barred by lapse of time." (3 Johns. C. R. 147.) The claimant in this case has a twofold claim to the benefit of the rule. He is not only to be barred of his just rights by the lapse of time, but that is accomplished by the delays and oversights of this court.

This concludes what I proposed to say in examination of the case, as it has been presented by the Chancellor in the circuit decree. I have endeavored to shew, that with the evidence there developed, the decree cannot be sustained. If I have failed in this, it does not deprive us of the privilege we claim, either to have the evidence not before the court at the hearing, struck out, and the decree reformed accordingly, or a re-hearing ordered, so that we may have an opportunity of answering to the evidence upon which our

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rights are adjudicated. This, no Judge *or court sitting to administer the laws and the rights of the citizen under a constitutional government, has a right to refuse.

Mr. Grimke was heard for Mrs. Price et al. defendants.

Mr. Dukes for James Lamb.

Mr. J. M. Walker for James Adger.

Mr. Memminger for appellant, in reply.

Curia, per DUNKIN, Ch. As to so much of the appeal as relates to the claims of Mrs. Eliza Price, the decree of the circuit court is affirmed; but it was assumed in the decree, that the funds of the assigned estate of Lothrop were inadequate to discharge the preferred debts. This is said to be a misapprehension, and that it is susceptible of proof, that the preferred creditors have been satisfied. In that case, the surplus is distributed among the general creditors of the assignor, "rateably and proportionally, according to the amount of their debts," as provided by the deed of the 12th Sept. 1825.

Although the order of Jan. 1832, directed a sale of the lot in Cheraw, the premises are yet unsold, and constitute part of the assigned estate of Lothrop.

It is ordered and decreed, that the lot in Cheraw be sold by one of the masters of this court, at such time and on such terms as the solicitors of the creditors shall fix.

It is further ordered, that the account of the defendant, James Adger, be referred to the master to report thereon; and that the master also report to the court, the creditors of S. H. Lothrop, who are yet unpaid, and who may be entitled to payment under the provisions of his assignment. All questions in relation to the accounts of the administrator, and the appropriation of the fund, being reserved until the hearing of the report. In other respects, the decree of the circuit court is affirmed, and the appeal dismissed.

JOHNSTON, Ch. I concur in the conclusion to which the Chancellor arrived in his decree.

It is very clear that the property, when originally mortgaged to the bank, and then passing as Lothrop's wharf, did not include lots 8 and 9; but it is apparent that, from the time when Lothrop acquired these lots, he regarded them as a portion of the wharf property, and passed the whole under his assignment under that designation.

It is unquestionable that neither Price nor

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Mrs. Price acquired *title, by their purchases, to more than an undivided moiety of the lots I have mentioned. The mortgages under which they purchased included no more, and they purchased no more.

It is manifest, therefore, that at the time Mrs. Price purchased, the title to one undivided half of these lots was in the heir, or heirs of Price, subject to the trusts of the assignment; and the other half in Mrs. Price as purchaser. I speak, of course, of the paper title.

But she went into the possession of the whole; and, as the bill states, held it thenceforth as her own: a thing very natural for her to do—inasmuch as she understood herself as purchasing the whole of Lothrop's wharf; of which Lothrop had, as early as 1825, regarded the lots 8 and 9, as integral portions.

Then if the trust estate in the half which was assigned to her husband, had descended to her, as sole heir, and been held by her, along with the other half, which she had purchased; been held by her as her own, as the bill states; I think it would be difficult for the plaintiff now, after the time which he has allowed to elapse, since the creation

of the trust, (and especially after the opportunities he has had, and neglected,) to enforce his demand against the property.

There was nothing to prevent the enforcement of his demand in the life-time of Price, the assignee; and nothing to prevent its enforcement during the pendency of Adger v. Price, or the Bank v. Adger et al. The assignment and all the mortgages were on record, and he must be held to have had full notice of the extent to which the property was liable to him.

There is another consideration. He was brought in, as the Chancellor states, in the two cases I have mentioned. In the first of these cases there was a professed enumeration of all the assigned property then remaining, and Mrs. Price and her children were called upon to submit to an execution of the trusts which are supposed to have devolved upon them. No part of these lots was enumerated. The family of Price understood themselves as then called on to execute, and as actually executing, all the trusts incumbent upon them; and Mrs. Price held these lots as her own, and free from all trusts, at least from that time. Why did not the plaintiff then interpose, and inform her that she was not fully executing the trusts?

When all these circumstances are put together—the lapse of time from the date of the assignment—the neglect of the plaintiff—the intention of the heirs of the trustee to

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acquit themselves *of all the trusts imputed to them; and the holding of Mrs. Price for herself, and not in trust; I think there is too great laches, and too great lapse of time, to allow the plaintiff to sustain his bill now.

But an argument has been urged to the following effect; that Mrs. Price as purchaser held only one undivided half of the lots, as tenant in common with the heir or heirs of her husband. That the other half either descended at common law upon Price's oldest son, who has but recently attained full age, or upon herself and all her children, (the whole of whom were minors,) under the statute of distribution. That her possession being that of a tenant in common, was the possession, also, of the heir or heirs of the trustee, and did not bar them of their legal estate; and that, of course, the trust still subsists, in virtue of the rights of the heirs of the trustee.

My opinion is, that the moiety subject to the trusts descended to the oldest son of the assignee, at common law.

The statute for the distribution of intestates' estates (5 Stat. 162,) recites that: "Whereas the convention of this State" "did direct that the legislature should" "pass laws for the abolition of the rights of primogeniture, and for giving an equitable distribution of the real estates of intestates."

"Be it, therefore, enacted, that the right of primogeniture be and the same is hereby abolished: and that when any person possessed of, interested in, or entitled unto a real estate, in his or her own right, in fee simple, shall die, without disposing thereof by will, the same shall be distributed in the following manner," &c.

Now my opinion is, that this has nothing to do with trust estates, but only concerns the distribution of those in which the intestate held the beneficiary interest in his own right.

We must remember that the object of the Act is to distribute estates among those interested in them; but trusts are not created, that the property should be distributed, but that the trusts may be executed. The Act only provides for the distribution of the intestate's own property; and would be violated not only in its spirit and intent but in its letter, if extended to estates not his own. If this were left doubtful, and resort were had to considerations of mere convenience, to aid us in the construction of the statute, these would determine in favor of the descent at common law, and not under the statute. Trusts are often of long continuance; being clogged with limitations and re-

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main*ders sometimes determinable at distant periods. In the meantime, by the death of the trustees, and possibly of their issue, the trustees, (taking the descent to be cast by the statute) would become so numerous and so widely dispersed, that it would amount almost to an impossibility, in many cases, to bring them before the court, to answer to their duty. On the other hand, the descent at common law presents a single person, easily traceable, and easy to be reached. The costs in the one case would be exorbitant, in the other comparatively inconsiderable.

It is said, however, that the statute leaves no room for the descent at common law. That the right of primogeniture is expressly abolished, and to hold that it may still exist, in any case, is an infraction of the Act of Assembly; but the purposes for which this right was abolished, as well as the manner and connection in which it is done, manifest that this would be a very narrow and imperfect interpretation of the statute—the great purpose of which the solicitude of the convention bears evidence, was that property should be equalized by an organic law. This could not be done without abolishing the right of primogeniture; and, therefore, the direction was given to abolish this right, to the end that real estate should be equally distributed; and the direction was exactly followed in the statute. The one right was abrogated and the other substituted uno flatu. But what would the distribution of trust estates accomplish towards the equalization of property, or how would it accomplish the great purpose of the convention?

If it be assumed that the right of primo-

geniture is unqualifiedly and absolutely abrogated in all cases on the one hand, it is just as certain,—and by the same mode of literal construction,—that the statute only provides for distributing the individual property of intestates on the other; and, then, as this does not include trust property, we are brought to the absurd conclusion that the title to such property does not descend at all: not at common law, for that descent is abolished; nor under the statute, because that does not extend to it; a construction not to be entertained for a moment.

Other portions of the Act, which I have not quoted, might be brought to bear on this question, such as the provision relating to dower; and the provision imposing the burden of a mortgage upon the property for equality of partition; but I forbear to go into them, because too much time has been already consumed upon a point unnecessary to the case before us.

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*Whether the heir of Price as to this trust property be the oldest son, or his wife and children, can be of no sort of consequence in the present suit. In the one case, her possession as purchaser would be regarded as the possession of her son. In the other it would enure to the benefit of all her children, who would be her co-tenants. But the bill alleges that she held in her own right;—that is, that she did not hold in trust. Her possession being that of her co-tenants, their possession must be regarded as equally exclusive of the trust. And, then, when we consider the circumstances to which I have already adverted, I think the plaintiff comes too late to insist on the obligation of the assignment.

On the other points I concur with the opinion just delivered by Chancellor DUNKIN.

JOHNSON, Ch., dissented.

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